IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee* v. TIMOTHY B. HENNIS Master Sergeant (E-8) United States Army, *Appellant*	CONSOLIDATED MOTION TO COMPEL FUNDING FOR LEARNED COUNSEL, A MITIGATION SPECIALIST, AND A FACT INVESTIGATOR; FOR APPOINTMENT OF APPELLATE TEAM MEMBERS; AND FOR A STAY OF PROCEEDINGS Crim. App. Dkt. No. 20100304 USCA Dkt. No. 17-0263/AR

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

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

COME NOW the undersigned appellate defense counsel, on behalf of appellant, Master Sergeant (MSG) Timothy B. Hennis, pursuant to Rule 30 of this Court's Rules of Practice and Procedure [hereinafter C.A.A.F. R.](and in accordance with the procedure set forth in Army Reg. 27-10, Legal Services: Military Justice [hereinafter AR 27-10]) and requests this Court grant the instant motion to order the government to provide funding and contract for learned appellate counsel, a capital mitigation specialist, and a fact investigator. Further, appellant requests this Court order the government to provide defense team members deemed necessary in accordance with AR 27-10. Finally, appellant

requests oral argument and a stay of proceedings pending receipt of required resources pursuant to C.A.A.F. R. 33 and 40.

INTRODUCTION

> Capital defense counsel in the military are at a disadvantage. They are expected to perform effectively in surely the most challenging and long-lasting litigation they will face in their legal careers, without the benefit of the exposure, training, guidelines, or experience in capital litigation that is available to federal civilian lawyers. We do military lawyers, and accused servicemembers, a disservice by putting them in this position.

United States v. Akbar, 74 M.J. 364, 440 (C.A.A.F. 2015) (Baker, C.J., and Erdmann, J., dissenting).

> I am persuaded that the 'military system' can 'provide adequate continuity of counsel.' Regrettably, however, generally it has not done so . . .

United States v. Loving, 41 M.J. 213, 319 (C.A.A.F. 1994) (Wiss, J., dissenting).

SUMMARY OF ARGUMENT

Master Sergeant Hennis is entitled to an effective appellate defense team, and the Army has an obligation to provide it. The Army expended the resources to recall MSG Hennis from retirement, and try over the course of three years for offenses of which he had been acquitted decades earlier. Once that conviction was pronounced, however, the Army's resources seemed to run out. Despite MSG Hennis' repeated requests, the Army has consistently denied MSG Hennis the

expertise, manpower, and resources needed to effectively challenge his conviction and sentence on appeal. Congress has revised Article 70, UCMJ to specifically provide servicemembers on death row with "defense counsel . . . learned in the law applicable to [capital] cases." There is no rational basis to deny a right that Congress expressly put into law, a right which aims at ensuring the fairness of the military's most complex and consequential cases. MSG Hennis asks this Court to hold the Army to its obligation to provide him an adequate appellate defense.

STATEMENT OF THE CASE

On February 4, April 8, June 2, 2008, January 6, March 31, May 8, June 9, July 22, August 18, September 9, October 1, December 16, 2009, January 20, March 1-5, March 8-12, March 22-26, March 29 - April 2, April 6-9, April 12-15, 2010, and January 21, 2011, MSG Hennis was tried by a panel of officer and enlisted members sitting as a general court-martial at Fort Bragg, North Carolina. The panel convicted MSG Hennis, contrary to his pleas, of three specifications of premeditated murder in violation of Article 118, UCMJ; 10 U.S.C. § 918. The panel sentenced MSG Hennis to be reduced to the grade of E-1, to forfeit all pay and allowances, to be discharged from the service with a dishonorable discharge, and to be put to death. The convening authority approved the adjudged death sentence.

On October 6, 2016, the Army Court of Criminal Appeals (Army Court) affirmed the findings and death sentence. On February 24, 2017, the Army Court denied the motion to reconsider. On March 1, 2017, the Judge Advocate General of the Army forwarded this case in accordance with Article 67, UCMJ for mandatory review.

STATEMENT OF FACTS

This case involves allegations of murder for which MSG Hennis has been tried three times. In 1986, the State of North Carolina tried him and he was convicted. That conviction was reversed on appeal, and MSG Hennis was acquitted at the retrial in 1989. More than twenty years later, the Army tried MSG Hennis at a court-martial and had him sentenced to death. This case involves all the complexities of a capital murder trial, compounded by the uncommon passage of time and a host of unique military and constitutional concerns. It is not an ordinary case, but to date, the Army has afforded nothing but the ordinary resources to MSG Hennis' appellate defense.

1. The Record, Allied Documents, and Defense File in this Case.

The record of trial consists of 7,410 transcribed pages and, in total, contains approximately 38,090 pages including 17,750 pages of discovery. (Record; Def. App. Ex. QQ). Further, approximately 1,500 pages of appellate opinions,

pleadings, orders, appellate exhibits, and ancillary documents have been generated on appeal to date. (Record; Def. App. Ex. QQ). When packaged, this case file fills a shipping pallet. Assuming a diligent attorney could read an average of 300 pages a work day, it would take that attorney more than half a year to simply read through the entire record of trial.

Additionally, the trial defense team's files fill an additional pallet of their own. The trial defense counsel's files were delivered consisting of over 40 additional boxes of materials. Further, even more materials were received from the defense experts to include the fact investigator and mitigation specialist at trial.[1]

2. The Statutory and Regulatory Requirements for Learned Counsel.

On December 23, 2016, the National Defense Authorization Act of 2017, 114 P.L. 328 (Mil. Jus. Act of 2016) mandated the appointment of learned counsel for capital appellants.[2] These amendments to Article 70, UCMJ, state:

> "(f) To the greatest extent practicable, in any capital case, at least one defense counsel under subsection (c) shall, as determined by the Judge Advocate General, be learned in the law applicable to such cases. If necessary, this counsel may be a civilian and, if so, may be compensated in

[1] Of note, and discussed below, no attorney representing MSG Hennis on appeal has discovered a mitigation report or multi-generational psychosocial history generated by the mitigation specialist anywhere in those documents.

[2] Notably this occurred after the concerned commentary by members of this Court. *See United States v. Akbar*, 74 M.J. 364, 440 (C.A.A.F. 2015)(Baker, C.J., and Erdmann, J., dissenting)(emphasis added).

> accordance with regulations prescribed by the Secretary of Defense."

Mil. Jus. Act of 2016 at sec. 5335. The conference report provides no additional discussion by Congress on this provision. Section 5542 makes this amendment effective on December 23, 2018 or earlier by designation of the President. *Id.* at sec. 5542.

This amendment was based on the identical portion of the legislative proposal developed by the Military Justice Review Group (MJRG) and later endorsed by the Secretary of Defense (SECDEF) and sent to Congress on December 28, 2015. Military Justice Review Group, Report of the Military Justice Review Group Part I: UCMJ Recommendations (2015)(MJRG Report Part I) (available at http://www.dod.gov/dodgc/mjrg.html).[3]

The MJRG was created at the direction of SECDEF to "conduct a comprehensive, holistic review of the UCMJ and the military justice system . . . solely intended to ensure that our system most effectively and efficiently does justice consistent with due process and good order and discipline." MJRG Report Part I at 87 (internal citations omitted).

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[3] In spite of SECDEF's intent and recent legislation, no member of the government has offered to provide appellant with learned counsel. Instead, the government opposed appellant's second and third requests for learned counsel made after the SECDEF endorsed the MJRG's legislative proposal. The government did not oppose MSG Hennis' fourth request for learned counsel, yet the Army Court still denied it. *Hennis*, ARMY 20100304 (Army Ct. Crim. App. 24 Feb. 2017)(order).

The MJRG based its recommendation on the necessity to provide servicemembers the same level of counsel afforded before the military commissions and in federal circuit courts. MJRG Report Part I at 644-45. The MJRG specifically cited *Douglas v. California*, 372 U.S. 353 (1963), which held if a system of justice with mandatory appeal provides for appointment of counsel for some, equal protection requires the appointment of competent counsel for all of those in that system of justice. The MJRG expounds upon how both the military commissions and federal system require the appointment of learned counsel. MJRG Report Part I at 644-45.

At the time it was signed into law, MSG Hennis was the only servicemember on death row and direct appeal. Nothing in the legislative history of the Mil. Jus. Act of 2016 or the MJRG's findings indicates that current members on capital appeal should be treated differently than subsequent death row inmates.

a. The qualifications of counsel learned in the law of capital defense.

The MJRG relied on 18 U.S.C. § 3005, which requires the appointment of at least two attorneys for all capital cases, and "at least one shall be learned in the law applicable to capital cases." *See In re Sterling-Suarez*, 323 F.3d 1, 5 (1st Cir. 2003)(stating 18 U.S.C. § 3005 requires expertise in capital litigation, not just general criminal law). Additionally, during a death penalty appeal or collateral attack, at least one counsel "must have been admitted to practice in the court of

appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases." 18 U.S.C. § 3599(c).

Accordingly, the Federal Judiciary established criteria to determine whether counsel[4] were "learned," stating:

> Courts should ensure that all attorneys appointed in federal death penalty cases are well qualified by virtue of their prior defense experience, training and commitment to serve as counsel in this highly specialized and demanding litigation. Ordinarily, 'learned counsel' (see 18 U.S.C. § 3005) should have distinguished prior experience in the trial, appeal or post-conviction review of federal death penalty cases, or distinguished prior experience in state death penalty trials, appeals or post-conviction review that, in combination with co-counsel, will assure high-quality representation.

Guide to Judiciary Policies and Procedures [hereinafter Guide to Judiciary Policy], Volume 7, Chapter VI, paragraph 6.01.

The Commentary to Recommendation 1 of Appendix 6A to the Guide to Judiciary Policy, based on the 1998 Spencer Report,[5] further states:

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[4] In the federal system, civilian attorneys may be appointed under the Criminal Justice Act after becoming part of a pool of attorneys. A similar structure is utilized by the Chief Defender of the Military Commissions office to appoint counsel.

[5] The Judicial Conference adopted the recommendations of the Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation (May 1998) ("Spencer Report"). Report of the Proceedings of the Judicial Conference of the United States at p. 67-74 (15 Sep. 1998). The language

> Counsel in a federal death penalty case must not only be skilled in defending the charged offense, e.g., a homicide, but also must be thoroughly knowledgeable about a complex body of constitutional law and special procedures that do not apply in other criminal cases. They must be able to direct extensive and sophisticated investigations into guilt/innocence and mitigation of sentence. . . . They must have communication skills to establish trust with clients, family members, witnesses, and others whose backgrounds may be culturally, racially, ethnically, linguistically, socioeconomically, and otherwise different from counsel's.

Guide to Judiciary Policy at Appendix 6A, pg. 93-94. The Commentary also goes on to explain that "distinguished prior experience" contemplates "excellence, not simply prior experience" in capital cases. *Id.* In other words, a learned counsel is not just a good defense attorney, but a good capital defense attorney. *See id.*

Further, the American Bar Association set forth a national standard of practice for the defense of capital cases in order to ensure high quality legal representation. *See* 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases [hereinafter 2003 ABA Guidelines]. These Guidelines provide a more expansive definition of the skills that are developed through experience and required for capital representation. Guideline 5.1 identifies eight areas in which expertise should be demonstrated including: "substantial knowledge and understanding of

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in Guide to Judiciary Policy paragraph 6.01 outlining the qualifications for learned counsel was adopted verbatim from the Spencer Report. *See* Spencer Report at 68.

the relevant state, federal and international law, both procedural and substantive governing capital cases;" "skill in the investigation, preparation, and presentation of evidence bearing on mental status;" and "skill in the investigation, preparation and presentation of mitigating evidence."

Finally, both the ABA Guidelines and Guide to Judiciary Policy state that even a qualified counsel "learned in the law applicable to capital cases" is otherwise unqualified if he or she lacks "sufficient time and resources, taking into account the extraordinary demands of a deferral death penalty representation." Federal Judicial Policies, Appendix 6A at 92; *see also* 2003 ABA Guideline 6.1 at 965 (stating workload "is a more accurate measurement of counsel's ability to provide quality representation."). This remains true of appellate counsel, especially during critical phases of appeal such as opening brief and oral argument. *See* 2003 ABA Guideline 6.1 at 965 (citing National Center for State Courts & The Spangenberg Group, Workload and Productivity Standards: A Report to the Office of the State Public Defender [hereinafter NCSC Workload Report] 86-89 (1989))(available at http://ncsc.contentdm.oclc.org/cdm/singleitem/collection/ctadmin/id/277/rec/1).

b. No attorney "learned in the law applicable to capital cases" has ever been assigned to DAD or to represent MSG Hennis during his appeal.

No attorney meeting the commonly accepted qualifications of "learned in the law applicable to capital cases" has never been assigned to the United States Army Defense Appellate Division [hereinafter "DAD"] or MSG Hennis' appeal. *See In re Sterling-Suarez*, 323 F.3d at 5; *see also* 2003 ABA Guidelines. Specifically, no counsel ever assigned to DAD or detailed to this case while docketed with the Army Court has defended an accused at a capital trial. *See id*; *see also* Guide to Judiciary Policy at 6.01. Thus, no counsel that could have been assigned meet the minimum quantitative or qualitative requirements of learned counsel.[6]

Further, it is unlikely any counsel currently remain on active duty in the United States Army who meet the requisite qualifications and experience of "counsel learned in the law applicable to capital cases." Namely, to appellant's

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[6] Additionally, the unitary military system of justice requiring collateral issues to be brought at the time of direct appeal necessitates viewing appellate defense counsel as both appellate attorneys and as post-conviction attorneys. *See United States v. Murphy*, 50 M.J. 4, 5-6 (C.A.A.F. 1998) (stating unlike federal practice, the military does not provide procedures for collateral, post-conviction attacks). Thus, similar to post-conviction attorneys in the federal and state systems, military appellate attorneys require expertise in matters relevant to both direct appeal and any potential *DuBay* hearing. Thus trial experience is even more necessary for a military capital appellate defense counsel.

knowledge, only two defense counsel currently in the Army on active duty have capital trial experience. One attorney, COL Andrew Glass, represented MSG Hennis at trial and is therefore conflicted from taking part in the appeal and collateral review of the trial.[7] The other, COL Daniel Brookhart, represented Hasan Akbar at trial, but his performance was found deficient by at least two members of this Court during Akbar's direct appeal.[8] *Akbar*, 74 M.J. at 440 (majority assuming deficient performance but no prejudice). However, even if qualified counsel are available, none has been provided to MSG Hennis despite numerous requests.

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[7] Guide to Judiciary Policy at Appendix 6A, page 95, footnote 95 reflects the common standard that "[w]here a claim of ineffective assistance of counsel on appeal is possible, continued representation would not be appropriate."

[8] The 1989 ABA Guidelines rejected a quantitative analysis of "learned in the law applicable to capital cases (i.e., X number of trials)," instead adopting the qualitative analysis in the 2003 Guidelines. 2003 ABA Guidelines at 3.1 Commentary ("An attorney with substantial prior experience in the representation of death penalty cases, but whose past performance does not represent the level of proficiency or commitment necessary for the adequate representation of a client in a capital case, should not be placed on the appointment roster."). This was due, in part, to jurisdictions such as Texas and Missouri who have come under fire where a select few defense attorneys account for more than 20 defendants on death row despite numerous ineffective assistance claims. *See, e.g.,* Rose, David, "Death row: the lawyer who keeps losing," The Guardian (24 Nov. 2016)(available at https://www.theguardian.com/world/2016/nov/24/death-row-the-lawyer-who-keeps-losing)(last visited May 1, 2017).

c. Army Regulation 27-10, Chapter 28: "Capital Litigation" (11 May 2016).

Less than six months after the MJRG's findings, and for the first time since re-implementing the death penalty, the Army issued a revised version of AR 27-10 including a chapter titled "Capital Litigation." AR 27-10, Ch. 28. The regulation applies to all cases whether referred capital or not and the regulation does not state it applies only at trial. AR 27-10, para. 28-1. To the contrary, it contains provisions discussing training requirements for capital appellate counsel. AR 27-10, para. 28-6c.

While the regulation is silent on "learned counsel" it sets non-binding guidance for the qualifications of defense counsel in capital cases. AR 27-10, paras. 28-4, 28-6. Further, the regulation mandates that a defense team "shall include" two attorneys and a paralegal. AR 27-10, para. 28-6c. Finally, similar to the Guide to Judiciary Policy and 2003 ABA Guidelines, paragraph 28-6c requires that attorneys must have "duties substantially dedicated to the case" and "should be relieved of other duties." AR 28-6, paras. 28-6a-c; *See* Guide to Judiciary Policy at Appendix 6A; 2003 ABA Guidelines at 10.1.

The government and the Army Court denied providing these resources in accordance with the regulation. (Def. App. Ex. MM, NN, OO); *Hennis*, ARMY 20100304 (Army Ct. Crim. App. 24 Feb 2017)(order).

3. Current Counsel Are Not Learned in the Law of Capital Defense.

Lead counsel is not a "learned counsel." Like the counsel who preceded him, CPT Burroughs has never before participated in a capital trial or appeal. He has never defended an accused at trial before, participated in a murder trial before, or prosecuted a case of comparable complexity. He has never investigated or presented a capital mitigation case, and he has attended fewer than 40 hours of capital mitigation training. At present, he has less than one year of appellate experience, and has only argued once before this Court. Moreover, lead counsel continues to carry a full caseload, currently representing 27 Soldiers at various stages of appeal before this Court and the Army Court.

Supervising counsel is not learned in the law applicable to capital cases either. LTC Carrier, DAD's supervisory attorney for capital and complex cases, has had many military justice assignments, but has never prosecuted or defended an accused at a capital trial, and has very limited experience in capital appeals. The same is true of other field grade officers who have been or will be assigned as branch chiefs and supervisory attorneys in DAD. Experience in military justice, in which capital cases are rare, does not make a lawyer "learned in the law applicable to capital cases." Moreover, LTC Carrier's role is merely advisory, and his duties include supervisory participation in a large number of cases.

4. Previous Counsel Were Not Learned in the Law of Capital Defense.

Over the course of five years, seven other judge advocates have endeavored to represent MSG Hennis on appeal. None of them has met the qualifications for learned counsel. None of them has been assigned to this case longer than two years. None of them has reviewed the entire record of trial, or conduct a formal investigation into the performance of MSG Hennis' trial team. None of them has been able to able to be substantially devoted to representing MSG Hennis.

a. The Initial Team (2012-2013): Resourcing and Logistics.

On February 8, 2012, Lieutenant Colonel (LTC) Peter Kageleiry was detailed as appellant's first lead counsel and then-Captain (CPT) Brandon Iriye was also detailed to represent appellant. Neither LTC Kageleiry nor CPT Iriye had any experience representing capital clients at trial or on appeal and both counsel had less than three years' experience as appellate attorneys. Neither attorney had experience in the investigation or presentation of mitigation evidence. Furthermore, LTC Kageleiry and CPT Iriye maintained full caseloads and, between the two of them, argued eleven cases between February 2012 and May 2013.

Lieutenant Colonel Kageliery ceased his duties as lead counsel in July 2013, transitioning to deputy of the division and later left active duty on June 24, 2014. Captain Iriye left active duty in January 2014. There is no evidence in the

appellate record that LTC Kageliery or CPT Iriye contacted any fact witnesses to determine whether trial defense counsel properly executed their duties.

During this time frame, initial client contact was conducted, numerous administrative requests for resources were made, 144-volume record of trial was scanned, waivers obtained, and thousands of pages of trial counsel files were obtained and scanned.[9] To date, not all documents have been scanned. However, a reserve component officer was mobilized, a paralegal was assigned part time to the case in 2013,[10] and a total team comprised of at least two attorneys and a paralegal was assembled. However, none of the attorneys indicate they reviewed the entire record of trial and trial defense files.

b. The Second Team (2013-2014): Writs and Petition for New Trial.

On August 1, 2012, Major (MAJ) Jaired Stallard was mobilized for two years, becoming lead counsel on July 1, 2013. Major Stallard had prior capital appellate experience for the government, but never represented a capital defendant

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[9] In addition to the scanned record, an audio recording of the trial was obtained. There is no evidence any counsel has listened to determine whether there are any material omissions.

[10] Staff Sergeant Matthew Jardine was tentatively assigned in the summer of 2013, but was quickly reassigned on about February of 2014 to the USALSA command suite to conduct S-1 duties for the organization, to include the Army Court judges. Thus, MAJ Stallard conducted the vast majority of the paralegal duties to include scanning in documents and maintaining the Lexis CaseMap system. That system has not been maintained since MAJ Stallard left in 2014.

at trial or on appeal. Major Stallard had only five years of criminal law experience, without experience in the management of a complex murder case nor experience in investigating or presenting mitigation evidence.

On February 1, 2013, then-MAJ Amy Fitzgibbons, a United States Army Reserve Officer, was appointed as a Drilling Individualized Mobilization Augmentee (DIMA) with the Defense Appellate Division (DAD). Lieutenant Colonel Fitzgibbons is an Assistant Federal Defender and has had some experience representing clients charged with death eligible offenses at the trial level in both civilian and military courts. However, she has never defended a contested capital trial. Lieutenant Colonel Fitzgibbons provided, and continues to provide, advice and other support to the action attorneys in appellant's case, but is limited to sixteen hours a month and two weeks a year.[11]

On or about August 13, 2013, LTC Jonathan F. Potter, was assigned as the chief of the newly created Complex and Capital Litigation Branch within DAD, and he was tasked with supervising all complex and capital litigation. Lieutenant Colonel Potter served primarily as an advisor on appellant's case due to his lead counsel responsibilities in *United States v. Akbar*. Because no other counsel were

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[11] As a DIMA, LTC Fitzgibbons is entitled to pay only up to 16 hours per month. *See* Army Regulation 140-185, Army Reserve: Training and Retirement Point Credits and Unit Level Strength Accounting Records; Army Regulation 140-1, Army Reserve: Mission, Organization, and Training.

qualified or assigned, LTC Potter argued three issues in front of the Army Court. Lieutenant Colonel Potter never represented an accused in a capital trial. Lieutenant Colonel Potter held only an Additional Skill Identifier (ASI) level three (Expert Military Justice Practitioner) out of four, after his application for level four (Master Military Justice Practitioner) was denied.[12] Lieutenant Colonel Potter did not have any experience in the investigation or presentation of mitigation evidence at trial. Lieutenant Colonel Potter never interviewed any fact witnesses regarding the performance of the trial defense team.

Major Stallard left active duty on June 1, 2014. At that time, then-CPT Michael Millios took over duties as lead counsel. Captain Iriye was not replaced in January of 2014, thus CPT Millios was the sole appellate counsel. Major Stallard continued to advise CPT Millios in his reserve capacity[13] until he received a new assignment to United States Strategic Command in July of 2015. However, during that time he did not conduct the investigation discussed below in spite of an identified need to do so. Major Stallard was prevented due to resources and

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[12] To be qualified as for ASI level three, one must have completed the US Army JAG Corps Graduate Course, forty-eight months of military justice experience or forty-five total courts-martial, and a letter of recommendation. (Def. App. Ex. Z at 3).

[13] Major Stallard was not assigned to DAD as a reservist. Thus any duties he executed on behalf of MSG Hennis for individual duty training were at the discretion of his reserve unit commander. These duties generally consisted of consultation and assisting with the opening brief.

workload. Major Stallard appears to have conducted minimal investigation while on active duty, but there is no evidence he has interviewed the majority of witnesses regarding the performance of the trial defense team. (Appellant's Brief in Support of Petition for New Trial dated 2 May 2014).

During this time, appellate counsel submitted two requests for writs of extraordinary relief to the Army Court and this Court, a motion for new trial, and numerous substantive motions. *See e.g., Hennis v. Ledwith*, ARMY Misc. 20130828 (26 Sep. 2013); *Hennis v. Nelson*, ARMY Misc. 20140634 (13 Aug. 2014)(Appellant's Brief in Support of Petition for New Trial dated 2 May 2014; Appellant's Motions dated 26 Sep. 2013, 8 Oct. 2013, 8 Oct. 2013, 2 Mar. 2014, 30 Mar. 2014,). In particular, on September 26 and October 8, 2013, appellate counsel filed motions seeking funds for a mitigation specialist, a fact investigator, and learned counsel due to the lack of qualifications, inexperience of appellate counsel, and inability to devote substantial duties dedicated to the case. (Appellant's Motion for Learned Counsel; Appellant's Motion for Mitigation Specialist and Fact Investigator).

c. The Third Team (2014-2015): Opening Brief.

Upon taking over duties as lead counsel in June 2014, CPT Millios did not have any capital litigation experience and he had served as an appellate attorney for less than a year. During his time as lead counsel, CPT Millios maintained a full

case-load. Captain Millios did not have any experience in managing complex or murder cases, and he did not have experience in investigating or presenting capital mitigation evidence.

Captain Millios, under the supervision of LTC Potter, was the sole attorney assigned when he filed the initial brief on behalf of the appellant on January 22, 2015 – six months after becoming lead counsel. Captain Millios left active duty in June 2015 with less than one month of overlap with CPT Yoder. Captain Millios spoke with MSG Hennis' family members, but there is no evidence that he interviewed the witnesses regarding the performance of trial defense counsel.

Also during this time, the former Chief of DAD, [14] who was conflicted on this case, did not provide any additional assistance internally and he did not request any additional assistance. Instead, the attorney intended to take over for MAJ Stallard (and whose caseload was reduced) was instead sent to the Military Justice Review Group. Thus, CPT Millios was left with no paralegal, no second counsel, and a full additional case load.

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[14] Colonel Kevin Boyle, Chief of Defense Appellate Division, and MAJ Amy Nieman, CPT Millios' Branch Chief, were conflicted from this case. Colonel Boyle was a former Chief of the Trial Counsel Assistance Program during MSG Hennis' trial. Major Nieman (née Walters) represented the government in MSG Hennis' post-trial 39(a) hearing. (R. at 7319).

In spite of this, CPT Millios filed the opening brief, consisting of 365 pages and forty-three assignments of error. CPT Millios also assisted in drafting at least two writs filed before the Army Court and this Court. Finally, CPT Millios transitioned from Active Duty after only one month of overlap with the next lead counsel in summer of 2015.

d. The Fourth Team (2015-2017): Reply Brief, Oral Argument, Motion for Reconsideration.

By the time CPT Ryan Yoder became lead counsel in May 2015, the resources available had dwindled to himself and LTC Potter as a supervisor. In July 2016, LTC Potter left active duty.[15] Lieutenant Colonel Potter's duties were mainly advisory; he did not meet with the client, and he had not read the entire record. The majority of LTC Potter's duties were focused on his own case load, including *United States v. Akbar*, and supervisory duties within DAD.

Captain Yoder had no previous capital experience and only one year of appellate experience at the time he assumed responsibility for MSG Hennis' case. He had never represented any defendant at trial, let alone at a capital trial. He had no experience in any of the following skills as required by the 2003 ABA

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[15] Lieutenant Colonel Potter was required to attend significant out-processing and retirement appointments amounting to many hours outside of the office. Thus in the months leading up to his departure, he was prevented from committing significant amounts of time to the supervision of this case.

Guidelines: 1) no previous knowledge of any state or federal laws governing capital cases; 2) no previous management of complex or murder cases; 3) no previous experience in the use of forensic evidence such as DNA, fingerprints, or serology; 4) he had executed only one oral argument prior to assuming duties; 5) he had no experience in the investigation or preparation of mental health evidence; 6) no experience in the investigation, preparation, or presentation of mitigating evidence; and 7) he had participated in approximately eleven total trials as a trial counsel with limited experience in voir dire, cross examination, or argument.

Between May 2015 and until present, CPT Yoder never read the entirety of the record of trial, appellate exhibits, or trial team files. (Def. App. Ex. QQ). Captain Yoder's duties related to this case were focused primarily on drafting pleadings necessary for the appeal. During his time as lead counsel, CPT Yoder drafted 44 substantive motions, seven briefs, four administrative requests, and one writ of extraordinary relief. (Def. App. Ex. QQ). In the 21 months as lead counsel, CPT Yoder filed a pleading almost every single month. (Def. App. Ex. QQ). In all, CPT Yoder personally drafted over 721 pages of pleadings. (Def. App. Ex. QQ). Further, CPT Yoder prepared and executed a forty-five-minute oral argument before the Army Court. Finally, CPT Yoder attended only five conferences relating to the representation of capital clients totaling approximately 120 hours of training.

While lead counsel, CPT Yoder carried an additional caseload of no less than forty additional cases at various stages of appeal. Between May 2015 and February 2017, CPT Yoder was assigned nearly 9,281 pages of transcript, not including allied documents. Captain Yoder filed approximately 47 pleadings at ACCA and CAAF, not including motions.

In July of 2016, CPT Yoder was assigned additional duties as branch chief for the reserve judge advocates assigned to DAD.[16] (Def. App. Ex. QQ). CPT Yoder also conducted over 800 hours of mandatory training, meetings, client calls, moots, or appointments related to additional duties at DAD. (Def. App. Ex. QQ). Based on the above, CPT Yoder's mandatory duties required over 90-100 hours of work per week, thus much of those duties remained incomplete or rudimentary. (Def. App. Ex. QQ). Under the NCSC Workload Report, discussed *supra*, experienced appellate attorneys should only be assigned no more than 26 "units" per year. NCSC Workload Report at 85-89. However, under this rubric, CPT Yoder averaged nearly 50 "units" per year.[17] *Id.*

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[16] The current Chief of DAD requested but was denied additional resources in order to support MSG Hennis' case in light of DAD's internal mission of supporting every other appeal in the Army.

[17] This was determined by adding the weighted amounts and dividing by timeframe of the following: 47 additional non-capital briefs; 44 substantive motions, 1 capital reply, 1 writ, 1 capital oral argument, 5 supplemental capital briefs, 1 motion for rehearing, and duties as a training officer. (See Def. App. Ex. QQ). This did not

Thus, due to excessive caseload and lack of resources, CPT Yoder did not conduct any formal investigation or interviews into the performance of trial defense counsel, including whether they should have known of the existence of available mitigating or exculpatory evidence. (Def. App. Ex. QQ).

5. Newly Discovered Evidence and the Need for a Fact Investigator.

The government discovered exculpatory evidence post-trial at forwarded it to CPT Yoder on August 10, 2016. (Def. App. Ex. LL). Namely, Walter Cline provided an affidavit before his death attesting that Anne Czerniak, the mother of the Eastburns' babysitter, Julie Czerniak, saw her daughter come home the night of the Eastburns' murders covered in blood. (Def. App. Ex. LL). Before her death, Anne Czerniak told Mr. Cline that she went to the Eastburns' home and wiped up blood from the floor and walls which may have had Julie Czerniak's fingerprints on them. (Def. App. Ex. LL).

Captain Yoder, the sole appellate counsel at the time, was unable to conduct any additional investigation due to the impending December 21, 2016 deadline for the motion to reconsider (raising four grounds for reconsideration and twelve new assignments of error) and workload constraints. This evidence requires investigation, which would entail interviewing of numerous individuals in the

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account for additional military duties or branch chief duties not captured under the NCSC Workload guidelines.

Fayetteville, North Carolina area. Without assistance, undersigned counsel is unable to estimate how long it will take to complete such an investigation.

6. The Absence of Mitigation Evidence and the Need for a Mitigation Expert.

For reasons discussed below, neither previous counsel nor undersigned counsel has been able to investigate any of the following concerns:

1) The lack of any mitigation report or investigative summary in the defense counsel files;

2) The lack of underlying biological and social history documentation normally contained in a mitigation report or psychosocial history;

3) The absence in the case file of common psychosocial historical information, documentary or otherwise, trial defense counsel obtained in order to make informed decisions regarding mental health or to provide to mental health experts;

4) The lack of testimony at trial by a mental health or mitigation expert. (R. at 6900-7200);

5) The lack of testimony on sentencing, or even letters on MSG Hennis' behalf by numerous close family members. (R. at 6900-7200);

6) A lack of evidence or argument of adaptive behavior in confinement. (R. at 6900-7200);

7) The lack of any mitigation investigation or evidence from the first North Carolina trial in the case file;

8) A capital sentencing case lasting only three and a half hours out of 30 days of trial. (R. at 6900-7072);

9) The lead trial defense counsel (Mr. FS) was found ineffective in the only other capital case he tried for failure to investigate and uncover mitigating evidence. *See United States v. Witt*, 72 M.J. 727, 756-66 (A. F. Ct. Crim. App. 9 Aug. 2013) (finding a sentence hearing warranted for Mr. FS's failure to investigate mitigation evidence).

Based on numerous affidavits from mitigation specialists, extensive mitigation investigation is required for capital appeals and may consist up to 1,360 hours of work on this case. (Def. App. Ex. A, C, E, X, Y, GG, OO, QQ). However, as discussed below, previous counsel were unable to investigate these red flags. (*See e.g.,* Def. App. Ex. QQ).

7. The Army Has Repeatedly Denied MSG Hennis' Requests for Assistance.

Master Sergeant Hennis has repeatedly asked the Army to provide him with the basic defense to which any capital appellant would be entitled in the federal courts or before the Military Commissions. He has sought this assistance from the relevant administrative authorities, and from the Army Court. All of those requests have been denied.

e. Administrative Denials.

The government has denied all requests for an investigator, mitigation expert, and learned counsel. First, on April 9, 2013, MAJ Stallard submitted an administrative request to create a complex and capital litigation branch within DAD. (Def. App. Ex. Z).[18] The request highlighted workload constraints in requesting additional duty positions to create teams consisting of learned counsel, an additional attorneys, a legal administrator, and a paralegal dedicated to each capital case. (Def. App. Ex. Z). That request was staffed through the Deputy Judge Advocate General and submitted to Army G3/5/7. (Def. App. Ex. Z). Counsel has no evidence that action was ever taken on that request.

In accordance with Army Regulation 27-10, Legal Services: Military Justice [hereinafter AR 27-10], paragraph 28-6, Appellant requested defense team members and/or funding to contract for defense team members from the Commander of United States Army Legal Services Agency (USALSA) and from Personnel, Plans, and Training Office (PP&TO). (Def. App. Ex. GG, HH, II). Both requests were denied. (Def. App. Ex. MM, NN).

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[18] The request also included years of requests for a civilian counsel in DAD to act as institutional knowledge and mitigate continuity of counsel issues. (Def. App. Ex. Z at 287-329). In spite of support from general officers, the requests were ultimately denied.

On September 7, 2016 Appellant requested funding from the Commander of Fort Sill, the General Court Martial Convening Authority (GCMCA) over MSG Hennis. (Def. App. Ex. OO). After 103 days, this request was denied on December 20, 2016 because the GCMCA "is not the most appropriate approval authority." (Def. App. Ex. PP). However, the regulation cited in the denial expressly states "[r]equests for funding of this nature should be made to the *appropriate* authority: the commander *presently* exercising [GCMCA] over the accused *or appellant*." AR 27-10, para. 6-5d (emphasis added).

f. Denials before the Army Court.

The Army Court denied appellant's four previous requests for funding for learned counsel, a mitigation expert, and a fact investigator. *United States v. Hennis*, ARMY 20100304 (Army Ct. Crim. App. 11 Oct. 2013, 8 Apr. 2014, 9 Oct. 2015, 24 Feb. 2017)) (orders). The only basis provided for denying the first three requests (prior to the 2016 amendments to AR 27-10) was failure to meet the requirements in *Gray*. *See Hennis*, ARMY 20100304 (Army Ct. Crim. App. 11 Oct. 2013, 8 Apr. 2014, 9 Oct. 2015)(orders). The Army Court provided no basis for denying the final motion in spite of the government's lack of opposition. *Hennis*, ARMY 20100304 (Army Ct. Crim. App. 24 Feb. 2017)(order).

The Army Court also denied MSG Hennis the ability to submit ex-parte requests for assistance as is available in all federal civilian capital cases. *Hennis*, ARMY 20100304 (Army Ct. Crim. App. 9 Oct. 2015)(order).

Appellant adopts the facts as stated in his previous motions, responses, and addenda for funding for learned counsel, mitigation specialists, and fact investigators. (Appellant Motions dated 26 Sep. 2013, 8 Oct. 2013, 23 Jun. 2015, 13 Jul. 2015, 8 Jan. 2016, 18 Jan. 2016, 27 Jan 2017). Appellant further adopts the facts as stated in the pleadings filed in connection with the Issue Specified on July 28, 2015 requesting to submit matters *ex parte* to support motions of resources. *Hennis*, ARMY 20100304 (Army Ct. Crim. App. 28 Feb. 2016)(order). Finally, appellant adopts the facts as stated in every request for extension on various pleadings filed since the case was docketed with the Army Court. (Appellant Motions for Extension #3-31; Appellant Motions dated 24 Mar. 2014, 30 Nov. 2015, 5 Jul. 2016, 15 Jul 2016, 25 Jul. 2016, 1 Nov. 2016, 27 Jan. 17, 9 Feb. 17).

LAW AND ARGUMENT

Congress has determined that capital appellants have a right to counsel learned in the law of capital defense, and there is no rational basis to deprive MSG Hennis of that right. Moreover, the plain language of Army Regulation 27-10 affords capital appellants the right to qualified and experienced counsel, and dedicated paralegal support. At a minimum, this team should include counsel

learned in the law applicable to capital cases, a mitigation specialist, a fact investigator, and administrative support staff.

1. The Mil. Jus. Act of 2016 Created a Right to Learned Counsel, and There Is No Rational Basis to Deny It to MSG Hennis.

Congress recognized a right to learned counsel with the passage of the Mil. Jus. Act of 2016 with an implementation date of no later than two years. *See United States v. Williams*, 544 F.2d 1215, 1218 (4th Cir. 1976)(interpreting 18 U.S.C. § 3005, the statute upon which the amended Art. 70 was based, as a statutory right). The only death penalty case on direct appeal in the military at the time of passage was MSG Hennis' case. Based on the normal duration of appeals, MSG Hennis' appeal will be ongoing by the time of implementation of the Mil. Jus. Act of 2016. Thus, precluding implementation of that right to learned counsel now would violate due process and equal protection because there is no rational basis to preclude MSG Hennis from receiving counsel.

In drafting its legislative proposal adopted by Congress, the MJRG relied on *Douglas v. California*, which stated appeals of right (like under Article 66, UCMJ) cannot be conditioned on something that violates equal protection. MJRG Report Part I at 642; *Douglas v. California*, 372 U.S. 353, 356-57 (1963). Moreover, a state may not treat individuals on appeal differently if it violates due process or unlawfully discriminates. *Id.* Further, equal protection requires that "all persons

similarly situated should be treated alike." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985); *United States v. McGraner*, 13 M.J. 408, 418 (C.M.A. 1982). Thus, any disparate treatment of military death penalty appellants must have a rational basis. *Douglas*, 372 U.S. 356-57; *see also Graham v. Richardson*, 403 U.S. 365, 372 (1971).

The appellant is similarly situated with other military death penalty appellants who will be entitled to learned counsel in the future. *See United States v. Akbar*, 74 M.J. 364, 406 (C.A.A.F. 2015). Specifically, MSG Hennis is a military death row appellant, subject to the jurisdiction and authority of the United States military, and he would be housed in the same facilities as subsequent death row appellants. *Compare United States v. Akbar*, 74 M.J. 364, 406 (C.A.A.F. 2015)(finding enemy combatants not similarly situated).

Further, there is no rational basis to deny MSG Hennis the right to learned counsel when other servicemembers would be entitled to that same right. The fact that MSG Hennis' case was referred prior to the enactment of the Mil. Jus. Act. of 2016 does not provide a reason to deny him equal protection on appeal.[19] In a

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[19] Nor is there a rational basis to treat MSG Hennis differently than those subject to the Military Commissions who also receive learned counsel. This Court noted in *Akbar* that civilian defendants are not similarly situated with accused servicemembers; however, that argument loses its force when compared to the detainees subject to the Military Commissions. *See Akbar*, 74 M.J. at 406 (*citing Parker*, 417 U.S. at 743). The Uniform Code of Military Justice governs the Commissions' proceedings, yet these detainees receive "learned counsel." *See*

system with an appeal of right, if counsel is received by one, then it must be available to the other. *See Douglas*, 372 U.S. 356-57. Thus, continuing to deprive MSG Hennis of learned counsel runs afoul of *Douglas* and equal protection.[20] *Id.*

Moreover, the plain language of the Mil. Jus. Act of 2016 directs that learned counsel be provided "to the greatest extent practicable." This strongly suggests that any rational basis for denying learned counsel to military capital appellants would be exceedingly rare. *See* MJRG Report Part I at 642-43. There is no reason the government cannot provide learned counsel now. Qualified military appellate counsel may not be available, but the Mil. Jus. Act of 2016 specifically authorizes the hiring of civilian attorneys to serve as learned counsel. There are no exigent military demands that prevent the government from providing

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2011 Regulation for Trial by Military Commissions, Chapter 9-1, para. (a)(17)(stating Chief Defense Counsel will provide appellate counsel learned in the law). The Department of Defense's decision to provide learned counsel to suspected terrorists but not to servicemembers lacks any rational basis, and thus fails to afford the latter with equal protection.

[20] Congress repudiated the government's earlier arguments that there is a rational basis for disparate treatment between federal civilian and military death row inmates. Namely, Congress has found that, despite the "small pool of attorneys and military utiliz[ation of] screening, training, appointment, and oversight provisions," learned counsel are required in military death penalty appeals. (Government Response to Second Motion for Learned Counsel, dated 30 July 15 at 6).

servicemembers on death row learned counsel.[21] MJRG Report Part I at 644-45. The MJRG dispels any notion, such as those previously relied upon by the government in this case,[22] that any rational basis exists for disparate treatment. Instead, the MJRG recommended providing learned counsel as a part of modernizing military appeals, reflecting the significant separation in capital practice developing between the federal civilian system and military since 1983.[23]

Likewise, there is no reason to put off providing learned counsel. True, Congress gave the President up to two years to implement these provisions. But holding MSG Hennis hostage to the government's speed of implementation perversely encourages the government to drag its feet.

Finally, learned counsel is necessary because current counsel fall short of the qualifications for learned counsel, including capital experience. None of the

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[21] The MJRG reviewed every recommendation in light of key considerations such as the importance of discipline, the necessity of unique features of military justice, and to "counterbalance the limitation of rights available to members of the armed forces and hierarchical nature of military service with procedures to ensure protection of rights provided under military law." MJRG Report Part I at 91.

[22] In both government responses to motions for learned counsel, the government relies on *Parker v. Levy* and the differences between the military and civilian systems to justify this disparate treatment. *See* Government's Response to Motion for Learned Counsel at 5-8; Government's Response to Second Motion for Learned Counsel at 6-7.

[23] Prior to the 1994 revision, "learned in the law" in 18 U.S.C. § 3005 did not mean having capital experience; however, after the 1994 revision, capital experience is required. *See United States v. Miranda*, 178 F.Supp 2d 292 (S.D.N.Y. 2001).

counsel assigned to this case would have qualified under either the 1989 or 2003 ABA guidelines, relied upon by federal courts, especially in light of heavy workload and lack of expert assistance.[24] Nor would any assigned counsel qualify as learned counsel for the pool of civilian DOD appointed counsel in the military commissions.[25]

Finally, learned counsel is necessary because "no unique qualifying criteria are imposed on defense counsel at [capital] trial or on appeal," and there are no "guidelines on how to provide effective assistance of counsel in a death penalty case." *See* MJRG Report Part I at 642; *United States v. Akbar*, 74 M.J. 364, 418

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[24] The 2003 guidelines discarded the prior reliance in the 1989 Guidelines on a rote numbers approach to trial/appellate experience in favor of qualitative guidelines, in part, because it removed academics from consideration, did not require counsel to allot the appropriate time and resources, and did not exclude counsel who have performed poorly. Here, first undersigned counsel's qualifications fall below both sets of standards. Second undersigned counsel has only very limited capital appellate expertise and no capital trial experience. Further, assuming arguendo counsel are qualified on paper, even the most qualified counsel are ineffective if they are unable to devote the appropriate time and resources. The government has failed in its obligation to ensure that undersigned counsel have the necessary time and resources.

[25] For example, Richard Kammen is the DOD appointed counsel for Al-Nishiri. His resume includes nearly forty-five years' experience after service in the Army, including two periods as a public defender in Indianapolis, at least six state and three federal capital murder cases, and experience as a faculty member of the National Criminal Defense College since 1982. *See* Richard Kammen, Kammen & Moody, Indianapolis Defense Attorney Webpage, http://www.kammenlaw.com/Our-Attorneys/Richard-Kammen.aspx (last visited 4 Jan. 2015).

(C.A.A.F. 2015)(Baker, C.J., dissenting[26])(stating the lack of discernible capital litigation guidelines "seems to expose counsel unnecessarily to allegations of ineffective assistance of counsel" and learned counsel would have "helped fill this void.").

2. This Court Should Mandate the Appointment of Defense Team Members Deemed Necessary in Accordance with Army Regulation 27-10.[27]

This court should order the government to appoint the required personnel because the "Capital Litigation" paragraph of AR 27-10 applies to capital appeals and mandates a capital defense team throughout appeal.

a. Army Regulation 27-10, paragraph 28-6c, "Suggested capital litigation teams" applies to capital appeals and, similarly to the federal civilian system, the regulation establishes an appellate defense team at trial that lasts throughout appeal.

As an initial matter, the "Capital Litigation" chapter of AR 27-10 applies to capital appeals based on the plain language of the applicability paragraph of Chapter 28. *See United States v. Schloff*, 74 M.J. 312, 314 (C.A.A.F. 2015); *see*

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[26] In addition to the many military justice experts participating in the MJRG's findings, four Chief Judges of CAAF seem to agree that learned counsel should be afforded to military capital defendants. Former Chief Judge Cox headed the Cox Commission, former Chief Judge Effron headed the MJRG, and former Chief Judge Baker and Chief Judge Erdmann all echoed concerns for learned counsel.

[27] The new paragraph 28 of AR 27-10 went into effect on June 11, 2016 prior to the Army Court's decision and prior to the reconsideration in this case. Nothing in the provisions barred retroactivity or limited its application to "new" cases.

also Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)(stating courts "interpret words and phrases used in the UCMJ by examining the ordinary meaning of the language, the context in which the language is used, and the broader statutory context). While not explicitly designating appeals, the plain language states the "Capital Litigation" chapter applies to "all Army cases in which an accused is charged or could be charged with an offense that may subject the accused to the death penalty." AR 27-10, para. 28-1. The broad language of the paragraph does not restrict applicability to any stage of the proceedings within "Capital Litigation."

Further, AR 27-10, para 28-6c, mandates a minimum defense team that exists throughout trial and direct appeal. The plain language of paragraph 28-6c requires creation of a "defense team" stating:

> The defense team should consist of members whose duties are substantially dedicated to the capital case and shall include at least two experienced, qualified defense counsel, detailed by the Chief, USATDS or by his or her designee, and one paralegal (GS-9 or E-6), in addition to the supervisory chain including, but not limited to the Deputy and Chief, DAD and the Chief, Capital Litigation. Other personnel may include, but shall not be limited to, a warrant officer, criminal investigator, mitigation specialist, and/or mental health professionals, as deemed appropriate. Because appellate review in capital cases normally takes a number of years, significant effort shall be made to ensure continuity of counsel. Counsel representing capital defendants on appeal shall undergo specialized training as determined by the Chief, DAD. Such training should seek to fulfill, to the extent practicable, the training requirements

> of the American Bar Association Guidelines for the Appointment and Performance of Death Penalty Counsel in Death Penalty Cases Guideline 8.1.

AR 27-10, para. 28-6c (emphasis added). Nothing restricts a "defense team" to a "trial defense team." Indeed, there is no mention of the word "trial." AR 27-10, para. 28-6c. Further, including the supervisory chain of DAD leadership within the definition of "defense team" reflects the SECARMY's intent that the team exist through trial and appeal. *Id.* Thus a plain reading of the first sentence indicates that a "defense team" is established at trial, then operates throughout appeal.

Even if the first sentence is ambiguous, the canons of statutory interpretation support a reading that the "defense team" begins at trial and exists through appeal because the surrounding language in the paragraph, section, and chapter all support such a reading. *See Schloff*, 74 M.J. at 314 (courts look to context for meaning). First, the surrounding sentences in the same paragraph supports a broad definition of "defense team" because they specifically 1) reference the length of "appellate review," 2) mandate efforts of continuity, and 3) require training necessary for ABA guidelines which apply to both trial and appellate attorneys. AR 27-10, para. 28-6c; *see Schloff*, 74 M.J. at 314.

The second sentence describes the possible members of an appellate team such as mitigation specialists and mental health professionals, all of which are routinely assigned to defense teams both at trial on appeal. AR 27-10, para. 28-6c;

see 2003 ABA Guidelines. Further, the third sentence specifically addresses the length of appellate review and the need for continuity of counsel, evincing that the team will exist on appeal. *Id.* Also, the fourth sentence mandates specific training of counsel representing capital defendants *on appeal*, again appearing to require the aforementioned "defense team" on appeal. *Id.* (emphasis added). Finally, the last sentence mandates training in accordance with ABA Guidelines, as adopted in the federal civilian system, which also require two attorneys to represent a capital defendant both at trial and on appeal. *Id.* Thus, every sentence uses a broad term of counsel and three out of the five sentences reference appeals. *Id.*

The surrounding subparagraphs reinforce that a "defense team" is created at trial and lasts through appeal. *See United States v. Gaddis*, 70 M.J. 248 (C.A.A.F. 2011)(holding related provisions must be read in harmony, giving meaning to each provision of the rule). First, the title of the subparagraph "[t]he defense team" uses the broad term and does not specify "trial defense team." AR 27-10, para. 28-6c; *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998)(stating "the title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute"). Second, the title of the paragraph "Suggested capital litigation teams" is similarly broad. AR 27-10, para. 28-6. Third, paragraph 28-6a also uses the broad terms to describe "capital litigation team" and "defense counsel" without reference to trial.

Subparagraph 28-6a, titled "General guidance," fits like a puzzle piece when read in conjunction with paragraph 28-6c, developing a clearer picture of when defense team members can be replaced. Specifically, while referring to *both* prosecution and defense teams it uses strong language to limit reassignment of "members during the investigation, pretrial, trial, and clemency stages." AR 27-10, para. 28-6a. (emphasis added). However, in paragraph 28-6c, referencing only the "defense team," it lightens the strictures of "general guidance" by being more forgiving of counsel changes on appeal, requiring them only to "ensure continuity of [defense] counsel" on appeal.[28] AR 27-10, para. 28-6c. This is consistent with a broader reading that when a team moves from trial to appeal, members may leave the "defense team."

Moreover, adding another puzzle-piece of subparagraph 28-6b, to the aforementioned paragraphs 28-6a and 28-6c makes clear another critical distinction between defense and prosecution teams: there is no reference to appeals for the "prosecution team" in paragraph 28-6b. *See* AR 27-10, para. 28-6 This is consistent with a broader reading because the "prosecution team" does not need to exist through appeal as government counsel are fungible. *See United States v. Royster*, 42 M.J. 488, 490 (C.A.A.F. 1995). Thus, the surrounding subparagraphs

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[28] This continuity of counsel concern echoes Judge Wiss' concerns from *Loving*. 41 M.J. at 319 (Wiss, J., dissenting).

support a reading that a "defense team" is established at trial and exists through appeal.

Moving outward, the surrounding paragraphs also support a broad reading of the term "defense team." Critically, narrower terms of "United States Army Trial Defense Service counsel" are used in paragraph 28-4 titled "Court-martial personnel" showing that the SECARMY used narrow terms when necessary to differentiate trial defense counsel from the broad, inclusive terms such as "defense team" or "counsel." *See Bates v. United States*, 522 U.S. 23, 29-30 (1997)(holding where the drafter includes particular language in one section of a statute but omits it in another section of the same Act, the drafter intentionally and purposely intended the disparate inclusion or exclusion).

Finally, this broad reading of "defense team" is also consistent with federal civilian practice, as analyzed by the MJRG. In federal civilian courts, an appointed capital trial team consists of a learned counsel with another qualified attorney, a mitigation specialist, and administrative support. 18 U.S.C. § 3005; 2003 ABA Guidelines. This defense team represents the capital defendant through trial and on direct appeal. While on appeal, another appellate counsel is often assigned to assist. Thus, the "defense team" scheme within paragraph 28-6 mirrors the civilian system, with the exception that on appeal the learned counsel may be reassigned, but the position within the team is not lost.

b. Because the "defense team" continues on appeal, additional defense counsel and a paralegal substantially dedicated to the case have been deemed necessary by the SECARMY.

Two experienced and qualified counsel and a paralegal substantially dedicated to the case are necessary for every capital case through appeal, pursuant to AR 27-10, paragraph 28-6. Paragraph 28-6c states "at least" two "experienced, qualified"[29] defense counsel and one paralegal "shall" be assigned to a "defense team." AR 27-10, para 28-6c. Further, the duties of team members should be "substantially dedicated to the capital case." *Id.*

Two qualified, experienced counsel with duties substantially dedicated to the case are not available at DAD. The Army has refused to provide DAD with billets for a capital team,[30] and so this case has only be staffed like any other non-capital case. Indeed, every resource that was mobilized to staff capital appeals has trickled away without replacement: LTC Potter, MAJ Stallard, and SSG Jardine.

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[29] Qualified is not defined within this paragraph. However, paragraph 28-4 does outline qualifications for trial defense counsel. Those are the "suggested minimum requirements." AR 27-10, para. 28-4a. Thus, the detailing authority may determine that additional qualifications are necessary.

[30] As indicated in previous motions and appellate exhibits, DAD has regularly submitted administrative requests to Army G3/5/7, USALSA, PP&TO, and the convening authority for the personnel control facility. (Second Motion for Learned Counsel at 11-14)(Def. App. Ex. Z at 1-469).

Thus, at present, undersigned counsel are the only attorneys assigned to the case, and they are unequipped for the task.

Lead counsel is neither "learned counsel" nor "experienced, qualified" counsel under paragraph 28-4a(1) or (2). He has never served in a capital case, never contested a case before a panel of members, never defended a Soldier at court-martial, and never investigated or presented a mitigation case.

Supervising counsel, LTC Carrier, is not qualified as "learned counsel" under the Mil. Jus. Act of 2016 and 18 U.S.C. § 3005. Moreover, as the Chief of Capital and Complex Litigation, he cannot substantially dedicate himself to this case because his duties include supervising all capital and complex litigation within DAD.[31] (*See* Motion for Learned Counsel, Motion for Mitigation and Fact Investigator, Second Motion for Learned Counsel, Motion for Reconsideration of Mitigation and Fact Investigator, and Third Motion for Learned Counsel, Mitigation Specialist and Fact Investigator).

Further, even if LTC Carrier and undersigned counsel constitute the requisite number of attorneys, our duties are not "substantially dedicated to the capital case"

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[31] In the past year this has included, but was not limited to drafting and reviewing pleadings as well as other duties related to representation of clients and consultation on a large percentage of DAD cases, especially writs or high profile cases such as *United States v. Akbar*, *United States v. Manning*, *United States v. Bergdahl* , and *United States v. Hassan*. Unlike some divisions of USALSA, DAD has no civilian Highly Qualified Expert.

as required under Army Regulation. *See* AR 27-10, para. 28-6c. Namely, undersigned counsel's current non-Hennis related workload accounts for well more than half of a normal forty-hour work week, thus any duties related to the capital case cannot be "substantial."[32] Thus, due to the government's limited staffing of DAD, no counsel assigned currently or in the future will have duties substantially devoted to the capital case. *See* UCMJ, art. 70; *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34 (C.A.A.F. 2003).

There is not a paralegal assigned to DAD whose duties are substantially dedicated to MSG Hennis' case. *See* AR 27-10, para. 28-6c. The one military and two civilian paralegals currently assigned to DAD are fully employed, managing over 700 open cases that are at various stages in the appellate process.[33] Further, these paralegals rarely conduct any duties related to this case. For example, of the forty-four (44) pleadings submitted by appellant over the past year, less than five

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[32] Merriam Webster defines substantial as "considerable in quantity" or "ample to satisfy or nourish." Merriam-Webster Online Dictionary available at http://www.merriam-webster.com/dictionary/substantial (last visited May 1, 2017).

[33] Briefly in May of 2013, SSG Matthew Jardine was assigned to MSG Hennis' case, but shortly thereafter in February 2014, and over objections by counsel, he was reassigned to spend half his time assisting the USALSA command group. Staff Sergeant Jardine, without the consent of counsel, was ordered to cease work on the case by June of 2014. At that time, the Chief of DAD, COL Kevin Boyle, was conflicted on this case. Until his retirement, SSG Jardine worked for the USALSA command group processing S-1 actions for personnel at USALSA including this court in spite of his arrival at DAD to work solely on MSG Hennis' case.

have been filed by anyone other than CPT Yoder. Physical and electronic file management duties were conducted solely by CPT Yoder. The paralegal NCO and civilian paralegals' duties are substantially dedicated to every other case within DAD.

Thus appellant has not been afforded the necessary defense team members required under the regulation and this Court should order the government to comply with Army Regulations and provide necessary resources.

c. The appellant has not been appointed discretionary defense team members deemed necessary in accordance with Army Regulation 27-10.

Discretionary members of the defense team have been deemed appropriate by the Chief of DAD in accordance with the regulation. The provisions in paragraph 28-6 are meant to be guidelines to "the detailing authority for defense counsel."[34] At DAD, the Chief of DAD is the detailing authority for defense counsel. Further, on appeal, the Chief of DAD must ensure every case is "analyzed and resourced individually, based on the specific circumstances." AR 27-10, para. 28-6a. Finally, other defense team members such as mitigation specialists and investigators may be appointed as "deemed appropriate." AR 27-10, para. 28-6c.

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[34] The regulation also includes the Staff Judge Advocate in this list; however, it is not relevant on appeal. AR 27-10 para. 28-6a.

While "deemed appropriate" is written in passive voice, the previous provisions and sentence contemplate that the detailing authority is who deems defense team members appropriate. *See* AR 27-10, paras. 28-4, 28-6c. Thus, the regulation brings military capital litigation practice in line with the federal practice and the Commissions. *See* Rules for Military Commissions [hereinafter R.M.C.] 506(b). A Federal Defender or Chief Defense Counsel in the Commissions normally determines which defense team resources are devoted to each case, including mitigation specialists and investigators who are on staff. *See* Regulation for Trial by Military Commissions [hereinafter Reg. for Mil. Comm.] para. 9-1a(6). In the Commissions, the Chief Defense Counsel makes the determination whether counsel is available within the office or selects a civilian from a defense pool (similar to the Federal system). Reg. for Mil. Comm. at para. 9-1a(6)A-C; 9-5. This practice also comports with the intent of the recent Military Justice Review Group's efforts to adopt federal practice where appropriate and recommending learned counsel on appeal. MJRG Report Part I at 14.

Accordingly, in this case, the Chief of DAD analyzed the particular circumstances of this case, including "relevant client confidential information and attorney work products." (Def. App. Ex. II). The Chief of DAD determined that a mitigation specialist and investigator were necessary team members, especially after reviewing information not available to this Court. As a result, appellant has

requested the government authorize funding for a mitigation specialist and investigator.

Because mandatory and discretionary members of the capital appellate team have been deemed necessary and appropriate in accordance with AR 27-10, paragraph 28-6c, this Honorable Court should order their funding and/or appointment and stay proceedings until such team members have been made available.

d. Failure of the government to comply with the regulation would materially prejudice a substantial right afforded under Army Regulation 27-10.

The new provisions of AR 27-10 are meant to "protect an accused's rights" because they impose minimum number of defense counsel and paralegal support for a capital defense team. *See United States v. Kohut*, 44 M.J. 245 (C.A.A.F. 1996)(citing *United States v. Sloan*, 35 M.J. 4 (C.M.A. 1992)). Normally, "a government agency must abide by its own rules regulations where the underlying purpose of such regulations is the protection of personal liberties or interests." *United States v. Dunks*, 1 M.J. 254, 255 (C.M.A. 1976).

However, in *Kohut* and *Sloan*, this Court stated the violation of a binding regulation may be asserted only if the regulation was designed to protect an accused's rights. In *Kohut*, the regulations used binding language such as "shall," but the regulation explicitly stated that it was "not intended to confer additional

rights upon the accused." *Kohut*, 44 M.J. at 250. In *Sloan*, the regulations were found to be only prosecutorial guidance to prevent unnecessary waste of resources rather than to confer a right. *Sloan*, 35 M.J. at 9.

Paragraph 28-6c is unlike those in *Sloan* and *Kohut* because it specifically establishes a personal right to minimum counsel requirements and the limiting language in the paragraph supports such a reading. First, unlike the provisions in *Sloan*, the purpose of Chapter 28 is to protect a capital accused's liberty interests by ensuring appropriate representation and resourcing. *See* AR 27-10, paras. 28-1-28-6; *Dunks*, 1 M.J. 254; *Sloan*, 35 M.J. at 9.

Unlike the broad limiting language in *Kohut*, paragraph 28-6c narrowly states that it does not create "a right to a *particular counsel or staff*,"[35] a plain reading of the language only limits creating a right to a specific counsel or specific support staff member. AR 27-10, para. 28-6c (emphasis added); *Kohut*, 44 M.J. at 250. Thus this language does not limit the right to the minimum number of counsel or paralegals or to a defense team deemed necessary by the Chief of DAD.

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[35] A similar statement appears in paragraph 28-4a related to the qualifications of trial defense counsel. AR 27-10, para. 28-4a (stating "the following sub paragraphs . . . shall not be construed as a right to a particular counsel or standard for determining effectiveness of counsel.") Thus, it is clear that the provisions withhold creation of a right in only in those two circumstances: specific persons assigned to the case and mandatory standards to evaluate counsel. Thus the limiting language does not apply outside those discrete circumstances, i.e. minimum staffing requirements.

Moreover, to hold contrary would render the mandatory language of "shall" in paragraph 28-6c superfluous.

Thus, because the appellant is entitled to the aforementioned team members, but is not currently represented as required, this Court should order the government to comply with the regulation and stay the proceedings until such time as appellant has received the required personnel.

3. Even if this Court Finds the Mitigation Specialist and Fact Investigator Are Not Required by AR 27-10, Funding for a Mitigation Specialist and Fact Investigator is Still Necessary.

a. A mitigation specialist is necessary in accordance with Gray.

A mitigation specialist is necessary because: 1) interviews of witnesses and review of the mitigation investigation by the trial defense counsel is necessary to determine whether the defense team provided effective assistance of counsel; 2) the expert is needed to interview witnesses and review documentation from the mitigation investigation at trial to determine whether it met capital standards of conduct; 3) the appellate defense team has not been able to complete these investigative tasks due to workload. *See United States v. Gray*, 51 M.J. 1, 20 (C.A.A.F. 1999).

First, at all stages of appeal, appellate defense counsel are required to review the record and trial defense team documents, and conduct any required

investigation to determine whether the trial defense team effectively represented MSG Hennis at trial. *See Strickland v. Washington*, 466 U.S. 668 (1984); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005); (Def. App. Ex. A, C, E, X, Y)(Affidavits). Namely, the Supreme Court in *Wiggins*, and *Rompilla* stated effective assistance of counsel requires that a trial team seek out mitigation evidence. *Rompilla*, 545 U.S. at 387-89.

Thus, in order to ensure that trial defense counsel (and the trial mitigation expert) met the constitutional minimum in both investigating and presenting a proper mitigation case, appellate defense counsel must, at a minimum, examine the record and case files for "red flags," some of which are listed above. *Id.* Additional tasks include, but are not limited to, interviewing sentencing witnesses, interviewing other witnesses interviewed by the trial mitigation expert, and reviewing the mitigation report (or lack thereof). (*See* Def. Ex. A, C, E, X, Y). This is not an exhaustive list.

Second, the mitigation specialist is needed to examine the non-exhaustive "red flags" listed in the facts section above, including but not limited to the following tasks: review the record of trial and trial team files for any other "red flags" not discovered by inexperienced undersigned counsel; interview the mitigation expert at trial to determine whether he complied with minimum standards and determine why he did not testify at trial; interview sentencing

witnesses and family members to determine whether trial defense counsel conducted proper investigation; determine whether a psychosocial history was conducted at trial and compare with other capital cases; and meet with the client to determine whether trial team missed any "red flags" regarding available mitigation or extenuation evidence. This list is also not exhaustive and, based on affidavits entered into the record, these duties may require hundreds of hours by a trained professional to complete, or even more time for inexperienced undersigned counsel.

These tasks consist of a minimum of 1,360 hours of work for a trained mitigation specialist with advanced degrees. (Def. App. Ex. MM, NN, OO)(Requests for Funding); *see also Kayer v. Ryan*, 2009 U.S. Dis. LEXIS 9661, 33-34 (D. Ariz. Oct. 19, 2009)(1,000-1,500 hours "begins to approach a competent test and reliability"). Without benefit of training or expertise, an estimate for undersigned counsel would be closer to 2,600 hours or 16.25 months of full time duties.[36]

Finally, none of appellant's previous counsel representing him before the Army Court were able to complete the above required investigation or failed to adequately preserve a record for subsequent counsel. First, there are no records from the previous appellate defense teams which indicate any of the above actions

[36] This estimate is based on 160 working hours a month.

have been taken. For example, there is no record of a mitigation report completed by the trial mitigation expert nor is there any memorialized information regarding an interview.

Finally, because LTC Carrier and CPT Burroughs: 1) have not read a fraction of the documentation necessary to make informed decisions; 2) have not had the opportunity to self-teach properly the standards of capital mitigation; and 3) still carry a full caseload of their own, they are also unable to complete any of the duties discussed above.

Thus, because appellate defense counsel must investigate red flags of potential ineffective assistance of counsel, a mitigation expert would execute those duties necessary to determine whether trial counsel were ineffective, and detailed counsel were unable to conduct this necessary investigation, a mitigation expert is necessary and funding should be ordered.

***b. A fact investigator is necessary in accordance with* Gray.**

A fact investigator is necessary because: 1) interviews of witnesses who did not testify at trial with potentially exculpatory evidence is necessary on appeal; 2) the expert is needed to interview witnesses and review documentation from the investigative file at trial to determine whether it met capital standards of conduct; 3) previous counsel were not able to complete any of these investigative tasks due

to workload while he was lead counsel. *See United States v. Gray*, 51 M.J. 1, 20 (C.A.A.F. 1999).

First, appellate defense counsel have the duty to investigate and raise ineffective assistance of counsel by the trial team. (Def. App. Ex. A, D, E). This includes reviewing case files and interviewing witnesses known to the appellate defense counsel who appear to have exculpatory evidence, but were not called as witnesses in a capital murder trial.

Second, a fact investigator is needed to interview witnesses and review documentation from the trial defense team's files to assist inexperienced undersigned counsel in determining whether the investigation was adequate. (Def. App. Ex. MM, NN, OO). Namely, an investigator is needed, at a minimum, to review the record of trial and investigation conducted by the trial team, review the documentation, and identify potential red flags or exculpatory or mitigating evidence that was not presented at trial. (Def. App. Ex. B, MM, NN, OO).

Further, an investigator is needed to interview individuals identified in Mr. Cline's statement as well as determine what, if any, investigation was completed by the trial team into similar issues. (See Def. App. Ex. LL). An investigator is also necessary to interview Ms. Wagner and determine what, if any, investigation was completed by the trial team into those issues. (See Def. App. Ex. V).

These tasks are estimated to require a bare minimum of 960 hours of investigation for an experienced individual (6 months of full time work). (Def. App. Ex. MM, NN, OO). These estimates were made prior to receipt of Mr. Cline's sworn statement from the government. Thus, a more reasoned estimate for an untrained investigator such as undersigned counsel would be as much as 2000 hours or full time employment for about 12.5 months.

Third, for the reasons outlined above, previous counsel have not conducted any of the required tasks indicated above. Namely, workloads of over 90-100 hours per week has prevented completion of those tasks. *(See, e.g.*, Def. App. Ex. QQ). Chiefs of Capital and Complex Litigation currently are supervisory and conduct numerous ancillary duties. Any duties to be devoted by any additional team members have focused solely on duties related to the direct issues on appeal and reading the ample record of trial. Finally, the government's staffing of DAD as if capital cases are like any others has prevented counsel from devoting sufficient time to execute the duties necessary in this case.

Thus, because counsel cannot and did not complete the above required tasks, due to the lack of resourcing by the government, this court should order funding for a fact investigator consistent the previous administrative requests. (Def. App. Ex. MM, NN, OO).

CONCLUSION

If this court should grant any of the motions for funding or appointment of learned counsel, additional attorneys, paralegal support, appellant requests an indefinite stay pending the contracting or hiring process necessary to provide the required resources. Finally, appellant requests oral argument in order to address the complicated factual and legal issues necessary for disposition of these issues.

WHEREFORE, appellate defense counsel respectfully request this Court grant the instant motions.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Hennis, Crim. App. Dkt. No. 20100304, USCA Dkt. No. 17-0263/AR, was electronically filed with the Court and Government Appellate Division on May 1, 2017.

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