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*	APPELLEE'S RESPONSE TO APPELLANT'S CONSOLIDATED MOTION TO COMPEL FUNDING FOR LEARNED COUNSEL, MITIGATION SPECIALIST, AND FACT INVESTIGATOR; FOR APPOINTMENT OF APPELLATE TEAM MEMBERS; AND FOR A STAY OF PROCEEDINGS Crim. App. Dkt. No. 20100304 USCA Dkt. No. 17-0623/AR

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

COMES NOW the United States, by and through the undersigned appellate government counsel, pursuant to Rule 30 of this Court's Rules of Practice and Procedure [hereinafter C.A.A.F. R.] and request that this Court deny Appellant's motion to order the Government to provide funding and a contract for learned appellate counsel, a capital mitigation specialist, and a fact investigator. Appellee requests that this Court also deny Appellant's motion to order the government to provide defense team members under Army Regulation 27-10, Legal Services: Military Justice (May 11, 2016) [hereinafter AR 27-10]. Finally, Appellee

requests that this Court deny Appellant's motion for a stay of proceedings and oral argument.

STATEMENT OF STATUTORY JURISDICTION

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice, 10 U.S.C. § 866(b) (2012) [hereinafter UCMJ]. The statutory basis for this Honorable Court's jurisdiction is Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

On April 8, 2010, an enlisted panel sitting as a general court-martial convicted Appellant, contrary to his pleas, of three specifications of premeditated murder in violation of Article 118, UCMJ. (R. at 6708). On April 15, 2010, the panel sentenced Appellant to a reduction to E-1, forfeiture of all pay and allowances, a dishonorable discharge, and death. (R. at 7313). The convening authority approved the panel's sentence on January 26, 2012, and ordered it be executed except for the death penalty and dishonorable discharge. (Action).

On September 26, 2013, after the case transferred to the Army Court of Criminal Appeals [hereinafter A.C.C.A.] for review, Appellant filed a motion for funding for the appointment of a mitigation specialist and fact investigator. On October 8, 2013, Appellant filed a motion for the appointment of learned appellate

counsel. On October 11, 2013, and October 28, 2013, the A.C.C.A. denied Appellant's motion because Appellant failed to demonstrate the necessity of expert assistance under *United States v. Gray*, 51 M.J. 1, 20 (C.A.A.F. 1999). *United States v. Hennis*, ARMY 20100304 (Oct. 11, 2013) (order); *United States v. Hennis*, ARMY 20100304 (Oct. 28, 2013) (order). Appellant renewed his submissions for learned counsel, a mitigation expert, and a fact investigator in 2015 and 2016. The A.C.C.A. denied these motions on February 4, 2016. *United States v. Hennis*, ARMY 20100304 (Feb. 4, 2016) (order). The A.C.C.A. issued its opinion in Appellant's case on October 6, 2016 and affirmed the findings and sentence. *United States v. Hennis*, 75 M.J. 796, 855-856 (A. Ct. Crim. App. 2016).

Following the A.C.C.A's opinion, Appellant filed motions to vacate the opinion of the court and for an extension for time to file a motion to reconsider. Appellant filed his fourth consolidated motion for learned counsel, a mitigation expert, and fact investigator on January 27, 2017. The A.C.C.A. denied this motion on February 23, 2017. *United States v. Hennis*, ARMY 20100304 (Feb. 23, 2017) (order). On March 1, 2017, the Judge Advocate General of the Army forwarded this case for review by this Court under Article 67, UCMJ.

STATEMENT OF FACTS

At trial, the defense team consisted of several expert consultants. Relevant to this motion, the defense team included a mitigation specialist, Mr. James Miller, and a civilian investigator, Mr. T.V. O'Malley. (App. Ex. 1, 2).[1]

The convening authority initially approved Mr. Miller's appointment to the defense team on August 30, 2007 for $28,000 and 350 hours of investigation and preparation. The convening authority approved supplemental funding requests for Mr. Miller on July 17, 2008 and July 21, 2009, and, in total, the defense received $142,000 for mitigation support at trial and the post-trial clemency process. (App. Ex. 1-2).

The convening authority initially appointed Mr. O'Malley to the defense team on September 20, 2007, and approved approximately $20,000 in funds. The convening authority approved supplemental funding requests on July 17, 2008 ($15,000) and January 12, 2009 ($20,000). (App. Ex. 1-2).

At all times relevant to these pleadings, Appellant's defense team consisted of attorneys qualified and certified under Article 27(b), UCMJ.

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[1] Government Appendices 1 and 2 contain the collection of documents approving Mr. Miller and Mr. O'Malley's contracts over the course of trial. Because Appellant's trial spanned several years, the documents reflect incremental amounts approved by successive commanders and Staff Judge Advocates for the XVIII Airborne Corps.

SUMMARY OF ARGUMENT

This Court should deny Appellant's motion because, contrary to Appellant's claims, the Military Justice Act of 2016 does not apply to his case. Further, even if the Military Justice Act of 2016 did apply to Appellant's case, this Court cannot enforce a law prior to its effective date. This Court should also deny Appellant's motion because AR 27-10 does not mandate the composition of defense teams in capital cases. By its own language, the regulation acts as a guideline, not a minimum standard for the resources allotted to the defense in capital cases. Finally, this Court should deny Appellant's motion because Appellant cannot make a showing of necessity to justify the appointment of a mitigation expert and fact investigator to the defense team.

ARGUMENT

I. Appellant is not entitled to learned counsel under the Military Justice Act of 2016 because the statute excludes Appellant's case from the changes in the law.

This Court should deny Appellant's motion because the Military Justice Act of 2016 has not yet come into effect and thereby cannot apply to Appellant's case. Section 5186 of the National Defense Authorization Act of 2017 [hereinafter NDAA FY17], 114 P.L. 328, 130 Stat. 2000 (December 23, 2016), provides, "To the greatest extent practicable, in any capital case, at least one defense counsel shall, as determined by the Judge Advocate General, be learned in the law

applicable to such cases." Section 5186, NDAA FY17, S. 2943-903. Congress added a similar provision pertaining to appellate defense counsel in Section 5334. Section 5334, NDAA FY17, S.2943-937. Section 5542 of the NDAA FY17 specifies, "Except as otherwise provided in this division, the amendments made by this division shall take effect on the date designated by the President, which date shall not be later than the first day of the first calendar month that begins two years after the date of enactment of this act." Section 5542, NDAA FY17, S. 2943-968. Per that provision, unless the President specifies an earlier implementation date, the law will go into effect on January 1, 2019. Further, Section 5542(c) of the NDAA FY17 reads as follows:

> (c) Applicability:
>
> (1) In general. Subject to the provisions of this division and the amendments made by this division, the President shall prescribe in regulations whether, and to what extent, the amendments made by this division shall apply to a case in which one or more actions under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), have been taken before the effective date of such amendments.
>
> (2) Inapplicability to cases in which charges already referred to trial on effective date. Except as otherwise provided in this division or the amendments made by this division, the amendments made by this division shall not apply to any case in which charges are referred to trial by court-martial before the effective date of such amendments. Proceedings in any such case shall be held in the same manner and with the same effect as if such amendments had not been enacted.

Section 5542, NDAA FY17, S. 2943-968. Nothing in the NDAA FY17 dictates a different effective date for the legislation for cases in the process of appeal. Accordingly, contrary to Appellant's argument, the new law does not apply to his case. Because the new law does not apply to Appellant, this Court should not grant Appellant's motion and effectively implement the law prior to its effective date.

This Court should also deny Appellant's motion because of the procedural posture of Appellant's case. Section 5542(c)(2) of the NDAA FY17 explicitly excludes cases "already referred to trial on the effective date" of the legislation. Section 5542, NDAA FY17, S.2943-968. Nothing in the text of the NDAA FY17 modifies this statement of inapplicability for Appellant's case or any other case in the process of appeal. The convening authority referred Appellant's case in August 2007. (Charge Sheet). Because the convening authority referred Appellant's charges to a court-martial nearly ten years prior to the passage of NDAA FY17, the changes to the law do not apply to his case.

Appellant argues that "there is no rational basis" to deny him learned counsel under the NDAA FY17 despite the statutory timeline for implementation. (Appellant's Mot. 30). Further, Appellant argues that "based on the normal duration for appeals," his appeal "will be ongoing by the time of implementation of the Mil. Jus. Act of 2016." (Appellant's Mot. 30). This argument presumes, first, that this Court has the power to enforce legislation before its effective date; and,

second, that this Court and the parties can accurately predict the future. Appellant also ignores that Congress specifically prescribed an effective date for the statute which has not yet occurred. There can be no more rational basis than not applying a law that, by its own terms, does not yet apply to anyone.

Contrary to Appellant's claims, the decision not to apply NDAA FY17 to Appellant's case does not violate equal protection. Congress has the broad power to create legislation and determine its applicability unless that legislation either creates a suspect classification or impinges upon fundamental rights. *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 408 (1982). Appellant argues that the law violates equal protection because Appellant's was "[t]he only death penalty case on direct appeal in the military at the time of passage." (Appellant's Br. 30). However, the law excludes all cases referred prior to the effective date—not just that of Appellant. Congress may legitimately legislate "a class of one" where it has reason to do so, but this Congress applied this exclusion to all potential cases with referral dates before the effective date of the statute. *See Plaut v. Spendthrift Farm*, 514 U.S. 211, 239 n. 9 (1995) (citing *Nixon v. Administrator of General Services*, 433 U. 425, 472 (1977)). While the class of capital cases excluded by the legislation currently only includes Appellant, any other case that arises between now and January 1, 2019 will also not benefit from the changes to the law. By necessity, every statute imposes different standards on parties affected by the

statute vis-à-vis the enactment date; if this Court ruled in favor of Appellant, Congress would violate equal protection every time it amended the law. *See Lundeen v. Canadian Pc. Ry. Co.*, 532 F.3d 682, 691 (8th Cir. 2008). Unless Appellant demonstrates that Congress intended to single out his case, or that the enactment of the statute impinges on his fundamental rights, his motion to apply the NDAA FY17 before its effective date should fail.

II. This Court should decline to mandate compliance with AR 27-10 because the detailing of defense team members remains the province of the U.S. Army Judge Advocate General's Corps.

Appellant's motion should fail because this Court has a strong precedent of not intervening in the internal personnel management of the military services. For instance, this Court declined to establish minimum standards for trial and appellate defense counsel in capital cases in *United States v. Loving*, 41 M.J. 213, 300 (C.A.A.F. 1994). This Court has also declined to involve itself in the detailing of military judges, determining a judge's term of office, or specifying the terms of officer fitness reports for military judges. *See United States v. Weiss*, 36 M.J. 224 (C.M.A. 1992), *aff'd, Weiss v. United States*, 510 U.S. 163 (1994); *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992); *United States v. Mitchell*, 39 M.J. 131 (C.M.A. 1994). This precedent weighs heavily against "[ordering] the government to appoint the required personnel" listed in AR 27-10 as requested by Appellant. (Appellant's Br. 35).

Further, even if this Court did involve itself in the personnel affairs of the military services, it should not do so in this case because AR 27-10 does not "mandate" additional defense personnel in capital cases. Paragraph 28-6, AR 27-10, "Suggested capital litigation teams," specifically states "[t]he suggested capital litigation team serves as a guideline to the [Staff Judge Advocate], the detailing authority for the defense counsel, [Personnel, Plans, and Training Office], and [Human Resources Command]." AR 27-10, paragraph 28-6(a). Paragraph 28-6(a) also provides, "Nothing in this paragraph is to be construed as a right to particular counsel or staff." AR 27-10, paragraph 28-6(a). This language does not constitute a mandate. The regulation also makes clear that the parties responsible for following the prescribed guidance include the Staff Judge Advocate (SJA), the detailing authority for the defense counsel, the personnel division of the U.S. Army Judge Advocate General's Corps, and the U.S. Army Human Resources Command. Appellant notes that the Defense Appellate Division (DAD) "has regularly submitted administrative requests to Army G3/5/7, USALSA, PP&TO, and the convening authority for the personnel control facility" to obtain additional staff. (Appellant's Br. 41 n.30). So far, the Army has not provided those billets; however, it is not within the purview of this Court to order the Army to change its personnel decisions for Appellant.

Appellant argues that Paragraph 28-6 of AR 27-10 "imposes" minimum standards for manning defense teams in capital cases. This reading distorts the language of the paragraph, which details "suggested" requirements. Paragraph 28-6, AR 27-10. While Appellant argues that "the provisions of AR 27-10 are meant to 'protect an accused's rights,'" the regulation specifically states that it does not entitle an accused to particular counsel or staff and does not serve "as a standard for determining the effectiveness of counsel under the U.S. Constitution." Paragraph 28-6(a), AR 27-10. In *United States v. Kohut*, this Court held "[t]he violation of a binding regulatory command 'may be asserted by an accused only if [the regulation] was proscribed to protect an accused's rights.'" *United States v. Kohut*, 44 M.J. 245, 250 (C.A.A.F. 1996) (citing *United States v. Sloan*, 35 M.J. 4, 9 (C.M.A. 1992)). Under *Kohut*, Appellant's argument fails in two respects: (1) by its own terms, the regulation does not create binding authority with respect to staffing capital litigation teams and (2) the regulation does not implicate the accused's substantive rights under either the U.S. Constitution or any statute. For example, the regulation does not suggest that anything less than the staffing articulated by Paragraph 28-6(c) would constitute an ineffective defense team, or that the accused would not receive competent representation. In this case, the Army is in compliance with the only real mandate of the regulation: that the defense team *shall* include two experienced, qualified defense counsel detailed by

the Chief, U.S. Army Trial Defense Services or the Deputy and Chief, Defense Appellate Division, and Chief, Capital Litigation. Paragraph 28(c), AR 27-10. This Court should deny Appellant's motion to enforce the provisions of AR 27-10 both because the regulation does not create a mandate and because the provisions do not protect the rights of the accused within the meaning of this Court's opinion in *Kohut*.

III. This Court should deny Appellant's motion for post-trial expert assistance because Appellant has not made a proper showing of necessity.

Appellant cannot make a showing of necessity that would justify the appointment of a mitigation expert and a fact investigator to the defense team for the duration of the appellate process. An appellant may receive expert assistance during an appeal upon a "proper showing of necessity." *United States v. Tharpe*, 38 M.J. 8, 14-15 (C.A.A.F. 1993). This Court should judge Appellant's necessity based on the facts of this case, including the assistance that Appellant received at the trial level. *See United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005); *United States v. Gray*, 51 M.J. 1, 20-21 (C.A.A.F. 1999). In the past, this Court found "necessity" in cases where the defense did not receive the required assistance at trial. *Kreutzer*, 61 M.J. at 306; *Loving*, 41 M.J. at 249; *United States v. Murphy*, 50. M.J. 4, 9-11 (C.A.A.F. 1998). In this case, Appellant already received expert assistance at trial totaling $140,000 in expert fees, so Appellant

cannot argue that he stands in the same position as the capital defendants in *Kreutzer*, *Loving*, or *Murphy*. When combined with Appellant's other rationale for appellate expert assistance, the substantial amount of money dedicated to his defense at the trial level undermines the argument that such assistance is "necessary" now.

Appellant provides the following reasons for appointing a mitigation expert: (1) the mitigation expert will help assess the effectiveness of Appellant's trial defense team; (2) the defense team requires a mitigation expert on appeal to review the mitigation investigation conducted at trial; and (3) the appellate defense team has not completed those tasks "due to workload." (Appellant's Br. 48).

In this case, Appellant's proffered reasons do not support the appointment of a mitigation expert at the appellate level. With respect to Appellant's first rationale, the relevant question for an ineffective assistance of counsel inquiry is whether counsel made appropriate investigative choices under the circumstances at the trial level. *Tharpe*, 38 M.J. at 15 ("[On appeal] [t]he question is whether trial defense counsel made a valid tactical decision, given the information and options available . . . . This is not a new trial on the merits smuggled into the appellate process."). As attorneys, the appellate defense counsel stand in the best position to determine the effectiveness of other attorneys at the trial level. Second, the defense suggests that they cannot review the work of one expert without

contracting another. This argument would lead to precedent wherein no appellate attorney could ever evaluate an expert's trial performance without contracting another expert. . None of these proffered reasons satisfy the showing of "necessity" required to trigger expert assistance at the appellate level.

With respect to Appellant's request for a fact investigator, Appellant asks this Court to appoint an investigator based on appellate counsel's apparent inability to interview witnesses or "review documentation from the trial defense team's files." (Appellant's Br. 52). Again, Appellant cites appellate counsel's "workload," but does not provide any facts supporting the appointment of a fact investigator to the defense appellate team. (Appellant's Br. 51-52). Appellant effectively re-states the facts presented in the four previous motions to compel expert assistance and fails to cite compelling reasons why—after over 1,900 days on appeal—the defense appellate team cannot complete a review of the case. Accordingly, because Appellant cannot demonstrate the necessity for an additional mitigation expert or fact investigator at this stage of his appeal, this Court should deny Appellant's motion.

Conclusion

For the reasons outlined above, this Honorable Court should deny Appellant's motion for learned counsel, a mitigation expert, and a fact investigator.

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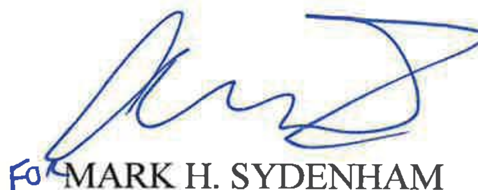

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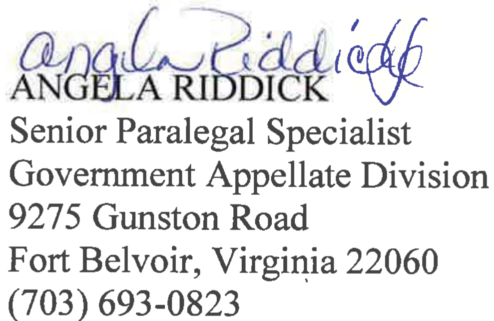
I certify that the foregoing brief in the case of *United States v. Hennis*, Crim. App. Dkt. No. 20100304. USCA Dkt. No. 17-0623/AR, was electronically filed with the Court (efiling@armfor.uscourts.gov) on 24 2017 and contemporaneously served on the Defense Appellate Division.



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