IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellant* *v.* **TIMOTHY B. HENNIS**, Master Sergeant (E-8), United States Army, *Appellee*	BRIEF ON BEHALF OF APPELLANT 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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SUMMARY OF ARGUMENT

On April 18, 1989, Timothy Hennis had just gone through his second trial for his life. For four years, the State of North Carolina had accused him of murder and set its prosecutorial engines against him. Its first effort led to failure on appeal, where the State's highest court condemned the government's overzealous and incendiary tactics. Rebuked, the government returned with less fire and brimstone, but no less determination, in this second trial. The contest was long, vigorous, and dramatic. It was a fixture in the press and a lightning rod for emotion. Yet the spirit of deliberation survived. Twelve honest and duly-sworn citizens considered all the evidence mustered over these four long years, and they pronounced Timothy Hennis not guilty. He was acquitted.

His ordeal was done. The jury's verdict was the inviolable mark of finality and the end of further jeopardy. Their act was as solemn and sacrosanct as any in civic life; once pronounced, it must stand. Impassioned trials always leave a side unsatisfied, yet free societies require their governments to move on. Generations of human experience have revealed this necessity, and it has been bound up in our traditions.[1] Indeed, the principles of a fair contest and finality are the very essence of law, and our Nation's Founders fought steadfastly to secure them for posterity.

And so Timothy Hennis returned to the world. He rejoined the Army, rose to the rank of first sergeant, and ultimately retired after two decades of honorable service. But the government did not treat this outcome as final. It would come back, once more hoping to convict and execute this man. Twenty-one years after his acquittal, the government would try Timothy Hennis again for the very same accusations.

The government now believed its evidence had improved, and that its third case would be its strongest yet. It believed that the specious doctrine of "dual sovereignty" absolved it of any double jeopardy concerns. And so what the State had started in 1985 passed to the Army, with both embodiments of government

[1] A rudiment even of our antecedent legal culture, it may be said in America as in England that trial by jury "hath been used time out of mind in this nation, and seems to have been co-eval with the first civil government thereof." 3 WILLIAM BLACKSTONE, COMMENTARIES *349.

now acting as one force against this ancient protection of law. The government reached past the jury's sworn verdict. The government reached past its jurisdictional limits and pulled a man from civilian life just to court-martial him for a civilian accusation. It reached past a quarter century of withering time to re-litigate what it had disregarded decades earlier. It reached over the line of fair adversity and excluded the defense from vital evidence and resources. It reached past the bounds of propriety yet again to whip up outrage and disgust, and to beat back dispassion and deliberation. It reached and grasped at every turn in this trial, all in order to take a man's life. It reached too far, yet again, and its efforts should be met with dismissal yet again.

1. This Court-Martial violated the Code and the Constitution.

The Army discharged MSG Hennis after an acquittal and some thirty-four months in civilian confinement. This broke any continuity in his military service, and with it, any jurisdictional claim over the allegations now at bar. His reenlistment could not repair this break, nor could it enable the Army to revive what it had relinquished definitively. The Army believes it can overcome this, however, because the State of North Carolina exhausted its ability to try MSG Hennis. Even at first blush, this is an unvarnished absurdity, and the pursuit of any rigorous analysis will make that absurdity clearer still. The government cannot corrupt the Constitution's guarantee against double jeopardy into a cause for

jeopardy. The government cannot use a constitutional protection against prosecution to defeat a statutory protection against prosecution.

The Army forever abandoned its claim to jurisdiction in 1989. Dismissing this court-martial on those grounds is the simplest way to resolve this case. But if this Court looks further, it will find further errors. And they too are fatal.

These were inherently civilian allegations. The crime occurred outside any military installation. It had no nexus to military duty, no abuse of military materiel, and no military victims. It was stridently pursued by civilian authorities in civilian courts before civilian juries. It was never a case "arising in the land and naval forces," and it always fell under the Fifth Amendment's grand and petit jury protections. This was a civilian capital murder case, and trying Timothy Hennis for it at court-martial violated the Constitution.

The court-martial lacked subject matter jurisdiction, and it lacked personal jurisdiction too. By September 2006, Timothy Hennis had retired from military service and returned to civilian life. He was not amenable to court-martial jurisdiction, not as a retiree and not as an active duty soldier. Timothy Hennis challenges the lawfulness of using his retired status to court-martial him. But even if that challenge is set to the side, the Army still failed to perfect jurisdiction over him. Simply put, it had no legal basis to recall him for this court-martial, and thus no basis for jurisdiction under Article 2(a)(1) of the Code. But it did so anyway,

over his objections. Even if he could have been tried in a retired status, the Army is estopped from asserting that now. It chose an unlawful path to court-martial, and it should be held to the outcome.

The Army exceeded its authority three times over, all to try a man *autrefois acquit* for a third time. Convinced that the "dual sovereigns" doctrine gave it free reign to retry MSG Hennis, the Army shunned the spirit of the Double Jeopardy Clause as well as its true and original meaning. The Supreme Court may soon return this rule to its full stature. If so, it will compel dismissal of this case.

And even if the Court does not, the Double Jeopardy Clause still compels dismissal of this case, which was nothing but a sham to escape from under it. The government, as both Army and State, hauled this man from his civilian life, put him back in uniform, and tried him for civilian offenses. Military counsel literally assumed the voices of state attorneys as they read aloud examinations their predecessors conducted twenty years earlier. They prosecuted this case relying almost entirely on state evidence, state witnesses, and state officials, using the ongoing assistance of state law enforcement. The military members heard all this and then rewrote a civilian verdict. These Army personnel became the tools of State prosecutors bypassing the Constitution. They became actors in a sham, a sham that used military authority to a civic protection. Whether under the Fifth

Amendment or Article 44, UCMJ, this Court must dismiss this court-martial and preserve the military nature of military justice.

2. Master Sergeant Hennis was denied due process of law.

If the State and Army officials involved in this court-martial had any reservations about this blurring of military and civilian authority, they never expressed it. And once it "hit the press big time" it was "to[o] late to back off gracefully." (JA 1484).

With MSG Hennis returning to duty in October 2006, the Army's course was set, and it was locked into the travails of a high-profile, complex, and capital court-martial. It glossed over the inequities of re-litigating accusations a quarter century old. Witnesses vital to the defense had died or declined in acuity, and the hopes of developing exculpatory leads were by now quite hopeless. Time had worked against MSG Hennis and in favor of the government. Time had let the government build, try, rebuild, retry, rebuild again, and retry its case again. The government saw nothing wrong in this, however, because it felt the damning force of its forensic testing snuffed out any challenges.

Faith in that testing brought this third court-martial into being. But the government balked when MSG Hennis asked to use the same tools in his defense. The government had 25 years and four laboratories to perfect its case, yet when the

accused sought some parity and the ability to pursue his own theory, the time and resources ran out.

3. The government's misconduct precluded a fair trial.

This cast a pall over the proceedings that only thickened with trial counsel's persistent impropriety. Throughout the court-martial, government counsel used inflammatory tactics to rouse the passions and curb the circumspection of the panel. This was deliberate. One possible defense to this prosecution was that MSG Hennis had intercourse with the victim before someone else murdered her. It was a possible, and thus rational, defense that could have nullified the government's "linchpin" evidence and assumptions. Trial counsel would have none of it, however. And so the government took up invective and theatrics to suck the rationality out of the courtroom. Trial counsel wanted the same atmosphere to pervade MSG Hennis's sentencing too; indeed, how else would a panel conclude that the life of a father, husband, and career servant lacked *any* human value? Just as in its first trial, the government believed that dispassionate deliberation would not serve it as well as outrage, fear, and disgust.

4. The panel was not fair, impartial, or properly instructed.

The members may have thought themselves above these emotional ploys, but their voir dire suggests otherwise. Their intentions may have been right, but

for several members, their presumptions were not. The crimes in this case are horrific. They stir up strong responses and touch upon deep-seated fears. Finding members who could weigh the evidence fairly was never going to be easy. But once it became clear that a robust voir dire process could delay trial, the military judge tightened his grip and seated the members. The result was a panel tainted by bias and prejudgment, one prone to trial counsel's improper tactics.

Confident in its cause, the government has overlooked its cost. Pursuing "justice" at the expense of the law does not bring justice. It courts distrust and abuse. A single-minded desire to "do justice," pursued with temerity towards the rights of the accused, will serve that virtue poorly in the end. This case shows that. The government has reached beyond the brink of legality to try to take a man's life. Its effort demands dismissal.

STATEMENT OF STATUTORY JURISDICTION

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(1), UCMJ, 10 U.S.C. § 867(a)(1) (2012).

STATEMENT OF THE CASE

On February 4, 2008, MSG Hennis was arraigned before a general court-martial sitting at Fort Bragg, North Carolina. Pretrial, trial, and post-trial proceedings occurred at times between April 8, 2008 and January 21, 2011. On April 8, 2010, a panel of officer and enlisted members convicted him, contrary to his pleas, of three specifications of premeditated murder in violation of Article 118, Uniform Code of Military Justice (UCMJ); 10 U.S.C. § 918. On April 15, 2010, that 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 sentence on January 26, 2012.

The Army Court denied MSG Hennis's petition for a new trial on June 30, 2014. It then affirmed the findings and sentence on October 6, 2016. It denied MSG Hennis's request for reconsideration on February 24, 2017. This Court docketed this case on March 2, 2017.

STATEMENT OF FACTS

On September 14, 2006, Timothy Hennis heard a knock at his door. He opened it and found a team of local police and military personnel standing at the stoop and staring back at him. They handed him a piece of paper directing him to

leave his home near Tacoma, Washington and report to Fort Bragg, North Carolina. (JA 1363). Hennis had retired from the Army as a first sergeant two years earlier. Now, however, the Army was purporting to recall Timothy B. Hennis, First Sergeant (Ret.) back to duty as "Master Sergeant Timothy B. Hennis." The purpose of this order: "UCMJ Processing." (JA 1363). The government was going to court-martial MSG Hennis, and try him for his life for the third time.

1. **Master Sergeant Hennis faced two trials and 34 months of incarceration before a jury acquitted him.**

Twenty-one years earlier, the State of North Carolina had accused him of murdering two young children and raping and murdering their mother. The crimes were horrific. The victims, Kathryn Eastburn and her daughters Kara and Erin, were stabbed and slashed to death inside their home on Summer Hill Road in Fayetteville, North Carolina. The body of Kathryn Eastburn lay bloody and partially undressed in the bedroom; her daughters were nearly decapitated. Their autopsies would later reveal that, together, they had succumbed to some 35 knife wounds. (R. at 932). Further investigation made clear that their murder must have occurred sometime between Thursday, May 9 and the morning of Friday, May 10, 1985. (R. at 754).

Two members of the Eastburn family survived this gruesome event. The first was Jana, who was just 20 months old. On May 12, 1985, her cries alerted a neighbor who entered the home and made the gut-wrenching discovery of what had happened. He found Jana dehydrated but otherwise unharmed. Gary Eastburn, Kathryn's husband and the girls' father, was the other survivor. An Air Force captain at the time, he had left weeks earlier to attend training at Maxwell Air Force Base in Alabama. (R. at 3907).

The murders shocked the communities of Fayetteville and Cumberland County. Local newspapers and television outlets covered the case and carried the requests of law enforcement that anyone with information come forward. (R. at 761, 772-73). The morning of May 15, 1985, then-Sergeant Timothy Hennis was watching television with his wife when a segment on the events aired. Master Sergeant Hennis realized that he had adopted a dog from this woman just seven days before. (JA 2125). He, his wife, and their young daughter then went to the Cumberland County Sheriff's Office. (R. at 761).

Master Sergeant Hennis spoke with the case's lead detective, Jack Watts. Master Sergeant Hennis was cooperative. (JA 813). He wrote a sworn statement and gave samples of his blood, head hair, pubic hair, and fingerprints. (JA 765-73). He returned home with his wife and daughter. The next day, police came to his home, arrested him, and frog-marched him out to a squad car.

a. The State tries—and then retries—MSG Hennis for the Eastburn murders.

A three-year legal battle began. The State tried MSG Hennis in 1986, convicted him, and had him sentenced to death. He appealed to the Supreme Court of North Carolina and had his conviction overturned. The State retried MSG Hennis in 1989, and the jury acquitted him unanimously.

The government's case was essentially the same in both trials. Its central witness was Patrick Cone. He claimed to have seen a white man about six feet tall and 167 lbs. near the Eastburn residence at about 3:30 a.m. on Friday, May 10, 1985. (JA 707). The man, according to Cone, wore a dark jacket and hat. He had a bag slung over his shoulder, and he passed by Cone before driving off in a white Chevette. (JA 668). Cone later identified MSG Hennis in a photo line-up, though only minutes after he had encountered MSG Hennis at Sheriff's Office. (JA 716, 774f). Cone himself expressed doubts over the identification for months. (JA 688, 721-24).

The State used its remaining witnesses to bolster Cone's account or add other incriminating circumstances. The testimony of Margaret Tillison was one example. A year after Hennis's picture had featured on newspapers and news broadcasts, she told investigators that she too had seen Hennis near the Eastburn home, sitting inside a white Chevette the afternoon before the murders. (JA 650-

53). Other witnesses were offered to suggest Hennis had destroyed evidence by taking his jacket to the dry cleaner or by burning things in a barrel, or that he might have used the Eastburns' credit card to withdraw cash.

By and large, however, that was the State's case. It never asserted any connection between MSG Hennis and the Eastburns other than the adopted dog. It never presented any forensic link between the crime scene and MSG Hennis. (JA 939). Its blood tests did not match Hennis. Its head hair and pubic hair analyses did not match Hennis. Its fingerprint analysis did not match Hennis. Its footprint analysis did not match Hennis. Its fiber analysis did not match Hennis. None of its other forensic efforts matched Hennis. Despite collecting a hundred items of evidentiary value from the Eastburn and Hennis homes, despite a complete search of Hennis's Chevette, and despite years of effort, the State had no hard evidence connecting the crime to MSG Hennis. (JA 823-31).

Other known individuals did not match the forensic evidence either. Furthermore, it came to light that weeks before MSG Hennis and Kathryn Eastburn met, she had been receiving disturbing phone calls around 4:00 or 5:00 a.m. (JA 587-89). A man's voice would threaten: "Ms. Eastburn, I live around the corner and I'm coming to see you." (JA 588). The calls so frightened Kathryn and Gary Eastburn that he asked friends to keep an eye on her safety. (JA 589). But from

"day one" MSG Hennis was the State's suspect. SCOTT WHISNANT, INNOCENT VICTIMS 368 (Penguin Books Ltd., 1993).

b. The defense discovers exculpatory evidence in 1989 that the government had withheld in 1986.

This was the backdrop of MSG Hennis's 1986 conviction. What the defense did not know then was that the State had information that tended to undermine its case and suggest others may have been responsible for the murders. The defense would only learn about this through its own independent efforts and the government's disclosures toward the end of the 1989 trial.

One of the men that the State had considered, interviewed, and ruled out was John Raupach. Strikingly similar to MSG Hennis in build, complexion, and appearance, John Raupach lived in the neighborhood. (JA 845). He had a habit of taking twilight-hour walks down Summer Hill Road and past the Eastburns' home, typically wearing his dark jacket and hat with a bag slung over his shoulder. (JA 845-46). The State had even collected his jacket and bag as evidence. (JA 845-46). The State never disclosed this to MSG Hennis's defense, and only acknowledged his existence after the defense had already called him as a surprise witness in the 1989 trial. (JA 1504-18).

The State also withheld information about another person of interest, the Eastburns' backyard neighbor WHJR. (JA 1704-06). Sources indicated he had

scratches on his face following the murders, and his attempts to explain them were inconsistent and unverifiable. (JA 957, 2017-21, 2138). His physical build and complexion also fit Cone's initial description of the man he saw outside the Eastburn home on May 10, 1985. (JA 2017-21).

Furthermore, the government also withheld a handwritten letter its attorneys received shortly after Hennis's conviction. The cryptic message stated: "I'm passing through Fayetteville on my way to New Jersey. I murdered the Eastburns. I did the crime. Hennis is doing the time. Thanks again, Mr. X." (JA 1741). The State never analyzed the letter or attempted to trace its origins; it just filed it and forgot it.

Notwithstanding the withholding of exculpatory evidence, the defense had a stronger case in 1989. It had discovered more information with which it could impeach Patrick Cone's testimony. (JA 1090-92). It had the visceral impact of John Raupach walking to the witness stand and testifying about his twilight walks. And the defense also had Charlotte Kirby. In the early morning of May 10, 1985, she was delivering newspapers along Summer Hill Road when she saw a man walking from the Eastburn residence with a bag over his shoulder. (JA 978-95). He was significantly shorter and slimmer than MSG Hennis. (JA 978-95). Kirby saw an image of Hennis in the newspaper and knew that he was not the man she saw on May 10, 1985. Shortly after this, however, she received phone calls from

an unknown man threatening to visit her in her home. Frightened, Kirby kept this to herself and a close friend, Judy Tolbert. Only when the gravity of Hennis's death sentence weighed on her did she approach defense counsel. (JA 1057).

2. Following four years of civilian proceedings, MSG Hennis returned to military service and then back to civilian life as a retiree.

In April 1989, a jury in Wilmington, North Carolina unanimously acquitted MSG Hennis. North Carolina released him. The Army, in turn, rescinded the administrative separation it had initiated and held in abeyance pending his appeal. Master Sergeant Hennis now reported to Fort Knox, Kentucky. His chain of command duly recognized the 34 months he had spent in civilian confinement as "unavoidable," and credited this against his term of service. (JA 1472-76). By June 1989, he had served well past his August 27, 1986 service commitment. The Army discharged him on June 12, 1989. It reenlisted him on June 13, 1989. (JA 9-10).

Master Sergeant Hennis returned to service and continued in the active Army for the next fifteen years. His service included deployments to Operation Desert Storm and Somalia, a tour in the Republic of Korea, and assignments at Fort Drum, New York, and Fort Lewis, Washington. (JA 1184, 1194; 2137). On July 31, 2004, he retired as a first sergeant and transitioned to civilian life and employment in the Tacoma, Washington area. (JA 1353).

3. The State renewed its forensic investigation in 2005.

The State briefly reopened its investigation after the 1989 trial. Investigators contacted Raupach, WHJR, and the Eastburns' babysitter JC, whose drug use and unusual interest in a similar murder raised suspicions. Ultimately, however, they kept to the conclusion they had always had, the one they formed hours after MSG Hennis walked in the Cumberland County Law Enforcement Center. The report was filed and the evidence shuttered away. Within a few years, the case had become the subject of a book, INNOCENT VICTIMS, and then a television miniseries by the same name. The "Hennis hysteria" of the late eighties faded away. (JA 1819-57).

Around 2005, Sergeant Larry Trotter of the Cumberland County Sheriff's Office decided to reexamine the Eastburn murders. He began by discussing the case with some of the initial investigators and prosecutors. (JA 168). He later attended a law enforcement training event in which the case was dissected and reanalyzed. (JA 169-70). After that, Trotter sent some of the biological evidence for testing. (JA 169). He sent it to the North Carolina State Bureau of Investigation (SBI) and let the lab know "this may become a military court case." (JA 175).

Leading up to the 1989 trial, Cumberland County had asked the FBI to examine the vaginal swabs taken from Kathryn Eastburn's body and assess them

for DNA testing. The FBI found them unsuitable for testing. (JA 1406-12). But in May 2006, the SBI came to a different conclusion. The SBI tested the swabs and reference samples and concluded that the sperm contained therein belonged to Timothy Hennis. (JA 908).

No other lab could replicate the SBI's result, however. In 2008, the United States Army Criminal Investigation Laboratory (USACIL) attempted to develop the same kind of profile on which the SBI had relied. But it could not. (JA 901). It then performed a Y-STR test that only evaluates genes inherited along the male line. (JA 893). This test could not exclude MSG Hennis from this profile, which according to USACIL's statistical data, was shared by one in a few hundred men. (JA 893). Unsure of its result, USACIL forwarded the extracted DNA samples to a private corporation, LabCorp, for a similar but more sensitive test. (JA 903-05, 914). LabCorp could not link this DNA extract to MSG Hennis. (JA 918). This DNA, taken from the same vaginal swabs on which the SBI had relied, "was consistent with Kathryn Eastburn and different from Timothy Hennis." (JA 918).

Beyond this, USACIL discovered the DNA of an unknown male under the fingernails of Kathryn Eastburn, as well as male DNA on a bloody towel and on a glove tip recovered from the crime scene.[2] (JA 890-91, 897-98). Neither linked to

[2] The glove tip did not correspond to the kinds used by State investigators. (JA 2130).

MSG Hennis. (JA 890-91, 897-98). Master Sergeant Hennis's requests to examine all of these materials with a forensic consultant were subsequently denied. (JA 1975).

4. The State invited the Army to prosecute MSG Hennis for a third time.

In June 2006, however, Cumberland County officials only had the SBI's results. This team of investigators and prosecutors gathered to figure out what they would do with it. As District Attorney Ed Grannis stated publicly: "We realized we have a double jeopardy issue which cannot be avoided. And so I contacted our friends at Fort Bragg and asked them if they would assign people to look into this matter, which they did."[3]

By June 29, 2006 the Commander, XVIII Airborne Corps and Fort Bragg, had requested authorization to recall MSG Hennis to active duty. (JA 1363). He justified the request on the grounds that "the United States Army . . . is the only entity that could exercise jurisdiction over MSG(R) Hennis and try him for the aforementioned allegations." (JA 1363). By August 2006, the Army had drafted Hennis's recall orders. By September 14, 2006, a group of policemen and uniformed personnel were knocking on Timothy Hennis's door, ready to serve him

[3] Paul Woolverton, *Hennis suspect again*, FAYETTEVILLE OBSERVER, Sep. 28, 2006, available at http://santillan.cc/Hennis/Hennis-1_content.html.

with orders recalling him to active duty. Reporters quickly caught wind of this, and by September 20, 2006, local media were questioning Cumberland County officials about the case, and District Attorney Grannis maintained that "it is a pending matter in my office." (JA 1489, 1495). Master Sergeant Hennis reported to Fort Bragg as ordered, and what happened after is addressed below.

PART A: ISSUES RAISED BEFORE THE ARMY COURT BUT NOT PREVIOUSLY DECIDED BY THIS COURT

I. THE BREAK IN MSG HENNIS'S SERVICE FORECLOSED ANY EXERCISE OF COURT-MARTIAL JURISDICTION.

The Army relinquished any ability to court-martial MSG Hennis for conduct in 1985 when it discharged him on June 12, 1989. His discharge broke any hold over prior conduct, and MSG Hennis's subsequent reenlistment did not and could not revive it. For all purposes relevant to this case, Congress expressly limited the revival of jurisdiction to allegations other state, territorial, or federal courts cannot try, and this is no such case. Simply put, a case that has been tried is not a case that "cannot be tried." North Carolina courts presided over these accusations *twice* already, and MSG Hennis stood trial and vindicated both himself and the purpose of Article 3(a), UCMJ. These accusations received a fair trial in 1989, and the criminal justice process had run its course then. Any concerns Congress harbored

about servicemembers evading the law were met and forever resolved when a North Carolina jury acquitted MSG Hennis.

But the Army Court does not accept this. Instead, it believes the acquittal of MSG Hennis actually subjects him to court-martial. Under this perplexing view, the constitutional protection against double jeopardy is now a liability, turning against citizen-soldiers, reneging on its promise, and exposing MSG Hennis to yet another trial for his life. This is a radically misguided conclusion. The Framers of our Constitution could have never fathomed that the plain words "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb" would serve the exact opposite ends. U.S. Const. amend. V. Nor could the drafters of the UCMJ, concerned as they were with *Hirshberg, infra*, ever fathom that Article 3(a)'s limitation to un-triable cases would perversely extend military jurisdiction over a case so triable that a State had already tried it. The Army Court's opinion celebrates an absurdity, and this Court should not suffer it. Reason and clear-eyed analysis lead to only one conclusion: the court-martial of MSG Hennis lacked jurisdiction, and the findings and sentence must be dismissed.

1. The government cannot carry its burden of proving jurisdiction.

This Court reviews jurisdiction de novo. *United States v. Morita*, 74 M.J. 116, 120 (C.A.A.F. 2015). There is a "presumption against federal subject-matter jurisdiction," and it is "neither granted nor assumed by implication." *United States*

v. Jacobsen, 77 M.J. 81, 85 (C.A.A.F. 2017) (citations and quotations omitted).[4] When challenged, then, "the Government must prove jurisdiction by a preponderance of evidence." *Morita*, 74 M.J. at 121. "A jurisdictional defect goes to the underlying authority of a court to hear a case," and such a defect "impacts the validity of the entire trial and mandates reversal." *United States v. Alexander*, 61 M.J. 266, 269 (C.A.A.F. 2005). If the government fails to carry its burden, the findings and sentence must be dismissed. *Id*.

It takes more than novel theories and broad assertions to carry that burden; courts-martial are "tribunals of special and limited jurisdiction," and they "must be convened strictly in accordance with statutory requirements." *United States v. Padilla*, 5 C.M.R. 31, 34 (C.M.A. 1952). This strict statutory adherence to the letter and spirit of the law is all the more pronounced in capital courts-martial, as Congress "has jealously restricted their jurisdiction to try capital cases and imposition of the death penalty has never been permitted unless specifically authorized by law." *United States v. French*, 27 C.M.R. 245, 251 (C.M.A. 1959). A court-martial's power to try and sentence a human being to death is not a forum for creative lawyering. The Army's inventive, uncertain, and grasping efforts to

[4] The authority for courts-martial is "statutory, and the statute under which they proceed must be followed throughout. The facts necessary to show their jurisdiction and that their sentences were conformable to law must be stated positively; and it is not enough that they may be inferred argumentatively." *Runkle v. United States*, 122 U.S. 543, 556 (1887).

reach jurisdiction in this case stretch the UCMJ and the Constitution too far. Those efforts must fail, and MSG Hennis's court-martial must be dismissed.

2. The Army created a break in MSG Hennis's service that created a break in jurisdiction.

Court-martial jurisdiction depends on the military status of the accused. Terminating that status terminates jurisdiction, and so when the Army discharged MSG Hennis on June 12, 1989, it relinquished the authority to court-martial MSG Hennis for any prior conduct. But the Army now denies this. Nearly two decades later, the Army wants to execute a person civilian jurors have already acquitted. The Army lacks the authority to do so; its effort defies the jurisprudence of this Court and the Supreme Court, and it disregards the clear will of Congress.

a. A break in military status terminates jurisdiction.

Court-martial jurisdiction vests only when there is "(1) jurisdiction over the offense, (2) jurisdiction over the accused, and (3) a properly convened and composed court-martial." *United States v. Ali*, 71 M.J. 256, 261 (C.A.A.F. 2012). Jurisdiction over both the offense and the accused derives from "the status of the individual," *id*., which generally begins at enlistment and ends on discharge.[5]

[5] *See Ali*, 71 M.J. at 264 ("the status of the individual is the focus for determining both jurisdiction over the offense and jurisdiction over the person."); *United States v. Murphy*, 50 M.J. 4, 7 (C.A.A.F. 1998) ("the test for whether a military court-martial has jurisdiction to try an accused is the military status of the accused.").

When an individual loses military status, the military loses jurisdiction. *Toth v. Quarles*, 350 U.S. 11 (1955); *Hirshberg v. Cooke*, 336 U.S. 210, 216-19 (1949); *Duncan v. Usher*, 23 M.J. 29, 35 (C.M.A. 1986) ("military jurisdiction does not survive a hiatus in the accused's status as a person subject to the Uniform Code.").

A discharge terminates court-martial jurisdiction. This holds true even if "the servicemember immediately reenters the service" after his or her term of service has expired. *United States v. Clardy*, 13 M.J. 308, 316 (C.A.A.F. 1982). A discharge after a completed term of service creates a "break in 'status,'" and any such break, "irrespective of the length of time between discharge and reenlistment, is sufficient to terminate jurisdiction." *Id*. To say it more concisely, "military jurisdiction is terminated by a discharge at the end of an enlistment or period of obligated term of service." *Id*. That rule precludes jurisdiction here.

b. Master Sergeant Hennis's discharge terminated his military status and the Army's jurisdiction.

The Army discharged MSG Hennis on June 12, 1989 after his enlistment had expired, and this extinguished jurisdiction over any preceding acts. The Army Court correctly found as fact that "immediately before the reenlistment in question, appellant's correct ETS date was—at the latest, applying both enlistment

extensions—27 August 1986." (JA 11).[6] This means that, when the Army discharged MSG Hennis on June 12, 1989, his "military status [had] terminated—albeit briefly—immediately before his reenlistment." (JA 13). That break in military status severed court-martial jurisdiction over this case.[7]

3. Jurisdiction terminated on June 12, 1989, and it never returned.

The Army Court correctly found a break in MSG Hennis's service. It erred, however, in holding that jurisdiction revived. Jurisdiction did not and cannot revive in this case. Congress created Article 3(a), UCMJ, 10 U.S.C. § 803, for the sole purpose of restoring court-martial jurisdiction over serious offenses no civilian

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[6] Master Sergeant Hennis enlisted in the Army on January 29, 1981, for a term of four years of active service, which he extended for an additional year. The state of North Carolina arrested MSG Hennis on May 16, 1985, and incarcerated him for 213 days. It later released him on bail and he resumed military duties until July 1986, when he returned to prison for another 825 days pending appeal. Following the reversal of his conviction and his acquittal, MSG Hennis reported for duty on April 21, 1989. His commanding general classified the 1,038 days of absence as "unavoidable," and established his end of service date as August 27, 1986. (JA 10-11).

[7] *Clardy* makes it clear that MSG Hennis did not receive "a short-term discharge," *i.e.*, one solely for the purposes of reenlistment. 13 M.J. at 310, n. 4. The fact that he reenlisted the day after his discharge is immaterial. Rather, the dispositive fact is that his service obligation had expired before his discharge, making his discharge a definitive break in status. *Id*. This legal break in service also mirrors an actual break in service; for nearly three years, MSG Hennis performed no military duties, living instead as an incarcerated civilian. *See*, *e.g.*, JA 2042.

court could try. This naturally excludes cases civilian courts have already tried. Nevertheless, the Army Court would warp the Article and bend it to the exact opposite purpose. Under the Army Court's ambitious new take, a civilian acquittal can now resurrect military jurisdiction that has long since expired. Such an outcome is absurd, mired in inconsistent reasoning, and deaf to the purposes of both Article 3(a) and the Double Jeopardy Clause.

a. Article 3(a), UCMJ, does not revive jurisdiction over cases civilian courts have already tried.

Article 3(a) can revive jurisdiction, just not here. How far the Article reaches is a matter of statutory interpretation, and the task at hand is to ascertain its meaning. In "determining the scope of a statute" courts will "look first to its language." *United States v. Turkette*, 452 U.S. 576, 580 (1981). But where those words confront "a clearly expressed legislative intent to the contrary," *id*., or they yield an "absurd" disposition, courts must press beyond the text itself. *EV v. United States*, 75 M.J. 331, 332 (C.A.A.F. 2016) (citing *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000)). The search for a "clear expression of congressional intent" may thus include "all available evidence about the meaning of the statute, including its text, structure, and legislative history." *United States v. Martinelli*, 62 M.J. 52, 59 (C.A.A.F. 2005) (citations omitted); *see also United States v. Phanphil*, 57 M.J. 6, 9 (C.A.A.F. 2002)

(statutory construction "begins with the statute's plain text and Congress's legislative intent in passing the statute."). The ultimate task is to discern the will of the legislature, as "even the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent." *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974).

In this case, all measures of that intent harmonize. The plain text does not support reviving jurisdiction over cases already tried in domestic courts. The legislative history does not support reviving jurisdiction over cases already tried in domestic courts. Common sense and the Constitution do not support reviving jurisdiction over cases already tried in domestic courts.

i. The plain meaning of "cannot be tried" excludes, ipso facto*, cases that have already been tried.*

Of course, the construction of Article 3(a), UCMJ must begin with the right statute. The current form of Article 3(a) is not the one; rather, the original Article 3(a), passed in 1950 and preserved until 1992, is what governs this case.[8] Unless

[8] Forty-two years after enacting the UCMJ, Congress revised Article 3(a) to its current form. This revision was purely prospective, applying only to offenses occurring on or after October 23, 1992. *See* National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, §§ 1063 and 1067, 102 Stat. 2315, 2505, 2506 (1992). Unlike the version of Article 3(a) at issue here, the 1992 revision permits revived jurisdiction whenever a person previously subject to the Code becomes subject to the Code again. 10 U.S.C. § 803 (1992) ("a person who is in a status in which the person is subject to this chapter and who committed an offense against this chapter while formerly in a status in which the person was

otherwise noted, all citations to Article 3(a) thus refer to the 1950 version enacted by the 81st Congress.

This version of Article 3(a) restricts the revival of jurisdiction to serious offenses that "cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia." 10 U.S.C. § 803(a) (1950). By the plain operation of its text, Article 3(a) cannot revive jurisdiction here as the acquittal of MSG Hennis in North Carolina made the case fully "tried in the courts of . . . [a] State." *Id*.

The best demonstration that a case is triable is that it has already been tried. This is an ordinary, straightforward understanding free of dubious distinctions and legal legerdemain.[9] Article 3(a) avoids duplicitous prosecutions; it provides a tool of military justice when civilian justice can never be had.[10] It is a provision of last

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subject to this chapter is not relieved from amenability to the jurisdiction of this chapter for that offense by reason of a termination of that person's former status.").

[9] *See*, *e.g.*, *Martin v. Young*, 134 F. Supp. 204, 206 (N.D. Cal. 1955) (holding that the "plain language" of Article 3(a) revives jurisdiction over a discharged servicemember "if, and only if, such person could not be tried in the civil courts.").

[10] *See, e.g.*, Letter from Sen. Millard E. Tydings, Chairman, Committee on Armed Services, to Sen. Pat McCarran, Chairman, Committee on the Judiciary, (Jul. 13, 1949), *reprinted at* 96 CONG. REC. 1367 (1950) (Where "the Federal or State courts have jurisdiction, such jurisdiction should not be disturbed, and there would be no justification in also giving it to the courts martial. For that reason, it is provided that the courts martial are to have jurisdiction only if the civil courts do not have it.").

resort, not an insurance policy against acquittals that dissatisfy commanders, nor a trick for state prosecutors seeking to skirt double jeopardy protections.[11] That is the easiest, most natural construction and the one this Court should accept.

ii. Congress created Article 3(a) in response to Hirshberg*, where no state or federal court could try allegations against a servicemember.*

This is also the most faithful construction of Congress's intent. Article 3(a) was a direct response to *Hirshberg v. Cooke*, 336 U.S. 210 (1949), the oft-cited case of a Navy petty officer convicted of maltreating his fellow prisoners of war. The Supreme Court dismissed his conviction and held his court-martial unlawful, finding that the preceding break in Hirshberg's service precluded military jurisdiction. *Id*. The Court reasoned that the armed forces had long "acted on the implicit assumption that discharged servicemen, whether re-enlisted or not, were no longer subject to court-martial power," and the Navy could not abrogate this practice without express authority from Congress. *Id*. at 218. The end result was that, once discharged, Chief Signalman Hirshberg and others like him would escape any reckoning for crimes committed overseas.

The Supreme Court decided *Hirshberg* just days before Congress started debating the future UCMJ. The Court's decision displeased lawmakers, who

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[11] *See* 95 Cong. Rec. 5721, (1949) (statement of Rep. T. Overton Brooks, Chairman, H. Subcomm).

balked at the outcome and resolved that "the *Hirshberg* type of case will be taken care of."[12] Through their drafting, debating, and deliberating, the lawmakers crafted Article 3(a) as their solution.[13] That Article 3(a) exists to overcome *Hirshberg* is beyond even "the slightest doubt . . . Congress passed this statute for the principal purpose of covering the situation brought about by the decision in *Hirshberg v Cooke* . . . . The legislative history demonstrates beyond question that the attention of the 81st Congress was focused on this precise issue." *United States v. Gallagher*, 22 C.M.R. 296, 299 (C.M.A. 1957). Indeed, as one lawmaker observed "the only purpose of this is to avoid a case like the *Hirshberg* case."[14] *Hirshberg* sparked the notion of revived jurisdiction; it is the raison d'être of Article 3(a) and the lens through which the Article must be understood.

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[12] *Uniform Code of Military Justice, Hearings before a Subcomm. of the Comm. on Armed Services on H.R. 2498*, 81st Cong., 1st Sess., at 884 (1949) [hereinafter *1949 House Hearings*] (statement of Rep. T. Overton Brooks, Chairman, Subcomm).

[13] *See* 95 Cong. Rec. 5721, (1949) (statement of Rep. T. Overton Brooks, Chairman, H. Subcomm) (describing the *Hirshberg* case and stating "there was a solution to this problem and our proposed solution is offered in article 3(a)").

[14] *Id*. at 883 (statement of Rep. Charles H. Elston).

iii. Congress only expanded court-martial jurisdiction far enough to solve the Hirshberg *problem and ensure that some state or federal jurisdiction could try allegations of wrongdoing.*

The 81st Congress cared about *Hirshberg* because it "involved an offense which was committed beyond the jurisdiction of our State and Federal courts," and thus "there is no tribunal which has any jurisdiction over the person or the offense." S. REP. NO. 81-486, at 8 (1949). The lawmakers sought to close this loophole, but not legislate beyond it. Indeed, they rejected proposals to revive jurisdiction across the board whether or not a case was triable in domestic courts.[15] Congress's rejection of these proposals underscores its intent to limit Article 3(a), and the absence of any contrary purpose highlights it further. Nothing in the Code's drafting history suggests the 81st Congress wanted to court-martial discharged servicemembers already tried and acquitted in state court.[16] Nothing

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[15] *See*, *e.g., 1949 House Hearings* at 881 (statement of Rep. Charles H. Elston) ("I am wondering why you could not reach the whole subject with a very simple provision to the effect that any person who commits any offense and is subject to prosecution under this code may be prosecuted even though he may no longer be in the service, and the only exceptions would be cases which are barred by the statute of limitations.").

[16] Consider Rep. Elston's remarks during the House floor debate, for example: "Although most of the comments against this article were that we were trying to encroach and enlarge our jurisdiction, we would be happy with the restrictions of a statute of limitations and not having jurisdiction over what is triable in the civil courts." *1949 House Hearings* at 883.

suggests they wanted to replace one loophole for "persons who commit offenses" with another for "capricious actions on the part of military authorities."[17] Nothing suggests they wanted to set the Double Jeopardy Clause against servicemembers.

Rather, everything suggests that the 81st Congress exercised only "the least possible power adequate to the end proposed," crafting Article 3(a) as a narrow response to *Hirshberg*. *Toth*, 350 U.S. at 23 (citing *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821)). The end proposed, of course, was ensuring that some forum could hear allegations against would-be Hirshbergs. Senator Estes Kefauver, a Member of the Committee on the Armed Services, made this inescapably clear in his report on the future UCMJ:

> Article 3 represents a new provision in military law. . . . Under the Articles of War, person[s] who commit serious *crimes overseas* . . . or who commit a *military offense in this country*, may not be tried by court martial or in any court after they have been discharged from the service. . . . This provision would, therefore, correct the inadequate jurisdiction heretofore provided and, at the same time, *limit and restrict the jurisdiction to proper areas*.

96 CONG. REC. 1358 (1949) (emphasis added). Article 3(a) has always been a limited and restricted means of ensuring accountability for serious crimes

[17] 95 Cong. Rec. 5721, (1949) (statement of Rep. T. Overton Brooks, Chairman, H. Subcomm).

committed overseas and military offenses committed domestically. *Id*. It was never intended to create a vehicle for retrying in courts-martial civilian offenses our civilian courts already addressed. Congress deliberately declined to reach no further than this, for that was the least power adequate to the end proposed. This is the limit of the law, and this Court should hold the Army to it.

iv. Hennis *is not* Hirshberg*, and the Army's attempt to revive jurisdiction in this case defies Article 3(a)'s manifest purpose.*

Article 3(a) was about *Hirshberg*, and *Hennis* is simply not *Hirshberg*. *United States v. Hennis* concerns peacetime accusations duly prosecuted in state court, not overseas offenses that will go forever unanswered.[18] The allegations against Chief Signalman Hirshberg arose seven years after their commission and one year after his discharge, 336 U.S. at 211; the Army tracked the allegations against Timothy Hennis from the moment Cumberland County arrested him, and the Army found the case had been tried to its satisfaction when it later reenlisted and even retired MSG Hennis. (JA 1353). Chief Signalman Hirshberg ultimately evaded trial; MSG Hennis twice faced the judgment of juries before being subjected to court-martial.

[18] *See Martin v. Young*, 134 F. Supp. at 206 (observing that Congress enacted Article 3(a) to address "serious offenses" committed by servicemembers "stationed outside the United States, [who] could not be brought to trial.").

Article 3(a) closes a jurisdictional void that never existed in this case. The State of North Carolina fully vindicated Congress's concerns when it tried MSG Hennis. There is no reason to believe Congress ever conceived Article 3(a) as a license to retry cases already resolved in our domestic courts. There is no reason to believe Congress ever wanted to subvert the Double Jeopardy Clause in order to drag retired soldiers before courts-martial decades after their acquittals. *See Lee v. Madigan*, 358 U.S. 228, 235 (1959) ("Statutory language is construed to conform as near as may be to traditional guarantees that protect the rights of the citizen."). There is no reason to believe anything but what the legislative record repeatedly shows:

> [N]o court—military or civilian—had jurisdiction to determine whether or not Hirshberg had committed a serious offense. . . . It was for the purpose of covering cases of this type, over which there is no present jurisdiction, that article 3 (a) was drafted. . . . However, it was not intended to extend blanket jurisdiction over cases of this type . . . In addition . . . *where the Federal or State courts have jurisdiction, such jurisdiction should not be disturbed, and there would be no justification in also giving it to the courts martial*. For that reason, it is provided that the courts martial are to have jurisdiction only if the civil courts do not have it.

Letter from Sen. Millard E. Tydings, Chairman, Committee on Armed Services, to Sen. Pat McCarran, Chairman, Committee on the Judiciary, (Jul. 13, 1949), *reprinted at* 96 CONG. REC. 1367 (1950) (emphasis added).

Congress focused solely on whether a state, territorial, or federal court could try the case. An interpretation that counts cases tried as cases that "can be tried" is the only interpretation that honors the text, purpose, and commonsense application of Article 3(a).

b. The Army Court's opinion ignores Congress's intent and relies on flawed reasoning.

The limitations Congress put on Article 3(a) are clear. The Army Court answers them, however, by asserting that Article 3(a) can revive jurisdiction over a soldier *because* he has already been tried and acquitted. (JA 15). This notion is so strained, so aberrant, and so offensive to the spirit of the Double Jeopardy Clause and Article 44, UCMJ that Congress could not have foreseen it, let alone discussed or desired it. The Army Court presents its conclusion as the plain, textual meaning of Article 3(a), (JA 14-15), but that is wrong on two counts. First, the plain text does not support the court-martial of already-tried servicemembers. Second, even if the plain text did suggest such a view, that view would falter for "it leads to an absurd result." *United States v. King*, 71 M.J. 50, 52 (C.A.A.F. 2012).

Of course this absurdity flows from a deeply flawed analysis. The Army Court begins by reading the tense of the word "cannot" rigidly and literally, without concession to context, commonsense, or the clear intent of Article 3(a). It relies on this inapposite literalism to discount and ignore "a state or federal court's

past ability to try a case," and thereby disregard the case's history. (JA 14). But when a literal reading of the term "cannot be tried" would also mean North Carolina can still try MSG Hennis, the Army Court switches to license and flexibility, presuming that the Double Jeopardy Clause bars any possible prosecution. In want of authority, the Army Court then appeals to *Willenbring v. Neurauter*, a case this Court has since reversed. This is what the Army Court proposes for jurisdiction: selective reasoning and bad law. The entire endeavor rebuffs the admonition that courts-martial "must be convened strictly in accordance with statutory requirements" to the point of abandoning it. *Padilla*, 5 C.M.R. at 34.

i. The Army Court's interpretation lets literalism override the meaning of the law.

The Army Court construes the term "cannot be tried" in isolation, orphaned from the legislative intent that brought it into being. Because Congress did not use the phrase "could not have been tried" or "an equivalent variant," the Army Court concludes that Congress did not care about "a state or federal court's past ability to try a case," only whether such a court can try the case presently. (JA 14). This kind of implication by negation misses the mark. Statutory interpretation is about discerning the will of the legislature, not grading its grammar. *See Flora v. United*

States, 362 U.S. 145, 150 (1960) ("This Court naturally does not review congressional enactments as a panel of grammarians . . . .").

As a preliminary matter, the Army Court's rendition of "cannot" is merely its own; other courts interpreting Article 3(a) have read "cannot be tried" as naturally including "could not be tried." This Court is one of them.[19] The Air Force Court of Criminal Appeals is another.[20] Even the federal courts have treated

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[19] *See United States v. Caputo*, 18 M.J. 259, 267 (C.M.A. 1984) (holding that Article 3(a) would not revive jurisdiction because "the principal offense alleged . . . clearly *could have been tried* in the state courts of Hawaii.") (emphasis added); *see also United States v. Poole*, 30 M.J. 149, 151 (C.A.A.F. 1990) ("a servicemember awaiting discharge after the end of an enlistment might commit a serious felony overseas for which he *could not be tried* by a state or federal court; and if court-martial jurisdiction were lacking, the crime might go unpunished. See Art. 3(a), UCMJ") (emphasis added); *Duncan v. Usher*, 23 M.J. 29, 32 (C.A.A.F. 1986) ("Article 3(a) . . . authorized military jurisdiction over serious crimes committed by Reserves while on active duty and for which they *could not be tried* by a Federal or State court.") (emphasis added).

[20] *See United States v. Rubenstein*, 19 C.M.R. 709, 791 (A.F.B.R. 1955) ("In our opinion, [the] accused *could not be tried* by a court of the United States or of a state or territory thereof or of the District of Columbia . . .") (emphasis added); *United States v. Zinn*, ACM 28930 (f rev), 1992 CMR LEXIS 887, at *14 (A.F.C.M.R. Apr. 16, 1992) ("Even if the offenses were committed in a prior enlistment, the United States would still have had jurisdiction under the code over them because they took place overseas and *could not be tried* in a civilian court. Article 3(a)") (emphasis added).

"cannot" and "could not" interchangeably in the context of Article 3(a).[21] Indeed, as one federal district court observed:

> The Congress did not intend Article 3(a) to be a general grant of court-martial jurisdiction over persons who had been discharged from the armed forces. The legislative history of this statute makes it clear that the Congress meant what the plain language of the statute says—that the armed forces should have court-martial jurisdiction over persons charged with committing serious offenses during a term of enlistment which had terminated if, and only if, such person *could not be tried* in the civil courts.

Martin v. Young, 134 F. Supp. at 206 (emphasis added). So much for the assertion that "cannot" clearly excludes "could not." (JA 14).

And yet even if the Army Court's reading of "cannot" passes some grammatical test, it still fails the legal ones. "The meaning of the legislature constitutes the law. A thing may be within the letter of a statute, but not within its meaning; and within its meaning, though not within its letter." *Raymond v. Thomas*, 91 U.S. 712, 715 (1875). A literal rending of a word will not always yield its meaning, and indeed "literalness may strangle meaning." *Utah Junk Co. v. Porter*, 328 U.S. 39, 44 (1946). Thus, when the literal reading of a statute is "at

[21] *See Murphy v. Dalton*, 81 F.3d 343, 350 (3d Cir. 1996) ("we find no evidence in the record to show that Plaintiff *could not have been tried* in another court in the United States for an offense of similar import. Accordingly, we hold that Plaintiff's case does not fall within the statutory exception of § 803(a).") (emphasis added).

war with the clear congressional purpose, a less literal construction must be considered." *United States v. Campos-Serrano*, 404 U.S. 293, 298 (1971).

Of course the words composing a law are the place to find its purpose. But again, the "obvious purpose of the law should not be sacrificed to a literal interpretation of such words." *E.F. Hutton Grp., Inc. v. United States*, 811 F.2d 581, 586 (Fed. Cir. 1987). The words themselves may be imperfect emissaries of what Congress meant, and "the meaning of statutory language, plain or not, depends on context." *Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 148, 155 (2d Cir. 1999) (citations omitted). Along with context, logic, and history, grammatical analysis offers "one tool with which to divine Congress' intent." *Gibraltar Sav. v. Ryan*, 1990 U.S. Dist. LEXIS 18386, *13, 1990 WL 484155 (citations omitted). It is just a tool, however, and "justice should not be the handmaiden of grammar." *Id*.

And so it is that when a literalistic approach to verb tense leads to absurdity, this Court chooses reason, everyday understandings, and a studied assessment of the law's history to discern its meaning.[22] It should continue that tradition here. A narrow, stunted interpretation of the word "cannot" would confound the meaning

[22] *See*, *e.g., United States v. Jones*, 73 M.J. 357, 361 (C.A.A.F. 2014) ("Although Article 31(b), UCMJ, seems straightforward, were these textual predicates applied literally, Article 31(b) would potentially have a comprehensive and unintended reach into all aspects of military life and mission.") (citations omitted); *United States v. Jordan*, 57 M.J. 236, 239 (C.A.A.F. 2002) ("this Court has declined to adopt too literal an application of Article 45 and RCM 910(e).").

of Article 3(a). The term must sit in context and reflect ordinary usage—that is "[o]rdinary, but not literal" usage. *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 199 (1993) (Blackmun, J., dissenting). When given their natural effect, the words "cannot be tried" exclude cases that "have been tried." The Army Court's contrary reading of Article 3(a) does not reflect Congress's intent, it distorts it.

ii. The Army Court's inconsistent reasoning produces its paradoxical conclusion.

The Army Court compounds its tone deaf literalism with inconsistency. While it treats the term "cannot be tried" literally and rigidly so as to limit it to present cases, it turns around and recasts the term figuratively and flexibly so as to include cases already tried. The Army Court's approach is thus simultaneously literal and liberal: literal, in its focus on the tense of one auxiliary verb to the exclusion of the law's purpose; and liberal, in its expansion of a jurisdictional statute that must be interpreted strictly. The Army Court gives no basis to construe "cannot be tried" literally for temporal purposes but liberally for legal ones, because no principled basis exists. Selective reasoning yields unjustifiable conclusions, and this Court has always favored consistency. *See United States v. Jacobsen*, 77 M.J. 81, 85 (C.A.A.F. 2017) ("It is a fundamental rule of statutory interpretation that we afford both parts of a statute the same construction.").

Had the Army Court remained constant and literal throughout, it would have necessarily found that North Carolina can still try MSG Hennis. The State *can* indict him again, and he *can* waive his protection against double jeopardy.[23] Master Sergeant Hennis can therefore "be tried in the courts of . . . [a] State" under the plain, literal text of Article 3(a). However likely this scenario may be, it is not impossible; it *can* happen, and that is enough to satisfy the literal terms of the Article. Indeed, if MSG Hennis had to choose between another civilian trial "surrounded with more constitutional safeguards than in military tribunals," *Toth*, 350 U.S. at 15, or a court-martial before officers and sergeants major harboring preconceived notions of his guilt and inflexible attitudes towards punishment, then MSG Hennis might very well choose the former. Whatever the case, the Army Court certainly cannot decide for him.

[23] The Constitutional protection against double jeopardy is not an absolute bar to prosecution and it can be waived. *See*, *e.g.*, *United States v. Gladue*, 67 M.J. 311, 314 (C.A.A.F. 2009) ("A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution . . . . That includes double jeopardy.") (citing *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995)); *State v. McKenzie*, 232 S.E.2d 424, 428 (1977) ("The general rule is that the defense of double jeopardy is not jurisdictional . . . [i]t is a defense personal to the defendant.") (citations omitted).

iii. The Army Court's reliance on Willenbring *is misplaced.*

The Army Court tries to shroud its reasoning with *Willenbring v. Neurauter*, 48 M.J. 152 (C.A.A.F. 1998), but to no avail—the contradictions and discord still poke through. Indeed, *Willenbring* provides little cover to begin with, as this Court overruled it in *United States v. Mangahas*, 77 M.J. 220 (C.A.A.F. 2018). Although that decision did not analyze Article 3(a),[24] it nevertheless mooted the rest of *Willenbring* and its discussion of revived jurisdiction should be discarded.[25]

But even if some of *Willenbring* survives, it cannot support jurisdiction here. The *Willenbring* court observed that the concern driving Article 3(a) was whether "the case involved a major offense that *could not* be tried in a civilian court." *Id*. at 177 (emphasis added). It further reasoned that, for a case to be "tried" there must

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[24] "The prior decisions of *United States v. Stebbins*, 61 M.J. 366, 369 (C.A.A.F. 2005), and *Willenbring v. Neurauter*, 48 M.J. 152, 178, 180 (C.A.A.F. 1998), are overruled to the extent that they hold that rape was punishable by death at the time of the charged offense." *United States v. Mangahas*, 77 M.J. 220, 222 (C.A.A.F. 2018).

[25] As the Army Court noted, no court actually found a break in Willenbring's service that would have necessitated interpretation of Article 3(a). (JA 15); *United States v. Willenbring*, 56 M.J. 671, 676 (Army Ct. Crim. App. 2001) ("As there was no complete termination of appellant's military service, we need not consider whether the criteria of the applicable version of Article 3(a), UCMJ, have been met."). The Army did the same thing in the case of Ronald Gray, only court-martialing him for the offenses he committed on post. *United States v. Gray*, 51 M.J. 1, 11 (C.A.A.F. 1999).

be some decision on the merits, and since "a statute of limitations does not establish a defense to the merits of a charge," the charges in *Willenbring* "cannot be tried" by a state or federal court. *Id*. at 176. In other words, Article 3(a) can revive jurisdiction only if a civilian trial on the merits could never occur. *Id*. If a trial on the merits has already occurred, however, then Article 3(a) cannot revive jurisdiction.

It follows, then, that *Willenbring* does not further jurisdiction over *Hennis*. Whereas a jury tried and acquitted MSG Hennis, the charges against SSG Willenbring never appeared on a state or federal docket.[26] In this crucial respect, *Willenbring* mirrored *Hirshberg*, as no domestic court could try either serviceman for the offenses prompting their courts-martial. *Willenbring*'s preoccupation with Article 3(a) was whether a civilian court could reach the substance of an alleged offense. An expired statute of limitations forecloses a trial on the merits, 48 M.J. at 155, whereas the protection against double jeopardy only arises after a trial on the merits has occurred. The former determines that the time

[26] *Willenbring*, 48 M.J. at 155. It is worth observing that the State of North Carolina convicted Willenbring of a different set of charges committed in 1987 and 1989 while he was still in an active duty status. *United States v. Willenbring*, 56 M.J. 671, 672-73 (A. Ct. Crim. App. 2001); North Carolina Department of Public Safety Offender Public Information, https://webapps.doc.state.nc.us/opi/viewoffender.do?method=view&offenderID=639843 (last visited Nov. 15, 2018). The Army never prosecuted him for those offenses, presumably because it understood that North Carolina's actions put them outside realm of Article 3(a).

for a fair trial has passed, while the latter affirms that a fair trial has already happened. *See Mangahas*, 77 M.J. at 223. The two protections spring from different sources and they serve different ends. The Army Court overlooked this critical distinction, and its reliance on *Willenbring* cannot aid its cause. *Hennis* is neither *Hirshberg* nor *Willenbring*.

c. The Army Court's interpretation of Article 3(a) leads to absurdity.

In its barest form, the Army's reasoning weaponizes MSG Hennis's protection against double jeopardy in order to put him again in jeopardy. It uses "the Double Jeopardy Clause, which guards against Government oppression," to force a retiree into yet another trial for life even though he was acquitted decades ago. *United States v. Scott*, 437 U.S. 82, 99 (1978). This Court must reject such alchemic reasoning. Americans have learned to tolerate a few subtleties, novelties, and fictions in our laws, but not outright absurdities. Our constitutional rights do not mean the opposite of what they say; they do not self-destruct upon government demand, and they do not betray the citizens they protect.[27] The Army Court's interpretation of Article 3(a) defies the ordinary sense of its terms, the

[27] *See*, *e.g.*, *United States v. Maybury*, 274 F.2d 899 (2nd Cir. 1960) (rejecting an argument that would "convert the guarantee of double jeopardy from a shield into a sword").

unmistakable intent of Congress, and the natural demands of the Fifth Amendment. This Court must reject that interpretation and dismiss this case.

II. THE CHARGES DID NOT ARISE IN THE ARMED FORCES, AND DID NOT FALL WITHIN THE SUBJECT MATTER JURISDICTION OF A CAPITAL COURT-MARTIAL.

Military courts should only try offenses arising from military service; this was the essence of *O'Callahan v. Parker*, 395 U.S. 258 (1969). Under this view, the Bill of Rights guaranteed all persons the protections of grand and petit juries "except in cases arising in the land or naval forces." *Id*. at 272; U. S. Const. Amend. V. Simply put, "If the case does not arise 'in the land or naval forces,' then the accused gets *first*, the benefit of an indictment by a grand jury and *second*, a trial by jury before a civilian court as guaranteed by the Sixth Amendment and by Art. III, § 2, of the Constitution." *Id*. at 262 (emphasis in original). An accused's military status, while necessary, was not enough for a case to "arise" in the Armed Forces; the offense itself also had to concern military duties, operations, or spheres of authority. *Id*. An offense without a "service connection" meant a court-martial without subject matter jurisdiction. *Id*.

But then the Court reversed itself in *Solorio v. United States*, 483 U.S. 435 (1987). Rejecting the Warren Court's historical analysis, the Rehnquist Court concluded that "the requirements of the Constitution are not violated where . . . a

court-martial is convened to try a serviceman who was a member of the Armed Services at the time of the offense charged." *Id*. at 450-51. *Solorio* thus dispensed with the "service connection" test and indicated that military status was now enough.

Capital cases are different, however. *Solorio* did not deal with a death penalty case, and it did not reckon with the fact that, for centuries, soldiers accused of ordinary capital offenses faced trial in ordinary civilian courts, not courts-martial.[28] Quite naturally, the Framers would have never treated such cases as "arising in the land and naval forces." Indeed, many of them served in the Revolutionary War and understood both the purposes and pitfalls of military justice. These statesmen fought for protections against governmental power, they would not have jettisoned rights that soldiers, sailors, and citizens alike had long

[28] "The power to try soldiers for the capital crimes of murder and rape was long withheld." *Lee v. Madigan*, 358 U.S. 228, 233 (1959). In fact, it was not "until 1863 that general courts-martial were given the power to impose the death penalty for the civilian capital offenses of murder and rape, and then only during wartime. Until the Uniform Code of Military Justice became effective, military courts were prohibited from trying those offenses if committed within the geographical limits of the States and the District of Columbia in time of peace. It would thus appear that prior to 1950, offenses which carried the death penalty and which were common to both the military and civilian communities could not be tried by military courts during time of peace." *United States v. French*, 27 C.M.R. 245, 251 (C.M.A. 1959) (citations omitted).

since held, especially when life itself hung upon them. Such considerations doubtlessly led Justice Stevens, and the three justices joining him, to observe that:

> The question whether a "service connection" requirement should obtain in capital cases is an open one both because *Solorio* was not a capital case, and because *Solorio*'s review of the historical materials would seem to undermine any contention that a military tribunal's power to try capital offenses must be as broad as its power to try noncapital ones. Moreover, the question is a substantial one because, when the punishment may be death, there are particular reasons to ensure that the men and women of the Armed Forces do not by reason of serving their country receive less protection than the Constitution provides for civilians.

Loving v. United States, 517 U.S. 748, 774 (1996) (Stevens, J., concurring) (citations omitted).

This short concurrence did not go unnoticed. A few days after its publication, this Court continued applying the service connection test to capital cases, finding in *United States v. Curtis*, 44 M.J. 106, 118 (C.A.A.F. 1996) that the "offenses were service connected because they occurred on base and the victims were appellant's commander and his wife." (Citing *Loving*, *supra*, and *Relford v. Commandant*, 401 U.S. 355 (1971)). Two years later, this Court reiterated its agreement "with Justice Stevens that the question whether *Solorio* applies in a capital case is an important question." *United States v. Gray*, 51 M.J. 1, 11 (C.A.A.F. 1999).

This Court had no need to go further then. *Gray* contained "overwhelming evidence" that "the murders were committed on post," and that established a "sufficient service connection." *Id*. at 11. The same was true of *Curtis* and *Loving*. In fact, every capital murder case reviewed by this Court has carried an undeniable connection to military service. *See infra* Assignment of Error II.2.b. Every one of them involved our forces overseas or a domestic military installation, and almost always involved some combination of military victims, military accomplices, and military weapons.

United States v. Hennis is no such case, and it marks the military's first pursuit of a capital civilian case guised as a court-martial. It is a misguided, renegade effort tilting against centuries of practice left unbroken and undisturbed by *Solorio*. When the case is capital, and the military interests weigh no more heavily than the civil ones, the Constitution has always guaranteed servicemembers and citizens alike the protections of grand and petit juries. This is the only way to adhere to that "unbending rule of law, that the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires." *Raymond v. Thomas*, 91 U.S. 712, 716 (1875). This Court should enforce that guarantee here and dismiss this case.

1. **This case lacks a meaningful connection to military service and does not "arise in the land or naval forces."**

The allegations in this case do not relate to any aspect of military service. They occurred in a purely civilian neighborhood, outside any area of military control. *See Gray*, 51 M.J. at 11; (Charge Sheet). They occurred within a State during a time of peace, not overseas during a time of war. *See*, *e.g.*, *Relford*, 401 U.S. at 364-65. They bore no conceivable relation to military duties, exercises, or operations. *Id*. They involved no flouting of military authority or procedures, no threats to a military post, and no harm or misuse of military property. *Id*. There is no suggestion that MSG Hennis colluded with other military personnel or used military arms to commit the alleged crimes. The victims, who were civilians, had no military relation to MSG Hennis. *Id*.

The only thread the government can trace to military service is MSG Hennis's 1985 status as an Army sergeant, and the fact that the Eastburns were family members of an Air Force officer. This Court has never found such incidental circumstances sufficient to render *an offense* "service-connected."[29]

[29] *But c.f. United States v. Abell*, 23 M.J. 99, 100, 103 (C.M.A. 1986) (non-capital offenses against military dependents were service-connected when: (1) they occurred in a trailer park "immediately adjacent to Fort Rucker," separated from the installation only "by a railroad track;" (2) the park was "on the command referral list for off-post housing and 80% of the residents were military members and their dependents;" (3) military police conducted most of the investigative

Under the most sweeping set of considerations, nothing makes these accusations "arise" from within the Armed Forces. It is a full break from anything before.

This was a civilian case, the kind civilian courts prosecute regularly, and the conduct of all actors proved this beyond cavil. The courts of North Carolina were open—all levels of them in fact—for this action. *See Relford,* 401 U.S. at 365-67. The State tried MSG Hennis in its courts, fought against his appeals in its courts, and then tried him again in its courts. *See State v. Hennis*, 372 S.E.2d 523 (N.C. 1988). North Carolina saw this as a civilian murder case, and it vigorously pursued its interests. The Army saw this as a civilian murder case as well, and left the justice process to North Carolina entirely; rather than take steps towards a parallel court-martial, the Army moved to separate him administratively. (JA 1472-76). That was a clear statement that the military had no interest in prosecuting this case. An offense already tried to an acquittal in a civilian court simply does not "arise in the land or naval forces." [30]

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work, as civilian authorities declined to prosecute); *United States v. Lockwood*, 15 M.J. 1 (C.M.A. 1983).

[30] *See*, *e.g.*, *United States v. Borys*, 40 C.M.R. 259 (C.M.A. 1969) (finding no subject matter jurisdiction where, *inter alia*, "the courts of South Carolina and Georgia were not only open and functioning, but resort to the former's facilities led only to accused's acquittal . . . [the] accused's military status was only a happenstance of chosen livelihood . . . and none of his acts were 'service connected' . . . they, like *O'Callahan*'s, were the very sort remanded to the

This was a civilian murder case in all respects. Why, then, should a court-martial convene for these allegations twenty years later?[31] Why should the accused's service nullify the protections grand and petit juries afford? Why should a panel of MSG Hennis's military superiors judge him, rather than a jury of his peers, when the allegations were civilian in nature? According to the government and Army Court, MSG Hennis's service to our Nation was reason enough. They rely on *Solorio*. (JA 16). But as this Court and Justice Stevens observed, *Solorio* does not necessarily reach this case. And indeed it does not.

2. Allegations of capital murder must be service-connected to be tried by court-martial.

O'Callahan rested on two premises. The first was that, while Article I, Chapter 8, Clause 14 of the Constitution empowers Congress "to make Rules for the Government and Regulation of the land and naval Forces," that power does not abridge the rights of the Fifth Amendment. 395 M.J. at 273 ("an express grant of general power to Congress is to be exercised in harmony with express guarantees

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appropriate civil jurisdiction in which indictment by grand jury and trial by petit jury could be afforded the defendant.").

[31] The "trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served." *Toth*, 350 U.S. at 17.

of the Bill of Rights.").[32] In particular, the Fifth Amendment's guarantee that "No person shall be held to answer for a capital, or otherwise infamous . . . crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces," means that the offenses must relate to military service to be triable at court-martial. *Id*. This understanding is consistent with every principle of judicial interpretation: a more specific law, enacted later in time, preserving a fundamental right prevails over the earlier and more general provision.

Solorio left this reasoning sound and unassailed. *See Loving*, 517 U.S. at 774 (Stevens, J., concurring). What it did attack was "the dearth of historical support for the *O'Callahan* holding." 483 U.S. at 447. In essence, the *Solorio* majority disagreed that early American courts-martial drew a firm boundary between military and civilian crimes. The Court's chief exhibit for the military "authority to try soldiers for civilian crimes" was "the much-disputed 'general article' of the 1776 Articles of War, which allowed court-martial jurisdiction over

[32] *See also United States v. Marcum*, 60 M.J. 198, 205 (C.A.A.F. 2004) ("The Supreme Court and this Court have long recognized that men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service . . . . As a result, this Court has consistently applied the Bill of Rights to members of the Armed Forces, except in cases where the express terms of the Constitution make such application inapposite.") (citations omitted).

'all crimes not capital . . . to the prejudice of good order and military discipline.'" *Id*. at 444 (citing Articles of War of 1776, Section XVIII, Article 5, *reprinted in* 2 WINTHROP, MILITARY LAW AND PRECEDENTS 1503 (1896)). As a result, the Court found "the history of court-martial jurisdiction in England and in this country during the 17th and 18th centuries . . . far too ambiguous to justify the restriction on the plain language of Clause 14 which *O'Callahan* imported into it." *Id*.

a. Capital murder was not triable at court-martial well before and well after the Bill of Rights was ratified.

But if the "general article" justifies retreat from *O'Callahan*, it only does so for "crimes and offenses not capital." The ambiguity *Solorio* saw in courts-martial practice at the Founding disappears entirely when the subject shifts to ordinary capital crimes. Murder was simply not subject to try by court-martial in 1791—or for many years after—and the Framers would have never viewed an off-post, peacetime murder case as one "arising in the land and naval forces." *See French*, 27 C.M.R. at 251. As the Supreme Court recounted:

> Although American courts-martial from their inception have had the power to decree capital punishment, they have not long had the authority to try and to sentence members of the Armed Forces for capital murder committed in the United States in peacetime. . . . The Articles [of War] adopted by the First Congress placed significant restrictions on court-martial jurisdiction over capital offenses. Although the death penalty was authorized for 14 military offenses, the Articles followed the British example of ensuring the supremacy of civil court jurisdiction over ordinary capital crimes that were punishable by the law of the land and

> were not special military offenses . . . . That provision was deemed protection enough for soldiers . . . .
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> In 1916, Congress granted to the military courts a general jurisdiction over common-law felonies committed by service members, except for murder and rape committed within the continental United States during peacetime. Persons accused of the latter two crimes were to be turned over to the civilian authorities.

Loving, 517 U.S. at 752-53 (citations omitted). From the founding of the Republic through the Second World War, this limitation on court-martial jurisdiction was integral to the balance of military and civilian authority. *See French*, 27 C.M.R. at 251. This "long history" reflects the enduring "attitude of a free society toward the jurisdiction of military tribunals—our reluctance to give them authority to try people for nonmilitary offenses." *Lee v. Madigan*, 358 U.S. 228, 232 (1959). A civilian murder case such as this summons up all of these well-founded and long-established worries over military prosecutions:

> Civil courts were, indeed, thought to be better qualified than military tribunals to try nonmilitary offenses. They have a more deeply engrained judicial attitude, a more thorough indoctrination in the procedural safeguards necessary for a fair trial. Moreover, important constitutional guarantees come into play once the citizen—whether soldier or civilian—is charged with a capital crime such as murder or rape.

Id. at 234. Americans have always relied on ordinary courts to adjudge ordinary capital crimes, even when the accused was serving in their armed forces.

b. Capital murder cases tried under the Code have not departed from the service connection requirement.

Enactment of the Code did not disturb this fundamental balance between military and civilian authority. It may have permitted the court-martial of stateside, peacetime murders, but it did not—and could not—subvert the Fifth and Sixth Amendments, and it could not make military tribunals dispensers of death for entirely civilian crimes. The centuries-old requirement of service connection for capital cases has remained intact, as a matter of both constitutional theory and military practice.

Since 1953, this Court has reviewed 31 capital murder cases.[33] All have been service connected, and that connection has always been required. The principal factor establishing a service connection has been the location of the crime, whether abroad or on an installation. Eighteen of these concerned servicemembers who committed their crimes while stationed overseas in

[33] As one expert observed, "no one knows precisely how many military capital cases have been tried since the current system took effect in 1984." Dwight H. Sullivan, *Killing Time: Two Decades of Military Capital Litigation*, 189 MIL. L. REV. 1, 10 (2006). This observation carries as much force with cases preceding 1984, particularly those occurring within the first decade of the Code, its earliest and most active period of capital punishment. As a result, this analysis limits itself to only those capital murder cases this Court, the highest in the military justice system, has reviewed.

Germany,[34] Austria,[35] Korea,[36] Japan,[37] or Kuwait.[38] Each of these cases "arose in" the Armed Forces, occurring amidst periods of conflict, occupation, and Cold War cooperation beyond our borders. *See Relford,* 401 U.S. at 365-67.

The remaining thirteen capital murder cases reflect obvious service connections that are also absent from *Hennis*. Critically, eleven of them occurred entirely on military installations or vessels, which is the single most important factor as it sets the crime squarely within military control and outside the reach of state authorities. Beyond that, however, these cases have also involved further

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[34] *United States v. Murphy*, 50 M.J. 4 (C.A.A.F. 1998); *United States v. Dock*, 28 M.J. 117 (C.M.A. 1989); *United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983); *United States v. McFarlane*, 8 C.M.A. 96 (C.M.A. 1957); *United States v. Morphis*, 7 C.M.A. 748 (C.M.A. 748); *United States v. Dunnahoe*, 6 C.M.A. 745 (C.M.A. 1956); *United States v. McMahan*, 6 C.M.A. 709 (C.M.A. 1956); *United States v. Thomas*, 6 C.M.A. 92 (C.M.A. 1955); *United States v. Edwards*, 4 C.M.A. 299 (C.M.A. 1954); *United States v. O'Brien*, 3 C.M.A. 105 (C.M.A. 1953).

[35] *United States v. Bennett*, 7 C.M.A. 97 (C.M.A. 1956). John A. Bennett was executed in 1961. The military has not executed anyone since.

[36] *United States v. Ransom*, 4 C.M.A. 195 (C.M.A. 1954); *United States v. Day*, 2 C.M.A. 416 (C.M.A. 1954); *United States v. Bigger*, 1953 C.M.A. LEXIS 957 (C.M.A. 1953); *United States v. Hunter*, 1952 C.M.A. LEXIS 553 (C.M.A. 1952).

[37] *United States v. Hurt*, 9 C.M.A. 735 (C.M.A. 1958); *United States v. Gravitt*, 5 C.M.A. 249 (C.M.A. 1954).

[38] *United States v. Akbar*, 74 M.J. 364 (C.A.A.F. 2015).

military connections, with some combination of military accomplices,[39] military victims,[40] and military weapons.[41] Such offenses have always implicated military operations and authority. *See Relford,* 401 U.S. at 365-67.

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[39] *See United States v. Simoy*, 50 M.J. 1 (C.A.A.F. 1998), *reversing* 46 M.J. 592 (A. F. Ct. Crim. App., 1996) (accused, a security policeman, masterminded an on-post robbery that led to the murder of his fellow airman on Anderson Air Force Base, Guam); *United States v. Hutchinson*, 18 M.J. 281 (C.M.A. 1984) *reversing* 15 M.J. 1056 (N-M.C.M.R. 1983) (accused conspired with another Marine to murder a private in their company on Camp Lejeune, North Carolina); *United States v. Thomas*, 46 M.J. 311 (C.A.A.F. 1997) and 43 M.J. 550, 562 (N-M Ct. Crim. App. 1995) (Marine bludgeoned his wife to death on Tustin Marine Corps Air Station, California, while a lance corporal helped him conceal evidence); *see also* George Frank, *Marine's Slain Wife Played Role in Navy Drug Investigations*, L.A. TIMES, Jun. 23, 1989, *available at* http://articles.latimes.com/1988-06-23/local/me-7020_1_melinda-thomas.

[40] *See United States v. Witt*, 75 M.J. 380 (C.A.A.F. 2016) and 73 M.J. 738 (A. F. Ct. Crim. App. 1994) (airman donned his battle dress uniform and knifed his commanding officer and his wife to death inside their quarters on Robbins Air Force Base, Georgia); *United States v. Quintanilla*, 63 M.J. 29 (C.A.A.F. 2006) *and* 60 M.J. 852 (N-M Ct. Crim. App. 2005) (Marine murdered his squadron executive officer and attempted to murder his squadron commander on Camp Pendleton, California); *Gray*, *supra* (accused murdered a fellow soldier, amongst others, on Fort Bragg, North Carolina); *Curtis*, *supra* (Marine murdered his military supervisor and the latter's wife in their quarters on Camp Lejeune); *United States v. Loving*, 41 M.J. 213 (C.A.A.F. 1994) (soldier's crime spree included murdering an active duty private on Fort Hood, Texas); *United States v. Rojas*, 17 M.J. 154 (C.M.A. 1984), *reversing* 15 M.J. 902 (N-M.C.M.R. 1983) (accused and his accomplice pummeled a fellow Marine to death in their Camp Lejeune barracks).

[41] *See United States v. Kreutzer*, 61 M.J. 293 (C.A.A.F. 2001) (accused fired an automatic rifle upon a formation of soldiers on Fort Bragg, North Carolina, wounding 18 and killing one officer); *United States v. Henderson*, 11 C.M.A. 556

Even the two murders that occurred off post still had their causative tendrils on post. In *United States v. Moore*, 4 C.M.A. 482 (C.M.A. 1954), the accused hailed a taxicab from his guard posting on Fort Bragg then, presumably still in uniform, fired his service pistol at both the driver and a fellow soldier in the cab, slaying the former and seriously wounding the latter.[42] Likewise, the case of *United States v. Riggins*, 2 C.M.A. 451 (C.M.A. 1953) concerned three soldiers who, ambling the outskirts of Fort Leonard Wood, Missouri in uniform, overpowered a cabdriver, crushed his skull with rocks, and left him to die in or just outside the installation. *Id*. at 454-56. The three then carjacked, kidnapped, and assaulted a fellow soldier making his way to post. *Id*. When apprehended, each of the accused still wearing "a cotton khaki uniform . . . spattered with blood." *Id*. at 456. These cases were so closely associated with military service that civilian authorities yielded to military authorities.

Each of these 31 cases directly implicated military authority in way that *United States v. Hennis* did not. Each one arose in the Armed Forces by virtue of

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(C.M.A. 1960) (accused murdered a fellow sailor with a service pistol aboard the *U.S.S. Uvalde*).

[42] *See United States v. Strangstalien*, 7 M.J. 225, 226 (C.M.A. 1979) (finding the off-post sale of narcotics service-connected because the "sale was the result of a contract created on a military installation," and noting that otherwise, "the second or third *Relford* criterion might deprive the military courts of jurisdiction.").

its overseas setting, its occurrence on or immediately outside a military installation, and its exploitation of military accomplices, military victims, and military weapons. None of them involved allegations already tried by civilian authorities, and none involved an accused who was already acquitted by a civilian jury. The court-martial of MSG Hennis was a total aberration, a stark break from the centuries of practice preceding the Code and the decades following it.

c. The Framers intended to safeguard the rights of servicemembers facing capital murder allegations.

Our military forces have always tethered capital trials to military service, and not merely military status. The Framers of the Constitution would not have deemed a case like *Hennis* to be one "arising in the land and naval forces;" indeed, many of the Framers "had recently experienced the rigors of military life and were well aware of the differences between it and civilian life." *Chappell v. Wallace*, 462 U.S. 296, 300 (1983). They knew that a murder without a military connection was not the stuff of courts-martial.[43] They would have presumed in 1791 exactly what North Carolina presumed in 1985: this is a case to be tried in civilian court, subject to the vital protections of a grand jury indictment and trial before one's peers. And so it was, and that should have been the end of it.

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[43] "The very first Congress continued the court-martial system as it then operated." *Ortiz v. United States*, 138 S. Ct. 2165, 2175 (2018).

The reasons for preserving grand and petit jury protections for nonmilitary capital cases persist today. Yes, it "is in fact one of the glories of this country that the military justice system is so deeply rooted in the rule of law." *Ortiz v. United States*, 138 S. Ct. 2165, 2176 n.5 (2018). And yes, "The procedural protections afforded to a service member" may now be "'virtually the same' as those given in a civilian criminal proceeding." *Id.* at 2174. But they are still not *entirely* the same: "military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts." *Toth*, 350 U.S. at 17.[44]

The division is evitable, as "[f]rom the very nature of things, courts have more independence in passing on the life and liberty of people than do military tribunals." *Id*. That independence springs in large part from the right to a trial before one's citizen peers, rather than a panel of one's military superiors:

> [T]here is a great difference between trial by jury and trial by selected members of the military forces. It is true that military personnel because of their training and experience may be especially competent to try soldiers for infractions of military rules. Such training is no doubt particularly important where an offense charged against a soldier is

[44] The Code's history of frequent revisions points to a system still developing. Since 1950, practitioners of military justice have had to work with 14 editions of the *Manual for Courts-Martial*. The eight years since MSG Hennis's court-martial alone have seen some of the most numerous changes to the Code. This speaks to a system less settled than its civilian cousins.

> purely military, such as disobedience of an order, leaving post, etc. But whether right or wrong, the premise underlying the constitutional method for determining guilt or innocence in federal courts is that laymen are better than specialists to perform this task. This idea is inherent in the institution of trial by jury.
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> Juries fairly chosen from different walks of life bring into the jury box a variety of different experiences, feelings, intuitions and habits. Such juries may reach completely different conclusions than would be reached by specialists in any single field, including specialists in the military field. On many occasions, fully known to the Founders of this country, jurors—plain people—have manfully stood up in defense of liberty against the importunities of judges and despite prevailing hysteria and prejudices.

Toth, 350 U.S. at 17-19.

Trial by jury is a primordial concept of Anglo-American law and institutions;[45] "those who emigrated to this country from England brought with them this great privilege as their birthright and inheritance," they held it up as one of "the most essential rights and liberties," and it has hitherto been "fundamental to our system of justice." *Duncan v. Louisiana*, 391 U.S. 145, 152-54 (1968). The right to a jury trial has always been a vital check on arbitrary power and part of

[45] *See Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 107 (1866) (The "men who fought out our Revolutionary contest . . . took care of the trial by jury . . . . They went over Magna Charta, the Petition of Right, the Bill of Rights, and the rules of the common law, and whatever was found there to favor individual liberty they carefully inserted in their own system, improved by clearer expression, strengthened by heavier sanctions, and extended by a more universal application.").

liberty's "heart and lungs."[46] Neither the Founders of our Nation nor the Framers of our Constitution would have withdrawn this protection just so military leaders could execute their subordinates for non-military offenses:

> There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. . . . [C]onsiderations of discipline provide no excuse for new expansion of court-martial jurisdiction at the expense of the normal and constitutionally preferable system of trial by jury. Determining the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to "the least possible power adequate to the end proposed."

Toth, 350 U.S. at 22-23. Allowing the government to depart from centuries of practice, which include every capital murder case reviewed by this Court, would hardly reflect "the least possible power adequate." The ends proposed—justice and discipline—are easily accomplished by letting civilian courts try such crimes, and letting the Services address what military matters remain. The military's infrequent forays into capital litigation should be limited to cases civilian courts cannot try.

The Armed Forces have no need to redouble civilian trials of civilian crimes. The justice juries deliver is the kind Americans already accept, whether they wear

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[46] John Adams, Third pseudonymous letter to the editor as the Earl of Clarendon addressing a similarly fictitious William [*sic*, actually John] Pym, *Boston Gazette* (Jan. 27, 1766), available at http://press-pubs.uchicago.edu/founders/documents/v1ch17s12.html.

a uniform or not. The retributive value of capital punishment is the same if imposed by a civilian executioner or a military one, and the deterrent value of being executed twice is no greater than the fear of being executed once. When it comes to ordinary crimes and capital punishment, civilian courts already provide the probity and pith of justice. *See Madigan*, 358 U.S. at 234. The military interests they cannot address fall squarely within the Armed Forces' well-tailored, honed, and ever-churning disciplinary processes. Let those processes address the issues incidental to an accused's military status, and let the civilian courts handle the life and death matters of justice that they have always handled.

This country has long adhered to the maxim that "military tribunals must be restricted to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service." *Kinsella v. United States*, 361 U.S. 234, 240 (1960) (citations omitted). Expanding court-martial jurisdiction to capital cases already tried in state courts has never been "absolutely essential" to American military discipline—not now, not during our earliest history when our rights were their most rudimentary, and not even during our most trying times of war and conflict. The court-martial of MSG Hennis marks a gross departure from centuries of practice, it reaches well beyond "the least possible power adequate to the end proposed," and it is neither "necessary" nor "proper." U.S. Const. Art I,

sec. 8. This Court should reject this court-martial, just as the Founders and Framers surely would have.

III. THE COURT-MARTIAL LACKED PERSONAL JURISDICTION OVER MSG HENNIS.

Courts-martial can exercise jurisdiction only over persons having a military status. Under Article 2(a)(4), UCMJ, Congress provided that military retirees have such a status. 10 U.S.C. § 802. While unconstitutional,[47] that is how Congress wanted to subject retirees to court-martial. Of course retirees may be recalled to active duty for other purposes necessary for the national defense, and once duly activated they become subject to the Code under Article 2(a)(1) as "persons lawfully called or ordered into, or to duty in or for training in, the armed forces." But under this regime, a retiree can only be in one status at one time—retired or active; you can be one, not both.

The Army wanted the best of both when trying Timothy Hennis, however. It wanted the tactical advantages of recalling him to active duty, and it did so over his objection. It explicitly ordered him to active duty, subjected him to active duty controls, and held him out as on active duty throughout his court-martial. But it had no authority to do so. This recall order was unlawful and thus unable to satisfy Article 2(a)(1).

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[47] *See infra* Assignment of Error XVIII.

Article 2(a)(4) can offer the Army no alternative here. By "recalling" him over his objection, and not allowing him to remain in a retired state, the Army bound itself to its first invalid theory of personal jurisdiction. The Army is estopped from asserting anything contrary. The Service controls when, where, why, and how it classifies its members. It must do so precisely, especially when a capital court-martial depends on it. When it foregoes the path Congress gave it, and reaches beyond it lawful authorities, it invites the kind of fatal error it created here. This Court must hold it to its decisions.

1. The Army had no authority to recall MSG Hennis to active duty, and it could not try him under Article 2(a)(1).

On July 31, 2004, MSG Hennis retired from active duty. (JA 1353). The Army informed him that the "people of the United States express their thanks and gratitude for your faithful service," and that, henceforth, he would be "transferred to the U.S. Army Reserve Control Group (Retired), U.S. Army Reserve Personnel Center, St. Louis, Missouri." (JA 1353). This made Timothy Hennis both a retiree and a reservist.

Two years later, the Army decided to pursue MSG Hennis in a third trial for the Eastburn murders. The Code offered two ways to exercise personal jurisdiction. First, the Army could try MSG Hennis as a retiree. *See* 10 U.S.C. § 802 (a)(4). If the Army tried him in that status, MSG (Ret.) Hennis would

continue living with his family in Washington State, working at his civilian job, and preparing for court-martial proceedings as he saw fit. He would remain free of unit duties and restrictions, and he could appear in court wearing civilian attire. Furthermore, according to the law at the time, he could not have been reduced in rank if convicted. *See United States v. Sloan*, 35 M.J. 4 (C.M.A. 1992), *rev'd*, *United States v. Dinger*, 77 M.J. 447 (C.A.A.F. 2018).

The Army saw a second way, however, which was to force MSG Hennis back to active duty and try him as someone "lawfully called or ordered . . . to duty in . . . the armed forces." 10 U.S.C. § 802(a)(1). By placing him on active duty, the Army could ensure MSG Hennis was "billetted [sic] in government quarters" on Fort Bragg, assigned military responsibilities, and subjected to various restrictions on his freedom. (JA 1363). Of course he would receive active duty pay and allowances commensurate with his rank, but he would also lose the combined income of his retirement pay and civilian employment, which was greater.

The Army had to choose one of these approaches. A servicemember cannot be active and inactive at the same time, as "retiree and active duty member are mutually exclusive statuses." *United States v. Smith*, No. ACM 38157, 2013 CCA LEXIS 1084, at *10 (A.F. Ct. Crim. App. Dec. 5, 2013). "A retiree, by definition, is no longer on active duty," and a "military member who retired but is

subsequently recalled to active duty is an active duty member, not a retiree." *Id*. That is, in fact, exactly why Congress created 13 subsections under Article 2(a), each reflects a different status. *See United States v. Hooper*, 26 C.M.R. 417, 421 (C.M.A. 1958). The Army thus had to pick the status in which it wanted to try MSG Hennis, and it picked the one that gave it obvious advantages: active duty.

a. The Army attempted to call MSG Hennis to Active Duty.

That the Army wanted MSG Hennis in an active status, rather than a retired one, is beyond dispute. The judge advocates orchestrating the recall made that clear themselves. They wanted to "recall him to active duty so there is not [an] issue regarding confinement." (JA 1484). They wanted to control him:

> The long answer, just for you, is that the rules did not require that MSG Hennis be recalled to active duty in order to exercise court martial jurisdiction over him. He could be tried by the court martial while in a retired status. However, by placing him on active duty, we have exercised some *positive control over him* . . . .

(JA 1491) (emphasis added). That is what the Army wanted, and that is what the Army did.

On September 14, 2006, a team of local police and military personnel arrived at MSG Hennis's home in western Washington. They knocked on the door and notified him "you are ordered to active duty." (JA 1363). The order specified that he was now "relieved from [his] reserve component assignment," that he

would be "retained on active duty" and "included in the active Army end strength." (JA 1363). The purpose of the order was "UCMJ Processing." (JA 1363).

Henceforth, every reference to Timothy Hennis was as "Master Sergeant" rather than "First Sergeant (Retired)."[48] Although he challenged the validity of this recall order, MSG Hennis complied with it as any soldier would. (JA 1351). He donned his uniform, reported to Fort Bragg, and for the next three and a half years, lived in the hotel room the command provided and discharged the duties it assigned.

There is just one problem with this: the Army had no lawful basis to recall him. The Army could have called him back to perform national defense duties, if necessary. But it had no authority to do this for the sole purpose of a court-martial. The recall of MSG Hennis was unlawful, and the government cannot rely on it to carry its burden of proving personal jurisdiction. *See*, *e.g.*, *Morita*, 74 M.J. at 121.

b. The Army could not recall MSG Hennis from the Reserve Component for this court-martial.

The order that recalled MSG Hennis was entirely couched in Reserve Component references. It relieved him from his "Reserve Component assignment," and cited Reserve Component authorities as justification: "AR 27-10,

[48] The most important reference in the case, of course, was the charge sheet, which describes appellant as "Master Sergeant Timothy B. Hennis, U.S. Army," and not "U.S. Army, Retired."

Ch 21" and "AR 135-200 (7-4)." (JA 1363). Both provisions dealt exclusively with reservists, not retirees.[49]

This document, issued "by order of the Secretary of the Army," should be the definitive statement on what the Army was trying to do, and by all appearances, it was trying to recall MSG Hennis from the Reserve Component. The Reserve Component is where the Army had assigned MSG(R) Hennis, after all, and that is certainly what the chief of the Army's Criminal Law Division believed. (JA 1484) ("Retirees are in the reserve component.").

But no statute allowed this recall. Prior to 1987, the Services could not involuntarily recall a reservist for court-martial. *See Caputo*, 18 M.J. at 266 ("orders under Article 2(a)(3) must be . . . voluntarily accepted."). The power to recall reserve members against their will for court-martial only arose after Congress passed the National Defense Authorization Act for Fiscal Year 1987. Therein, it added Article 2(d) "in direct response to *Caputo*." *Murphy v. Dalton*, 81

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[49] *See* ARMY REG. 27-10, MILITARY JUSTICE, (Nov. 16, 2005), para. 21-1(a), (b). Chapter 21 is entitled "Military justice within the Reserve Component;" it concerns implementation of the "Military Justice Amendments of 1987," and notes that those amendments only "apply to offenses committed on or after 12 March 1987." *See also* ARMY REG. 135-200, ACTIVE DUTY FOR MISSIONS, PROJECTS, AND TRAINING FOR RESERVE COMPONENT SOLDIERS, (Jun. 30, 1999), para. 7-4 (stating that "soldiers may be retained involuntarily on [active duty] . . . for the purpose of completing an investigation initiated with a view to trial by court-martial up to the date of completion of the disciplinary action.").

F.3d 343, 351 (3d Cir. 1996). That change only applied to "an offense committed on or after the effective date of this title," which was well after May 9, 1985. *See* Pub L. No. 99-661, Sec. 804, 808, 100 Stat. 3907-08. Thus the law expressly forbade what the Army did here. The recall orders were unlawful, and unlawful orders cannot render a person "lawfully called or ordered . . . to duty in . . . the armed forces." 10 U.S.C. §802(a)(1). The military judge and the Army Court should have sustained MSG Hennis's challenge to them and dismissed the case.

c. The Army could not recall MSG Hennis from the retired list for this court-martial.

Instead, the lower judges must have deemed MSG Hennis recalled from the retired list. But this too would be unlawful, for it was entirely unnecessary to national security.

The power to activate a retiree resides in 10 U.S.C. § 688, "Retired members." This section provides that the Secretary of the Army may recall a "retired member of the Regular Army" and assign him or her to "duties as the Secretary considers necessary in the interests of national defense." *Id*. at (b)(1), (c). Moreover, any such recall must comport with "regulations prescribed by the

Secretary of Defense." *Id*. at (a). The relevant regulation likewise requires that a recalled retiree serve in a position "necessary in the interests of national defense."[50]

This is a sensible requirement. While the statute permits the Secretary concerned to recall a retiree at "any time," this is purely temporal and in contrast to "in time of war." *See* Pub. L. 96-513, Sec. 106, 94 Stat. 2868 (as enacted Dec. 12, 1980). It does not mean "for any purpose," as that would contradict the requirement of "regulations" and consistency "with other provisions of law." *Id*.; *see also United States v. Davenport*, 73 M.J. 373, 381 n.1 (C.A.A.F. 2014) (a term can be known "by the company it keeps," *i.e.*, *noscitur a sociis*). The law is certainly not designed to stir up retired servicemembers for tasks unnecessary to national defense.

But the Army seemed to overlook this requirement. The Acting Assistant Secretary of the Army who signed off on MSG Hennis's recall did not address it in his memorandum, and it would have required ambitious thinking to do so. (JA 1363). To begin with, a reasonable person may wonder how the prosecution of a duly acquitted retiree actually furthered our national defense, especially when those allegations were twenty years old and inherently civilian in nature. *See supra* Assignment of Error II. And at least nine Supreme Court Justices would add

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[50] *See* DEP'T DEFENSE DIRECTIVE 1352.1, MANAGEMENT AND MOBILIZATION OF REGULAR AND RESERVE RETIRED MILITARY MEMBERS, (Jul. 16, 2005), para. 4.3.5.

to that wonder, given that the "trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function." *Toth*, 350 U.S. at 17.

But there is an even simpler reason why recalling MSG Hennis was in no way "necessary" for national defense. He was a retiree, and that alone would have satisfied Article 2; the Army did not need to recall him to try him. *See United States v. Hooper*, 26 C.M.R. 417, 421 (C.M.A. 1958) (retiree did not need to be on active duty to be court-martialed). Recalling MSG Hennis for the sole purpose of "UCMJ Processing" was thus a patently *unnecessary* action, even if one believes there is a national defense interest in undermining our double jeopardy, speedy trial, and due process protections. *See infra* Assignments of Errors IV, V, and VI.

2. The Army foreclosed any claim of personal jurisdiction based on MSG Hennis's retired status when, over his objection, it treated him as a solider on active duty.

But having recalled MSG Hennis without legal authority, and having court-martialed him in that state over his objection, the Army cannot say now that it tried him as a retiree. The Army recalled him for its own advantages: exercising "positive control" over him, (JA 1491), collecting statements to use against him,[51]

[51] When Army personnel report to a new unit, the receiving command typically assigns a "sponsor" to help the incoming solider get up and running. Keeping with this practice, XVIII Airborne Corps assigned another master sergeant to be MSG Hennis's sponsor. The Corps' Chief of Capital Litigation ensured that "if Hennis says anything substantively," the sponsor "needs to write it down and let me know." (JA 1493).

and ensuring the full range of punishments could be brought upon him.[52] The government did not need to do this, but it did. It should remain stuck with the consequences now: a lack of personal jurisdiction. When the government has held out the accused as a soldier on active duty, subject to Article 2(a)(1), it should be estopped from claiming he was tried as a retiree under Article 2(a)(4) all along. The government should not be allowed to play games with jurisdiction, especially when it subtly but consistently prejudices the accused.

a. Forcing MSG Hennis to appear before the panel as an active duty soldier, rather than a retiree, exposed him to prejudice.

And while uprooting MSG Hennis from his family and civilian employment may have just been incidental, the constant mischaracterization of his status was not. To have Timothy Hennis sitting as an active master sergeant, rather than a man who had retired six years earlier, was misleading.[53] By the start of trial, he

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[52] The Army's Chief of Criminal Law advised the XVIII Airborne Corps staff judge advocate to "recall him to active duty so there is not [an] issue regarding confinement." (JA 1484).

[53] It was not until the Defense's sentencing case that the members learned he had actually retired. (R. at 6925; JA 2131-37). The government only addressed MSG Hennis's retired status when trying to stoke outrage and disparage his right to defend himself. *See infra*, Assignments of Error V, IX; (JA 1214; "The accused, a convicted murderer, sits in this courtroom and wants you to look at pictures of him and his kids and his retirement with his parents at Disneyland.").

was 52 years old and, quite naturally, no longer looking like an airborne master sergeant. Time's physical toll was evident. In fact health problems had led to his retirement in the first place. Timothy Hennis had put on some weight since his active duty days, and that was plain to at least one of the members.[54] His uniform did not quite match his appearance anymore, and this all cast a sort of dissonance upon him.

Such dissonance can cost military defendants dearly. As this Court rightly observed, it "does not require citation of authority" to recognize the worth of a servicemember's appearance, which is "but another facet" of his "good military character." *United States v. West*, 31 C.M.R. 256, 260 (C.M.A. 1962). The "sight of the accused at trial, as he is arraigned, as he testifies . . . as he confers with counsel, and as he stands to be sentenced, is part of the 'silent evidence' in the case." *See United States v. Whitehead*, 27 C.M.R. 875, 876 (N.B.R. 1959). And that silent evidence can work against justice, as "nothing is more inflammatory to an officer of the military than to see a member of his service" wearing an "ill-fitting uniform." *Id*. Anything less than an accused appearing "neat, clean and sharp, in the uniform-of-the-day, complete with merited insignia, ribbons and decorations . . . must be presumed to be prejudicial *pro tanto*." *Id*.

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[54] *See* JA 2047 (wondering how "an increase in weight over a span of 25 years" might affect someone's foot size).

Appearance matters in every military proceeding, and R.C.M. 803(e)(1) reflects that. Yet it may have mattered even more in this one. This panel was drawn from Fort Bragg's airborne community.[55] To anyone familiar with this community, it is a truism that, more than most soldiers, paratroopers pride themselves on their physical fitness, combat readiness, and outward confidence.[56] Their mission demands it. Airborne leaders are expected to run several miles a day with their soldiers, jump out of aircraft at low altitudes, and thrive in field operations. A master sergeant who no longer looks up to those tasks will no longer look the part. Instead, he or she will look like a liability, a danger rather than a boon in wartime. When the accused falls under an airborne command, but no longer projects the able-bodied, elite, and disciplined mien of a paratrooper, he can expect scowls and degrees of scorn from the paratroopers judging him.

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[55] All but two of the fourteen members were airborne-qualified. Nine were jumpmasters who regularly led airborne operations, and eight of them had received the master parachutist badge in recognition of their long careers of leaping from military aircraft. Four members had also earned their "Ranger tabs," and two had even jumped in actual combat conditions. (App. Ex. 290. This exhibit contained the members' record briefs, but was never filed with the court).

[56] "It is probably the self-confidence and self-respect which successful paratroop training reveals and nurtures that has made the airborne soldiers of all nations so formidable on the field of battle." William P. Yarborough, *Foreword* to GERARD M. DEVLIN, PARATROOPER!, at xiv (St. Martin's Press 1979).

That is not a good position for any accused, let alone one in a capital case. Yet it is the one into which the Army put MSG Hennis. At 52, he was older than every panel member and yet outranked by every member. In fact six of the panel's sergeants major—the closest to his peers on the panel—were almost ten years younger than him.[57] He could not have matched their expectations for a Fort Bragg master sergeant, not at this station in his life. Instead, he could have only incurred the silent but sharp sting of unfavorable biases.

b. Army is bound by its actions; it cannot assert retiree jurisdiction when it never treated MSG Hennis as a retiree.

The Army could have pursued personal jurisdiction over MSG Hennis the way Congress specified, under Article 2(a)(4). It could have tried him as a retiree and accurately represented what it was doing: court-martialing a man who had already served his country and bowed out of service honorably. But instead, it unlawfully activated Timothy Hennis, over his objection, to better control, monitor, and sentence him. Whether the government intended to or not, it presented MSG Hennis to the panel as a man who had yet to bow out of service gracefully, who for some reason remained in uniform despite his waning fitness for it. That misleading image was cast continually through the court-martial, and it tilted the "silent evidence" against MSG Hennis. The government cannot erase

[57] *See* note 57, *supra*, regarding background information on the members.

that on appeal. In its effort to secure advantage, the government foreclosed the one option it had. It failed to establish personal jurisdiction over MSG Hennis, and that demands dismissal of this case.

IV. THIS COURT-MARTIAL VIOLATED THE DOUBLE JEOPARDY CLAUSE OF THE CONSTITUTION.

> [T]he law attaches particular significance to an acquittal. To permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might *wear down the defendant so that even though innocent he may be found guilty*.

United States v. Scott, 437 U.S. 82, 91 (1978) (emphasis added). To American citizens and all friends of logic, it makes no difference whether "the Government" comes in the form of a State, the United States, or both bodies in collusion; retrial after acquittal is the same intolerable affront to liberty and fairness however it occurs.

The government's only retort is "separate sovereigns," a legalism that means nothing grander than each arm of our two-tiered Republic taking a whack at the accused; let any state try him that can, and then let federal powers renew the effort decades later. The government wants this Court to look past the oppressive toll of successive trials, the costs of fighting for one's life three times in twenty-four years and the inevitable exhaustion of a man's resources, support, and spirit. It wants

this Court to reconcile repeat prosecutions with the principle that "if the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair." *Arizona v. Washington*, 434 U.S. 497, 503-05 (1978). The government wants this Court to rely on the legal fiction of "dual sovereigns" rather than the plain text of the Double Jeopardy Clause,[58] even when it has deliberately exploited the former to slip past the latter.

Yes, the Supreme Court has sanctioned the dual sovereigns doctrine since *United States v. Lanza*, 260 U.S. 377 (1922). But the fierce criticism that has chased after the doctrine appears to have caught up with it now.[59] *See Gamble v. United States,* 138 S. Ct. 2707 (2018) (granting writ of certiorari). Several reasons compel a return to the original, commonsense meaning of the Double Jeopardy Clause. The most obvious is the clause's plain text, which applies absolutely and admits no "separate sovereigns" exception. The clause reads that way because it should apply that way. The protection against double jeopardy is an ancient

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[58] *See*, *e.g.*, *State v. Hogg*, 385 A.2d 844, 846 (N.H. 1978) ("It is pure fiction to say they are different crimes because of dual sovereignty.").

[59] *See*, *e.g.*, *Bartkus v. Illinois*, 359 U.S. 121, 152 (1959) (Black, J., dissenting) ("Even in the Dark Ages, when so many other principles of justice were lost, the idea that one trial and one punishment were enough remained alive . . .").

right.[60] By the time our English predecessors arrived on American shores, they had long-since decried the idea of successive prosecutions, regardless of sovereign, and the Framers who followed them fixed this mark of civilization in the Fifth Amendment.[61] When the first House of Representatives heard a proposal to limit the protection to federal offenses, its members rejected the idea with little debate.[62] The Framers wrote exactly what they wanted: a robust, absolute protection against double jeopardy.

Beyond this, justifying a second prosecution with the dual sovereigns doctrine is "a misuse and desecration" of the whole federal enterprise: "Our Federal Union was conceived and created 'to establish Justice' and to 'secure the Blessings of Liberty,' not to destroy any of the bulwarks on which both freedom

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[60] *See Benton v. Maryland*, 395 U.S. 784, 795 (1969) ("The fundamental nature of the guarantee against double jeopardy can hardly be doubted. Its origins can be traced to Greek and Roman times, and it became established in the common law of England long before this Nation's independence.").

[61] *See*, *e.g.*, *id*.; *King v. Roche*, (1775) 168 Eng. Rep. 169, 169 (K.B.) (upholding the accused's plea of *autrefois acquit*, which rested on his earlier acquittal before a Dutch court); *see generally*, David S. Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy*, 14 WM. & MARY BILL OF RTS. J. 193, 218-221 (2005).

[62] *See* 1 ANNALS OF CONG. 782 (1789) (Joseph Gales ed., 1834) (recording Representative George Partridge's failed proposal to add "by any law of the United States" after the word "offence" in the Double Jeopardy Clause).

and justice depend." *Bartkus v. Illinois*, 359 U.S. 121, 155 (1959) (Black, J., dissenting). The idea of a "dual sovereigns" exception ignores that the powers of the United States derive from those of the States themselves.[63] Indeed, there is only one true source of sovereignty in America, and it is the citizenry of America,[64] the "federal and State governments are in fact but different agents and trustees of the people." THE FEDERALIST NO. 46 (James Madison). The Framers built our republic from two tiers of representation so that our essential freedoms would endure the persistent nature of power to extend itself. The protection against successive prosecutions is "clearly fundamental to the American scheme of justice," and by the end of its current term, the Supreme Court will hopefully have restored it to its full and true meaning. *Benton v. Maryland*, 395 U.S. 784, 796 (1969).

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[63] *See* THE FEDERALIST NO. 45 (James Madison) ("The State governments may be regarded as constituent and essential parts of the federal government; whilst the latter is nowise essential to the operation or organization of the former . . . each of the principal branches of the federal government will owe its existence more or less to the favor of the State governments.").

[64] *See also Abbate v. United States*, 359 U.S. 187, 203 (1959) (Black, J., dissenting) ("I am also not convinced that a State and the Nation can be considered two wholly separate sovereignties for the purpose of allowing them to do together what, generally, neither can do separately.").

If the Court reverses the dual sovereigns exception, the court-martial of MSG Hennis must follow. But even if the Supreme Court spares the dubious doctrine, this Court should still dismiss Hennis's court-martial as it was nothing but "a sham and a cover for" a third Cumberland County prosecution.[65] *Bartkus v.* 359 U.S. at 124. The County turned the Army into its tool for surmounting the Double Jeopardy Clause, and the resulting court-martial was, in essential fact, the culmination of the county's decades-long effort to convict someone for the Eastburn murders.

The Army had twenty years to exercise independent prosecutorial discretion over Hennis, and in those twenty years, it never cared to court-martial him. It never investigated the crimes or raised an accusatory finger, as it had no uniquely military interest in prosecution that a civilian trial would not meet. This has always been a civilian matter, and only after Cumberland County reopened the state's case, retested the state's evidence, and requested Army involvement did the service try him in the state's stead. The entire effort was merely an end-run around Hennis's rights. North Carolina officials put a military trial in motion and kept going by providing almost all of the government's evidence, investigative support, and even many of its witness examinations. In short, the District Attorney of

[65] In addition to violating MSG Hennis's constitutional protection against double jeopardy, this court-martial violated his statutory protection under Article 44 of the Code, and Assignment of Error XV details why.

Cumberland County used the Army to retry a case his office lost twice twenty years prior. Now, however, the government returned as an amalgam of Army and State, rearmed with "new" evidence and advantaged by the withering passage of years. This third trial capital trial of Timothy Hennis betrayed both the spirit and the sense of the Double Jeopardy Clause. It exploited a man's military service to avoid his civil right. It transgressed the line that keeps military powers out civilian law enforcement. It relied on a sham, plain and simple, and this Court should not stand for it.

1. **This Court should apply *Bartkus* in a way that protects servicemembers from sham prosecutions and preserves the vital barrier between military and civilian law enforcement.**

If the dual sovereigns exception to double jeopardy survives *Gamble v. United States*, it will still remain subject to its own "sham prosecution" exception. Although the Court recognized this limit on successive trials in *Bartkus*, 359 U.S. at 124, it has given little guidance since. All the federal Courts of Appeals have

recognized it as well, [66] though with varying degrees of certainty and enthusiasm.[67] None has yet dismissed a case for being a "sham,"[68] though at least one district court has.[69] In general, the federal courts have construed the exception narrowly, and in some case impossibly so, all in apparent service to "federalism."

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[66] *See*, *e.g.*, *United States v. Guzman*, 85 F.3d 823, 826-27 (1st Cir. 1996); *United States v. 38 Whalers Cove Drive*, 954 F.2d 29, 38 (2d Cir. 1991); *United States v. Berry*, 164 F.3d 844, 847 (3d Cir. 1999); *United States v. X.D.*, 442 F. App'x 832, 832 (4th Cir. 2011); *United States v. Moore*, 370 F. App'x 559, 561 (5th Cir. 2010); *United States v. Mardis*, 600 F.3d 693, 697 (6th Cir. 2010); *United States v. Tirrell*, 120 F.3d 670, 677 (7th Cir. 1997); *United States v. Leathers*, 354 F.3d 955, 960 (8th Cir. 2004); *United States v. Figueroa-Soto*, 938 F.2d 1015, 1019 (9th Cir. 1991); *United States v. Raymer*, 941 F.2d 1031, 1037 (10th Cir. 1991); *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1362 (11th Cir. 1994); *United States v. Rashed*, 234 F.3d 1280, 1282 (D.C. Cir. 2000).

[67] *Compare Guzman*, 85 F.3d at 827 ("We find the gravitational pull of *Bartkus* irresistible . . . the exception is compelled by the bedrock principles of dual sovereignty.") *with Tirrell*, 120 F.3d at 677 ("the exception, if it exists at all, is a very narrow one.").

[68] *Cf. Mardis*, 600 F.3d at 697 (observing that, where "Sovereign A failed to secure a conviction and therefore takes its evidence and charges to Sovereign B for another bite at the apple," the act of "pull[ing] the strings of Sovereign B's prosecution may indeed violate the Fifth Amendment's ban on double jeopardy."); *United States v. G.P.S. Auto. Corp.*, 66 F.3d 483, 495-96 (2d Cir. 1995) (noting that the "*Bartkus* exception might apply" where the state convinced federal authorities to pursue a forfeiture action that would only serve the state's interests).

[69] *See United States v. Belcher*, 762 F. Supp. 666, 668 (Dist. Ct. W. Va. 1991) (federal prosecutor brought the same case he had bungled as a county attorney, and the district court dismissed his effort as a sham).

This Court should take a different approach. The other federal courts have not considered this question in a military context. Their opinions do not address servicemembers' greater exposure to collusive, sham prosecutions. Nor do they address the vital barriers between state and military authorities, barriers that do not hinder state and federal law enforcement. Federal caselaw simply has not confronted the military dimensions of the dual sovereigns doctrine, and it would transplant poorly into our military justice system. Indeed, Justice Breyer recently observed that the services appear to engage in successive prosecutions more frequently, or at least produce clearer examples of it, than civilian authorities:

> Now what I looked for in your briefs which I haven't found yet but for the military is, is it really the case or not that, as a practical matter, if you go back the last 10 years or five or whatever it is, you found a whole lot of cases where people were prosecuted twice by different sovereigns for what was the same thing. Because I didn't see them listed here in any brief but for the military.

Transcript of Oral Argument at 24, *Gamble v. United States*, No. 17-646 (U.S. Dec. 6, 2018).

Beyond the broad strokes of *Bartkus*, this Court has a blank slate on which to rule; it is not bound by the decisions of its civilian cousins, or even by its own precedent as it has never opined on this issue. If it decides this question, this Court should do so in a manner that safeguards servicemembers from abuse and

preserves the clear distinction between military authority and civil law enforcement.

a. Military service exposes servicemembers to greater risks of sham prosecutions.

This Court has always interpreted the Constitution's guarantees in light of its "understanding of military culture and mission" and the "nuance of military life." *United States v. Marcum*, 60 M.J. 198, 207 (C.A.A.F. 2004). As it has frequently observed, "constitutional rights may apply differently to members of the armed forces than they do to civilians," and this may mean less protection in some cases but more in others.[70] *Id*. at 205. Where the burdens of military service go beyond military needs and encumber servicemembers' core rights, this Court has given them the vigor needed to preserve them. *See*, *e.g.*, *United States v. Jones,* 34 M.J. 270 (C.M.A. 1992); *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969). While "the burden of showing that military conditions require a different rule than that prevailing in the civilian community" may fall "upon the party arguing for a different rule," *Courtney v. Williams*, 1 M.J. 267 (C.M.A. 1976), this case carries that burden.

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[70] "Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment." *Burns v. Wilson*, 346 U.S. 137, 140 (1953).

Servicemembers can find themselves objects of successive prosecutions more easily than civilians, and they stand to suffer more when it happens to them. Military service demands sacrifices, but enduring collusive prosecutions should not figure amongst them. Second guessing jury verdicts does not further our national defense; the "trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function," and when resources are "diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served." *Toth*, 350 U.S. at 17. Perhaps there is some military interest in deterring misconduct with greater punishments than those civilian authorities mete out, but there is absolutely none in retrying the acquitted.[71] A competent jury's finding of not guilty delivers all the justice good order and discipline require. Our commanders' mission is being "ready to fight wars," not convicting their acquitted soldiers. *Id*.

Little currently protects servicemembers from this injustice. Their service exposes them greater prosecution, and yet policy gives them no protection. Construing *Bartkus* narrowly would leave them with no defense. This Court should account for servicemembers' acute vulnerability to sham prosecutions, and ensure "our citizens in uniform" are not "stripped of basic rights simply because

[71] *See State v. Hogg*, 385 A.2d 844, 847 (N.H. 1978) ("whatever reasons there may be for permitting, in the name of federalism, a second prosecution in the State court after a conviction in the federal court, they lose all force when the first prosecution ends in a finding of not guilty.").

they have doffed their civilian clothes." *Chappell v. Wallace*, 462 U.S. 296, 304 (1983) (citations omitted).

i. The territorial and substantive breadth of the UCMJ exposes servicemembers to prosecution for offenses already tried by the states.

The UCMJ has no territorial limits, and it proscribes a far broader swath of conduct than any civilian counterpart. The state and federal codes are geographically limited, whereas the Code "applies in all places." Art. 5, UCMJ. The substance of civilian codes is more limited too. Federal law does not reach common law offenses like murder that have historically fallen under of the States' inherent police powers. Likewise, the states do not criminalize many federal offenses. As a result, the state and federal penal schemes frequently underlap. Not so for the UCMJ: "Today, trial-level courts-martial hear cases involving a wide range of offenses, including crimes unconnected with military service; as a result, the jurisdiction of those tribunals overlaps substantially with that of state and federal courts." *Ortiz v. United States*, 138 S. Ct. 2165, 2170 (2018). When the near limitless reach of Articles 133 and 134 is considered, that overlap is overwhelming. *See Parker v. Levy*, 417 U.S. 733 (1974). The UCMJ applies to any servicemember, anywhere, for just about anything. This means that, unlike the United States Attorneys, commanders can almost always charge servicemembers

with allegations state and foreign courts already resolved. This puts servicemembers at a far greater risk of repeat prosecution than ordinary citizens.

ii. Policy constrains federal prosecutors more strictly and uniformly than the Armed Forces.

Department of Defense policy does nothing to reduce that risk. The services operate under divergent, diffuse, and deferential policies that hardly deter repeat prosecutions. United States Attorneys, on the other hand, have far less ability to repeat prosecutions than do general court-martial convening authorities. The Justice Department's "*Petite* policy" requires United States Attorneys to convince the appropriate Assistant Attorney General that the earlier prosecution left a "substantial federal interest . . . demonstrably unvindicated."[72] This policy arose "in direct response" to both *Bartkus* and *Abbate*. The policy's "overriding purpose . . . is to protect the individual from any unfairness associated with needless multiple prosecutions." *Rinaldi v. United States*, 434 U.S. 22, 28, 31 (1977). As a result, the *Petite* policy presumes that "a prior prosecution, regardless of result, has vindicated the relevant federal interest." USAM, § 9-2.031(D). A prior acquittal, in other words, does not justify another trial.

[72] Offices of the U.S. Attys, Dep't of Justice, *United States Attorneys' Manual* § 9-2.031(A) (2009), *available at* https://www.justice.gov/jm/jm-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals#9-2.031 [hereinafter USAM]).

The *Petite* policy centralizes discretion, providing a measure of uniformity, reflection, and accountability for the United States Attorneys serving the more than 325 million Americans subject to federal jurisdiction. The Department of Defense, on the other hand, has no policy for the 1.3 million members subject to the Code.[73] The Department simply lets each service decide for itself, and the result is an unsurprising dearth of restraint.[74]

The Army, for example, lets any one of its 45 or so general court-martial convening authorities decide whether to retry a soldier already tried in civilian court. The only criterion for that decision is whether that commander believes "administrative action alone is inadequate and punitive action is essential to maintain discipline in the command."[75] This is but a mirage of restraint. Commanders already assess whether a good order and discipline requires a general

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[73] The closest the Department comes is the discussion to R.C.M. 201(d), which states that "as a matter of policy a person who is pending trial or has been tried by a State court should not ordinarily be tried by court-martial for the same act. Overseas, international agreements might preclude trial by one state of a person acquitted or finally convicted of a given act by the other state."

[74] *See* Charles L. Pritchard, Jr., *The Pit and the Pendulum: Why the Military Must Change Its Policy Regarding Successive State-Military Prosecutions*, ARMY LAW. (Nov. 2007), pp. 18-19 (discussing disparate service policies in effect in 2007).

[75] ARMY REG. 27-10, MILITARY JUSTICE, (May 11, 2016), para. 4-3. The policy was the same at the time of MSG Hennis's recall. *See* ARMY REG. 27-10, (Nov. 16, 2005), para. 4-3.

court-martial referral,[76] and they already withhold resources from anything, courts-martial or otherwise, they deem nonessential. The Army's policy is effectively one of unlimited discretion.

The Navy and Marine Corps' policy is more prolix, but just as permissive. Any general court-martial convening authority can retry sailors and marines if he or she considers it "essential in the interests of justice, discipline, and proper administration within the Naval service."[77] For its part, the Coast Guard simply requires assent from one its two Area Commanders or its Deputy Commandant for Mission Support.[78] Only the Air Force approaches anything similar to the *Petite* policy; the Secretary of the Air Force must approve successive prosecutions of

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[76] *See id*. at para. 3-2 (May 11, 2016) ("A commander should use nonpunitive measures to the fullest extent to further the efficiency of the command before resorting to nonjudicial punishment."); *see also* MCM (2012), R.C.M. 306, discussion ("In deciding how an offense should be disposed of, factors the commander should consider . . . include . . . the offense's effect on morale, health, safety, welfare, and discipline.").

[77] DEP'T OF THE NAVY, JAG INSTRUCTION 5800.7F, §§ 0124(a), (c)(1) (Jun. 26, 2012).

[78] UNITED STATES COAST GUARD, COMDTINST M5810.1F, 60-61, para. 4.D.1 (Mar. 2018).

airmen, and "approval will be granted in only the most unusual cases when justice and good order and discipline can be satisfied in no other way."[79]

The end result is diffuse discretion across the Department of Defense. And even if these policies whisper words of constraint, those words mean little, as abrogating them comes at no cost.[80] This stands in contrast to the Justice Department, which has actively enforced its policy by dismissing convictions.[81] The *Petite* policy is no substitute for an enforceable right,[82] but it still provides some break against successive prosecutions.[83] But servicemembers get no such

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[79] DEP'T OF THE AIR FORCE, AIR FORCE INSTRUCTION 51-201, para. 2.18.3 (Dec. 8, 2017).

[80] *See*, *e.g.*, *United States v. Kohut*, 44 M.J. 245, 249-50 (C.A.A.F. 1996) (finding that "appellant makes a plausible argument that § 0124, JAGMAN, was at least technically violated in this case," but denying him "standing to complain about this regulation's violation.").

[81] *See Rinaldi,* 434 U.S. at 28-29; *Petite v. United States*, 361 U.S. 529, 533 (1960). As one circuit court judge observed, the *Petite* policy "is a double jeopardy protection in sheep's clothing." *United States v. Thompson*, 579 F.2d 1184, 1192 (10th Cir. 1978) (Seth, J., dissenting).

[82] *See Petite*, 361 U.S. at 533 (Warren, J., concurring) ("But with all deference, I do not see how our duty can be fully performed in this case if our action stops with simply giving effect to a 'policy' of the Government.").

[83] *See* Bureau of Justice Statistics, Federal Justice Statistics, https://www.bjs.gov/index.cfm?ty=tp&tid=62 (statistical tables show that the Justice Department declines to prosecute hundreds of cases every year because of the *Petite* policy).

break. The Department of Defense has not truly limited its "exercise of the power to bring successive prosecutions for the same offense to situations comporting with the rationale for the existence of that power." *Rinaldi*, 434 U.S. at 29. The Department's merely hortatory policies mean that, with respect to dual prosecutions, administration of the Uniform Code of Military Justice is hardly uniform or just.

iii. Repeat prosecutions hit servicemembers harder than ordinary citizens.

The nature of courts-martial exacerbates the evils of successive trials. While a servicemember may not be punished before trial, his or her career will surely suffer during state court proceedings. The security clearance of an accused servicemember will be suspended, and he or she will be quickly relegated to positions of lesser responsibility. The command will "flag" the servicemember for adverse actions, who will then fail to advance alongside his or her peers. And many of those peers will inevitably presume the accused is guilty, and quietly ostracize him or her from the social bonds integral to military life.

This stasis may last for years while the servicemember fights state proceedings, and the subsequent referral to court-martial only doubles that harm. In a system that long recognized the need for a good soldier defense,[84] this kind of

[84] *See*, *e.g.*, *United States v. Weeks*, 20 M.J. 22, 25 (C.M.A. 1985) (reversing a Marine's conviction because "the military judge erred in this case in ruling that

"career injury" puts accused servicemembers at a greater disadvantage than twice-tried civilians. Accused servicemembers are, rightly or wrongly, measured by their military accomplishments which are expected to come at certain times. Years spent away from the right jobs, the right units, and the right leaders can subtly prejudice a panel's view of the accused. *See supra* Assignment of Error III. If civilians experience this at all, it is not to any comparable degree—they don't wear their accomplishments on their chests.

Moreover, civilians do not contend with prosecuting authorities that can dictate where they live, control where they go, and limit who they see without prior judicial intervention. The federal courts have never considered successive trials where the prosecutor doubles as an agent of the accused's employer, landlord, and medical care provider. Nor have they considered the conduct of government officials sheltered from political accountability.

Finally, this Court should also consider the absurdity that exists when our military personnel go abroad. Status of forces agreements protect them from successive prosecutions in other countries, as do every one of our nation's

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evidence of appellant's good military character was not admissible on the merits."); *United States v. Browning*, 5 C.M.R. 27, 29 (C.M.A. 1952) (finding failure to instruct on character evidence was reversible error, and noting that "evidence of good soldierly character is even stronger than the customary evidence of good general character.").

extradition treaties.[85] Yet the Army believes that when they serve domestically, nothing shields them from court-martial after a state trial.[86] It is lamentable that American servicemembers can only feel fully protected from double jeopardy when they live in foreign lands.

b. Efforts to extend civilian prosecutorial reach through military instruments are inimical to American society and should face close scrutiny.

The kind of cooperation Americans expect between state and federal law enforcement agencies is, and must always be, fundamentally different from the kind they will tolerate between military and civilian authorities. Our laws broadly reflect this, and so too should any ruling of this Court on the dual sovereigns doctrine.

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[85] *See*, *e.g.*, Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces art. VII, para. 8, June 19, 1951, 4 U.S.T. 1792; *United States v. Green*, 14 M.J. 461, 462 (C.M.A. 1983) (recognizing that an "accused may properly assert a violation" of the NATO SOFA's double jeopardy provision); R.C.M. 201(d), discussion. *See also*, Pritchard, *supra*, note 74, at 22, 28-29 (observing that as of 2007, every extradition treaty to which the United States was party protects against dual prosecutions).

[86] A majority of states prohibit successive prosecutions through their own constitutional or statutory schemes, and they include some of the largest in the Union, like California, New York, Illinois, and Pennsylvania. *See* Pritchard, *supra*, note 74, at 19-20, 27. This reflects the disdain of their citizens for repeat prosecutions, and if confirms that they are just not needed to do justice or shore up sovereign independence. Unfortunately, these laws do nothing for the servicemembers tried in such states who continue to serve.

Generally speaking, "[c]ooperative law enforcement efforts between independent sovereigns are commendable," *Guzman*, 85 F.3d at 828, and with respect to state and federal attorneys, collaboration has long been the "conventional practice between the two sets of prosecutors throughout the country." *Bartkus*, 359 U.S. at 123. The courts dismissing sham prosecution claims have invoked this idea repeatedly, in fact it is the central assumption to their readings of *Bartkus*. *See*, *e.g.*, *Berry*, 164 F.3d at 847 ("In *Bartkus*, federal and state officials had cooperated with each other, and this cooperation was sanctioned by the Supreme Court.").

But that assumption does not carry over to the military. Rather than accepting it as "conventional," society rightly discourages the comingling of civilian and military law enforcement. The Posse Comitatus Act, for example, forbids using "any part of the Army . . . to execute the laws" of a state. 18 U.S.C. § 1385 (2000). It is a "century-old law that was passed to prevent the then-common use of military forces to help civilian authorities enforce civil laws." *United States v. Thompson*, 33 M.J. 218, 220 (C.A.A.F. 1991). Today the Act still reflects a hard-earned wisdom and the "traditional and strong resistance of Americans to any military intrusion into civilian affairs." *Laird v. Tatum*, 408 U.S. 1, 15 (1972). The military should never become, whether in fact or perception, an agent of civilian law enforcement.

Of course the Posse Comitatus Act does not prohibit commanders from using civilian evidence to enforce military discipline. *Thompson*, 33 M.J. at 221. That is well and good, and society has nothing to fear from military members policing military matters. But our civic antibodies must respond swiftly whenever civilian authorities "militarize" a matter in order to use military assets to accomplish things they themselves could not. Even when such conduct does not contravene the Posse Comitatus Act, it gnaws away the norms that keep military powers out of civilian affairs.

And military authorities are certainly susceptible to civilian influence, even from state officials. County attorneys are not subject to the Code, and thus not able to exert unlawful command influence. Article 37(a), UCMJ. But they can still manipulate and exploit military resources for their own police purposes. Indeed, the general spirit of deference to civilian authority that pervades our armed forces may give civilian officials outside the chain of command an outsized influence within it. Commanders are not immune to civilian pressure, especially when the installations they command need the goodwill with municipal powers.

Civilians can exploit this. When civilian authorities start seeing court-martial jurisdiction as an auxiliary force for their prosecutors, they start seeing the military as a tool. And they use that tool, just as Cumberland County has done at least twice already. Such practices go well beyond the federalism of *Bartkus*; they

distort the firm demarcation between civilian and military authority that free societies require. That presents a grave danger wholly absent in conventional state and federal cooperation.

The boundaries between civilian and military law enforcement must remain clear and unclouded. Because of its unique mandate, this Court should scrutinize the successive prosecutions that come before it more closely than the federal courts have. Convening authorities must demonstrate an independent military necessity for retrying a Soldier, Sailor, Airman, Marine, or Coastguardsman. *See Toth*, 350 U.S. at 22-23 ("trial by court-martial presents another instance calling for limitation to 'the least possible power adequate to the end proposed.'").

Using national defense assets to redo local justice sets a dangerous precedent, one that nudges the military further into civilian affairs. Such concerns should harken us back to the warning of Justice William Douglas, the Supreme Court's longest serving member:

> The alarm was sounded in the Constitutional Convention about the dangers of the armed services. Luther Martin of Maryland said, "when a government wishes to deprive its citizens of freedom, and reduce them to slavery, it generally makes use of a standing army." That danger, we have held, exists not only in bold acts of usurpation of power, but also in gradual encroachments.

Laird v. Tatum, 408 U.S. 1, 18 (1972) (Douglas, J., dissenting). Even small transgressions of civil society invite great risks, especially when magnified by a

standing military of 1.8 million members and some two million more retirees.[87] This Court has a special role in curtailing such risks and it should do so here.

2. A court-martial for offenses already tried in civilian court must serve an independent, unvindicated, and compelling military purpose.

So how should this Court scrutinize successive prosecutions in military courts? To begin with, it should review the issue de novo when preserved, as it was in this case. (JA 1417); *United States v. Campbell*, 71 M.J. 19, 26-27 (C.A.A.F. 2012) (Stucky, J., concurring). It should also recognize that, once "the defendant tenders a prima facie double jeopardy claim, the burden of persuasion shifts to the government." *United States v. Harrison*, 918 F.2d 469, 475 (5th Cir. 1990). That prima facie showing is easily made here: the government tried MSG Hennis for the Eastburn murders in 1986 and 1989, and the government tried him for the exact same allegations in 2010. That is enough to implicate the Double Jeopardy Clause.

a. The government must prove it did not participate in a sham prosecution.

If the government wants to escape the Clause on the grounds that it is exercising its sovereign prerogatives, independently from the state that prosecuted

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[87] *See* DEP'T OF DEFENSE OFFICE OF THE ACTUARY, STATISTICAL REPORT ON THE MILITARY RETIREMENT SYSTEM 20 (Jul. 2017), https://actuary.defense.gov/Portals/15/Documents/MRS_StatRpt_2016%20v4%20FINAL.pdf?ver=2017-07-31-104724-430

first, then it must prove it. Requiring the government to justify its conduct is nothing new, of course;[88] it must regularly prove the reasonableness of its searches,[89] the voluntariness of its confessions,[90] and the independence of its courts-martial.[91] The general rule is that, when the government puts core rights at risk, it holds all the cards and it needs to show them. That rule should continue here.

b. A court-martial done at the request of state authorities, that does not pursue a new and unvindicated military interest, is a sham.

Bartkus identified two ways in which colluding sovereigns might violate the Double Jeopardy Clause, and this Court should still start there. 359 U.S. at 123-24. When state officials use court-martial jurisdiction like a "tool" to avoid the Double

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[88] *See Guzman*, 85 F.3d at 827 n.2 ("there is nothing unorthodox about requiring the government to bear the ultimate burden of proof vis-a-vis the existence of an alleged constitutional violation once sufficient evidence is adduced to put the question legitimately into issue.").

[89] *See*, *e.g.*, *United States v. Ayala*, 69 M.J. 63, 67 (C.A.A.F. 2010) (government must prove unauthorized search was an inspection by clear and convincing evidence); *United States v. Owens*, 51 M.J. 204, 210 (C.A.A.F. 1999) (government must prove consent to search by clear and convincing evidence).

[90] *United States v. Ford*, 51 M.J. 445, 450 (C.A.A.F. 1999) (government must prove confession was voluntary by a preponderance of the evidence).

[91] *United States v. Biagase*, 50 M.J. 143, 151 (C.A.A.F. 1999) (once the issue is raised, the government must prove beyond a reasonable doubt that unlawful command influence did not affect the court-martial).

Jeopardy Clause, for example, the court-martial is "a sham and cover." *Id*. Likewise, where the court-martial is "in essential fact another" state prosecution, the court-martial is a "sham and cover." *Id*. When a court-martial is a "sham and cover," it violates the Double Jeopardy Clause. *Id*.

This Court should construe those terms in a manner that responds to the military-specific concerns at issue. It should ensure that its test actually protects servicemembers from exploitations of their status, and that it keeps national warfighting forces from becoming part-time augmentations of local prosecutor offices. To do so, it should eschew the near-impossible strictures some federal courts have put on *Bartkus*.[92] Demanding an accused servicemember prove the convening authority was "acting as a mere puppet of the state" would effectively turn *Bartkus* challenges into fools' errands. *Tirrell*, 120 F.3d at 677.

Courts-martial after civilian acquittals raise military concerns that blend law and perception, and which are served better by a commonsense approach rather than "legal logic" that is "too subtle . . . to grasp." *Abbate*, 359 U.S. at 202 (Black, J., dissenting). If the court-martial exists to circumvent the Double Jeopardy Clause, then it is a sham. If the court-martial furthers the interests of a

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[92] *See*, *e.g.*, *United States v. Padilla*, 589 F.2d 481 (10th Cir. 1978) (over a spirited dissent, the court's majority concluded a federal prosecutor's pursuit of the same case he previously prosecuted as a state attorney, in violation of the *Petite* policy, was not a sham).

municipality more than the military, it is a sham. If the court-martial merely second-guesses the verdict of a duly-seated jury, then it is a sham. Such courts-martial turn the military into a tool and upend the justification for "dual sovereigns" exception in the first place.

3. This court-martial was a sham effort to avoid the Double Jeopardy Clause.

This Court should take the foregoing approach. But even if it construes *Bartkus* narrowly, it will find this case was worse than *Bartkus*. Cumberland County and the State of North Carolina provided the motivation, the methods, the means, and even the manning to court-martial Hennis. The State used the Army as a tool against the Double Jeopardy Clause, and the resulting prosecution was, in essential fact, just another State trial.

a. The court-martial of MSG Hennis was a "tool" to overcome the Double Jeopardy Clause.

The court-martial of MSG Hennis was "a tool of the [state] authorities, who thereby avoided the prohibition of the Fifth Amendment against a retrial of a [North Carolina] prosecution after an acquittal." *Bartkus*, 359 U.S. at 123-24. The allegations in this case have never borne a substantial connection to military service, this has always been a case for North Carolina. *See supra* Assignment of Error II. That is why, for more than twenty years, no military commander moved to court-martial MSG Hennis. A third trial of Hennis, if it was even possible,

would serve no military purpose, and the justice interests in this case were already resolved definitively and absolutely. *See Arizona v. Washington*, 434 U.S. 497, 503 (1978) ("The public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though the acquittal was based upon an egregiously erroneous foundation.") (citations omitted).

But Cumberland County officials did not see it that way. They reopened their case, concluded their belief in Hennis's guilt was right all along, and entreated their counterparts at Fort Bragg to try him again because they themselves could not. And thus the State of North Carolina used the Army to re-prosecute Timothy Hennis. The State did not need to commandeer the wheels of military justice, usurp control of XVIII Airborne Corps, and direct the entire affair. Rather, the State merely needed to initiate the effort, ask the Army to continue it, and support it along the way to get exactly what it wanted: a third trial of Timothy Hennis. And they did.

i. The Army had no military interest in this case before North Carolina turned it into a tool for re-prosecuting MSG Hennis.

The 1989 acquittal of MSG Hennis addressed any concerns the Army had in this case. A fair trial had delivered its justice and the finality society demands. Members of the Armed Forces did not riot in disorder or indiscipline, Fort Bragg continued its mission, and the only military interest that remained was

MSG Hennis's return to service. The Army vacated his administrative separation, credited his time in civilian confinement against his service obligation, discharged him and then reenlisted him. (JA 1472-76). Master Sergeant Hennis went on to serve fifteen more years, during which he deployed to Operation Desert Storm, rose through the enlisted ranks, and ultimately served as a company first sergeant before retiring honorably. (JA 1184, 2137).

The Army's actions demonstrate its level of "independent" interest in prosecuting this case: none. For twenty years, it conducted no independent investigation and it took no independent steps to try MSG Hennis. At most, it deemed this a purely civilian matter, and its sole action would have been to administratively separate then-Sergeant Hennis if the State had proven him guilty. (JA 1472-76). The Army's about-face can only be explained by one thing: the State's intervention.

ii. The acquittal of MSG Hennis embarrassed Cumberland County and exposed serious abuses of prosecutorial authority.

Unlike the Army, Cumberland County officials have always had an interest in this case and a personal conviction that Hennis, even once acquitted, was guilty. Speaking to local reporters after the 1989 verdict, District Attorney Ed Grannis expressed his discontent in muted terms: "I am just sorry the outcome was not in our favor." (JA 1834-35). He and others working for the State on this case

remained steadfast in their belief that Hennis was responsible, and they said so openly.

This was a high-profile and sensationalized case that had attracted significant media attention, and the District Attorney and Sheriff's offices had invested considerable time, effort, and credibility trying to secure a death sentence for Hennis. (JA 1819-1912). To an outside observer, winning the case against Hennis seemed to matter more to the State than ensuring justice. Misconduct marred the State's prosecution of Hennis from the very beginning and through both trials. Detectives Jack Watts and Robert Bittle were convinced that Hennis was guilty.[93] His investigation reflected that bias.[94] Once a grand jury indicted Hennis, the State released the crime scene without informing defense counsel; it was immediately cleaned, painted over, and compromised, preventing an independent forensic investigation. (JA 1518-41).

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[93] Nicholas Schmidle, *Three Trials for Murder*, THE NEW YORKER, Nov. 14, 2011, https://www.newyorker.com/magazine/2011/11/14/three-trials-for-murder [hereinafter "THE NEW YORKER"].

[94] Detective Bittle, for example, worked on the assumption that Hennis was a "certain class of criminal" who thought "others didn't know how to do it right." THE NEW YORKER. That was his scientific profile of "Tim Hennis's attitude: 'You can't get me. I am smarter than you are.'" *Id*.

Once prosecutors got to try Hennis, their advocacy belied a "win at all cost" mentality. Throughout trial, lead counsel for the State projected "grotesque and macabre" images of the victims' corpses right above Hennis's head, all in a flagrante effort to inflame the jury. *State v. Hennis*, 372 S.E.2d 523, 528 (1988). The Supreme Court of North Carolina repudiated these egregious, overzealous tactics and set aside the convictions.

The State's retrial of Hennis in 1989 unearthed further prosecutorial misconduct. By the end of the defense's case in chief, it became clear that the District Attorney's office had withheld clearly exculpatory evidence for years. (JA 1518-41). That evidence included the identity of John Raupach, a man with a striking similarity to Hennis who routinely walked by the Eastburn residence at night. (JA 1574-1720). Ultimately discovered through defense efforts, Raupach's testimony, and mere presence in the courtroom, powerfully addressed the testimony of Patrick Cone, the government's shaky eyewitness placing Hennis at the scene. (JA 1509-17). Cumberland County prosecutors also failed to disclose a letter they received after Hennis's 1986 conviction in which a "Mr. X" claimed responsibility for the murders. (JA 1676-79). They removed charge of quarters logs from MSG Hennis's unit that conflicted with the government's theory, and never informed the defense of them. (JA 1635). Only diligent defense work and a

few lucky breaks brought all this to light, and the only thing that spared the state from enduring a complete misconduct hearing was Hennis's acquittal. (JA 1722).

The State could not convict Hennis a second time. Such a high-profile loss must have stung District Attorney Grannis and others in his office, such as assistant district attorney Calvin Colyer, who served on the 1989 prosecution team and litigated the misconduct motion, and Robert Bittle, a homicide detective who had investigated the case from the beginning. Portrayals of the case in books such as WITNESS FOR THE DEFENSE, or INNOCENT VICTIMS and its eponymous mini-series, must have only salted their wounds. (JA 1858-1914). Grannis, Colyer, and Bittle, never believed in any suspect other than Hennis, even after he was acquitted,[95] and the Double Jeopardy Clause is, presumably, the only thing that shielded him from another trial.

iii. The State of North Carolina reopened and reinvestigated this case with the intent of exploiting Army jurisdiction.

But then an investigator for the Cumberland County Sheriff, Larry Trotter, reopened the case. A former soldier himself, Trotter was serving at Fort Bragg the same year Kathryn, Kara, and Erin Eastburn were murdered. (JA 166, 196). Ten years later, he retired from the Army and joined the Cumberland County Sheriff's

[95] *See*, *e.g.*, THE NEW YORKER (quoting Bittle as saying that, after the acquittal, "'I felt sick, like someone had sucked the air out of me. . . . I felt like I let Gary down, like I let Jana down.' He wasn't ready to give up, he said.").

Office. (JA 166). By 2005, Trotter had become a homicide detective with an interest in solving the Eastburn murders. (JA 166-67). Trotter knew Hennis was acquitted of these accusations, and he knew any retrial would require the Army's court-martial jurisdiction. (JA 168, 176). This did not deter him, however, because he already had "experience" exploiting military courts to retry unwelcomed acquittals. (JA 173-74).

That experience arose from the successive prosecutions of Army Staff Sergeant David Tillery. (JA 173-74). In 2002, Cumberland County prosecutors tried Tillery for the murder of his lover's husband, an Air Force sergeant, which occurred in the latter's off-post residence. *Tillery v. Shartle*, No. CV 16-0204-TUC-CKJ (LAB), 2016 U.S. Dist. LEXIS 173650, at *5 (D. Ariz. Dec. 14, 2016). Yet by the "ninth day of trial, the trial court dismissed the charge for insufficient evidence." *Id.* at 5. Dissatisfied, county officials pressed Tillery's command to retry their case. And it did, quickly preferring the same charges and presenting the same case at court-martial. *Id*. But in an unsurprising twist, military prosecutors got a very different result this time: a murder conviction, and life without the possibility of parole. *Id*.

With this "experience" under his belt, Trotter reopened the Eastburn file. He reviewed the evidence, and discussed it with Calvin Colyer. (JA 168-70). Around May or June 2005, Trotter sent biological evidence recovered from the crime scene

to the North Carolina State Bureau of Investigation for testing. (JA 170). Trotter asked the lab to compare these with Hennis's blood sample, but did not ask for any further comparison against its databases. (JA 201). Believing "that the Army had potential jurisdiction still over Hennis," Trotter called the SBI lab on April 24, 2006 and specifically informed it that "this may become a military court case" and that he "needed the DNA results." (JA 175).

The lab, whose practices came under criticism after MSG Hennis's court-martial,[96] reported its results one month later. (JA 175, 1362). The state's analysts asserted that the vaginal smears taken from Kathryn Eastburn contained sperm belonging to Hennis. (JA 908). Trotter then contacted Grannis and Bittle. (JA 180); THE NEW YORKER. Bittle later told local reporters that "I just wanted to jump up and ... and scream, I was so happy."[97] Trotter would describe the test as "his most famous contribution of his Sheriff's Office career."[98]

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[96] *See infra* Assignment of Error VIII.

[97] Andrew Paparella, *For 2nd Time, Man Sentenced to Death for Murders*, ABC NEWS, Sep. 17, 2010, https://abcnews.go.com/2020/timothy-hennis-guilty-1985-triple-murder-trial/story?id=11652956.

[98] Nancy McCleary, *Cumberland County's chief jailer announces retirement, successor announced*, FAYETTEVILLE OBSERVER, May 20, 2016, https://www.fayobserver.com/ad1935a0-c72e-591f-bf84-73a3eececb23.html.

In an act that seemed to presume a new prosecution would follow, Bittle immediately informed Gary Eastburn of the lab results. THE NEW YORKER. Trotter, Colyer, Bittle, and Grannis then convened to consider their case. (JA 180). Of course they understood that the Constitution forbade another trial, but "somehow the judicial system is going to have to work around that."[99] And they found their work-around, the one they had used before: court-martial. As District Attorney Grannis admitted, "We realized we have a double jeopardy issue which cannot be avoided. And so I contacted our friends at Fort Bragg and asked them if they would assign people to look into this matter, which they did."[100] Those friends included the Staff Judge Advocate of XVIII Airborne Corps, Fort Bragg. (JA 184, 1466). Over a few conversations, they discussed the matter, including MSG Hennis's status as a military retiree. (JA 184).

Not long after, the Commander of XVIII Airborne Corps and Fort Bragg requested MSG Hennis's recall from retirement on the grounds that "the United States Army . . . is the only entity that could exercise jurisdiction over MSG(R) Hennis and try him for the aforementioned allegations." (JA 185; JA 1363). The

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[99] *Death Row Stories – Timothy Hennis*, (CNN television broadcast Sep. 7, 2014), transcript at http://www.cnn.com/TRANSCRIPTS/1409/07/drow.01.html.

[100] Paul Woolverton, *Hennis suspect again*, FAYETTEVILLE OBSERVER, Sep. 28, 2006, available at http://santillan.cc/Hennis/Hennis-1_content.html.

Army had not done any independent investigation. It took on this case simply because North Carolina could not. *Id*. And once it did, it knew that "this will hit the press big time and then it will [be] to[o] late to back off gracefully." (JA 1484). Once the Army decided to become the County's cat's-paw, it was not going to back off.

These facts spell out what the Army has so far failed to admit: it recalled and court-martialed MSG Hennis at the prodding and behest of Cumberland County officials. It did so because it was the "only entity that could exercise jurisdiction" over him. (JA 1363). It did so *because of* his constitutional protection against double jeopardy, which really means that the Army's "interest" in this case was simply circumventing the Double Jeopardy Clause. That served no independent military goal. Cumberland County officials exploited the Army's purported jurisdiction over Hennis, and this was just a "sham and cover" for their third chance to get the man they always thought got away with murder.

b. The court-martial of MSG Hennis was "in essential fact" another North Carolina prosecution.

The government simply took *State v. Hennis* and renamed it *United States v. Hennis;* this court-martial was "in essential fact another [state] prosecution;" *Bartkus*, 359 U.S. at 124. This is true all the way down to the investigators, the

evidence, and even the questioning of witnesses. Brazenly, the government even relied on the same examinations of the same Cumberland County attorneys.

i. The Army was just a conduit for Cumberland County's case.

The government's evidence was the State's evidence. Sixteen of the witnesses who testified in its case-in-chief were State or County employees, whether investigators, patrolmen, technicians, or examiners.[101] Another witness was the same FBI agent who had testified for the State at Hennis's 1986 and 1989 trials. (JA 643). Of the 21 other merits witnesses called by the government, only two had not testified for the State at its previous trials. These two were the Army's contributions to the trial: a CID agent who took a buccal swab, and the USACIL employee who had attempted to replicate North Carolina's DNA testing. (R. at 5288, 5292; JA 888).

The Army simply copied and pasted North Carolina's efforts. This was, "in essential fact," another North Carolina trial. Even the government's opening, closing, rebuttal, and sentencing arguments made this clear. Government counsel did not present this as a military case aimed at unique military interests. (JA 574-

[101] These included seven members of the Cumberland County Sheriff's Office, (R. at 3976, 4371, 4426, 4721, 5082, 5142); an emergency medical technician for the county, (R. at 4016); two crime scene technicians for the county, (R. at 4067, 4215); a serologist, an investigator, and a forensic biologist for the State Bureau of Investigation, (R. at 4272, 4407, 5436); and three state medical examiners, (R. at 4778, 4811, 4842).

84, 1094-1180). At most, its references to military life were incidental and no greater than those the juries heard in 1986 and 1989. Trial counsel made no talk about "discipline" or "mission" because they simply were not implicated; rather, the Army's message remained on "evil" and "justice," a replay of Cumberland County's thematic interests. (JA 1196-1213). The boundary between Corps and County was so blurred in fact that, by the end of trial, government counsel actually had to remind the members that "this is an Army prosecution. Cumberland County worked the case back in the 1980s. Cumberland County produced witnesses, but this has come to you from the United States Army." (JA 1159). Needing to remind uniformed panel members that this was "an Army prosecution" is a telling sign of just how little "Army" was actually in it.

ii. Cumberland County attorneys and investigators helped prosecute this court-martial.

The government depended on Cumberland County to supply part of its trial team too, not merely its evidence. County detectives and attorneys were essential to the Army's prosecution of the case. For the two and a half years building to trial, Larry Trotter helped trial counsel locate and identify some two dozen witnesses for the government's case. (JA 190-92). Likewise, trial counsel relied on another Cumberland County official, Assistant District Attorney Bunty-Russ, to interface with its star witness, Patrick Cone. (JA 181, 1482). If this had been a

truly independent action by the Army, its Criminal Investigation Command would have done this work. But this court-martial was never an independent Army action, and so trial counsel relied instead on Cumberland County assets, Cumberland County time, and Cumberland County personnel to perform "Army" functions.

Furthermore, Army trial counsel assumed the role of state actors several times. First, they tried to enforce a putative stipulation of fact made in the 1986 trial. (JA 1977). Recognizing that stipulations are agreements "entered into between the parties," the government asked the military judge to enforce the so-called stipulation. (JA 249, 1981). The request necessarily asserted parity of party between the Army and the State, *i.e.*, that they are one and the same party. Moreover, the government's argument that "stipulations entered into in one trial carry over to a retrial" revealed exactly how it truly saw this case: a retrial, not a new, independent court-martial of MSG Hennis. (JA 1981). The Army's belief that it could enforce an agreement in the State's stead shows just how intertwined both expressions of government had become in this trial.[102]

[102] The military judge declined to enforce the stipulation because of its ambiguity and, in his view, "the different sovereigns involved." (JA 260). However he insisted, "I'm not making a ruling." (JA 260).

Second, Army counsel relied on the State to examine of seven of its case-in-chief witnesses.[103] Cumberland County attorneys were the only ones to examine these witnesses, judge advocates never asked them a word. Of course their evidence came in the form of prior testimony, which Army trial counsel read aloud to the members. In a capital court-martial, this alone gives grounds for reversal, as Assignment of Error VII describes below. But it displays the North Carolina's hold over this case. The fact that it was "former testimony" did not change that it was adduced by state attorneys asking the state's questions for the state's purposes during the state's trials. All of the circuit cases that have failed to see a "sham" prosecution never confronted a case tried simultaneously by state and federal attorneys. *See* note 66, *supra*.

iii. The entire justification for a new trial was "new" evidence, but that itself was a sham.

As "Captain Nathan Huff, one of the prosecutors, noted, 'The only difference between this trial and the previous trials is the discovery of this new DNA evidence.'" THE NEW YORKER. That simple remark sums up so much about this case, and it is deeply wrong. Yes, this was just a repeat of the earlier trials topped off with dubious DNA arguments. But the idea that "new evidence" can

[103] These witnesses were Minnie Renegar, (R. at 3962-65); Margaret Tillison, (JA 646); Clarence Brickey and John McCoy, (JA 733-40); Elfriede Ballard and John Green, (R. at 4914-21); and Vivian Mallonie, (R. at 5313-15).

overpower the protection against repeat trials is fundamentally wrong. "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks v. United States*, 437 U.S. 1, 11 (1978). The government does not get to keep perfecting its case.

The claim that this was a "discovery" of "new DNA evidence" is also wrong. In 1985, the State collected the very evidence it retested in 2005; it did not acquire any "new" evidence. Forensic DNA tests were emerging in 1985, but by 1987 they were already appearing in American courts. (JA 164). Within two more years, DNA testing had weathered serious defense challenges and the Federal Bureau of Investigation was "providing it as a service to law enforcement agencies within the United States." (JA 163-64).

The State of North Carolina even presented an FBI agent qualified in DNA testing, Randall Murch, during its 1986 and 1989 prosecutions. In the latter, the State took pains to show why it had not tested its biological samples for a DNA match to Hennis: the relevant samples were too small, some were consumed and fouled by other materials, they were stored under dubious conditions, and too much time had elapsed. (JA 1406-12). The government actually attacked the testability of its samples in order to strengthen its case against Hennis in 1989. The idea that its 2006 lab-work was "newly discovered evidence" is simply false.

The Army could have tried to test this itself at any time before 2006, if there was a military interest in doing so. But it never did, because there never was.

c. This court-martial was a sham prosecution under any test based on Bartkus.

The foregoing shows this court-martial was not an independent exercise of military authority pursuing independent military interests. This Court should dismiss it on those grounds alone. But even if this Court declines to adopt a military-centric reading of *Bartkus*, it should still dismiss this case as a "sham and cover" court-martial. The collusive and exploitive nature of this prosecution exceeded that in *Bartkus*.

In *Bartkus*, the "state and federal prosecutions were separately conducted." 359 U.S. at 122. In *Hennis*, they were not. Cumberland County officials examined seven government witnesses, and ensured some two dozen others would be ready for trial. All of the government's operative evidence was the result of state and county investigation, and Army counsel simply reenacted parts of Cumberland County attorneys. The Army even went so far as to imply it was a party to stipulations between the North Carolina and Hennis's earlier legal team, all but admitting that it was standing in the State's shoes. The State's presence was inseparable from this trial.

In *Bartkus*, the agent "who had conducted the investigation on behalf of the Federal Government turned over to the Illinois prosecuting officials all the evidence he had gathered against the petitioner," some of which "[c]oncededly . . . had been gathered after acquittal in the federal court." 359 U.S. at 122. In *Hennis*, Cumberland County officials did the same thing—but only after using two trials and twenty-five years to perfect their case. The government's newly-gained advantage in this trial outstripped anything in *Bartkus*. *See infra* Assignments of Error V, VI, VII, VIII, IX. After two trials for his life, an acquitted man may finally believe the ordeal is done. His resources spent and his morale exhausted, he will turn from the constant state of defense and simply try to live the rest of his life, as MSG Hennis did. Time does him no favor, however, if the government can constantly strengthen its hand for another contest. *See Green v. United States*, 355 U.S. 184, 187-188 (1957). A government that renews prosecution after so much time levies an oppressive and intolerable toll, and this Court should not condone it. *Bartkus* was bad, but not this bad.

In *Bartkus*, furthermore, the "record establishe[d] that the prosecution was undertaken by state prosecuting officials within their discretionary responsibility." *Id*. at 123. In *Hennis*, the record establishes that Army officials had absolutely no will to court-martial until Cumberland County pushed them into it. Illinois indicted Alfonse Bartkus three weeks after his federal acquittal, showing itself

already willing to try him. *Id*. at 121-22. In stark contrast, the Army let two decades pass before it adopted the State's case and preferred charges against MSG Hennis. Beyond this, Cumberland County officials manipulated the Army's incentives by immediately contacting Gary Eastburn, and later leaking its DNA conclusions to the public before the Army ever ordered Hennis to active duty.[104] Such efforts subtly forced the Army's hand. Months after the Army had begun pulling the administrative levers to recall Hennis from retirement, DA Grannis was still asserting that the case was "a pending matter in my office."[105] Once the Army brought MSG Hennis, who was now "infamous" in Cumberland County, it was too "late to back off gracefully." (JA 1484, 1497).

In *Bartkus*, the Court was wary that, without a dual sovereigns exception to double jeopardy, one sovereign could undercut the other's "historic right and obligation . . . to maintain peace and order" and thus upset the federal scheme. *Id*. at 137-38. The same thinking guided the Court in *Abbate*: if "state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered." 359 U.S. at 195. Those apprehensions have no place

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[104] *See* Paul Woolverton, *Investigation is Revived*, FAYETTEVILLE OBSERVER, Sep. 21, 2006, http://santillan.cc/Hennis/Hennis-1_content.html (see "Archives / 2006").

[105] *Id*.

here, however.[106] This was not a case where the State tried to sabotage federal efforts, shield the accused from a harsher federal process, or mollify federal interests with a half-hearted trial. This was not a case ruined by corruption or incompetence. While Cumberland County committed plenty of prosecutorial misconduct, it all sprung from bias and zeal, not sloth or neglect. Its mistakes laid in trying too hard to convict Timothy Hennis, not in trying too little. It did everything it could—and even some things it could not—to vindicate the very same interests replayed in this court-martial.

Finally, in *Barktus* there was no indication that the reputation of one sovereign stood to gain much from the other's performance. Not so in this case. Cumberland County's failure to convict Hennis after two trials, its failure to ever find the real killer or killers, and the exposure of its questionable practices all came as a blow to the county's lawmen. *See* INNOCENT VICTIMS, WITNESS FOR THE DEFENSE. But the court-martial of Hennis now offered redemption. For Robert Bittle, it was "vindication." THE NEW YORKER. For Jack Watts, it was his

[106] *Cf. State v. Hogg*, 385 A.2d 844, 847 (N.H. 1978) ("whatever reasons there may be for permitting, in the name of federalism, a second prosecution in the State court after a conviction in the federal court, they lose all force when the first prosecution ends in a finding of not guilty.").

"reputation."[107] For Ed Grannis, his prosecutors, and the Cumberland County Sheriff's Office, it was proof that they had been after the right guy "from day one." INNOCENT VICTIMS 368. For Larry Trotter, it was "his most famous contribution of his Sheriff's Office career."[108]

But for reporter and author Scott Whisnant, who covered this case closely, this court-martial was "fundamentally wrong." THE NEW YORKER. This third trial left him wondering "how the Army could allow itself 'to be a pawn of the Cumberland County sheriff's department.'" *Id*. Like others,[109] he "can't believe that, in the United States of America, you can do a best-two-out-of-three for your life." *Id*. This Court should ensure this game is never played again in our country, with our servicemembers, with such stakes. It should dismiss this court-martial for the "sham and cover" that it is, and the abuse of law it represents.

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[107] *See* INNOCENT VICTIMS 336 ("'He's guilty he's guilty. I know he is,' a frustrated Watts told Nancy Maeser, 'I would bet my reputation on it.'").

[108] Nancy McCleary, *Cumberland County's chief jailer announces retirement, successor announced*, FAYETTEVILLE OBSERVER, May 20, 2016, https://www.fayobserver.com/ad1935a0-c72e-591f-bf84-73a3eececb23.html.

[109] *See*, *e.g., State v. Hogg*, 385 A.2d 844, 845 (N.H. 1978) ("It is fundamentally and morally wrong to try a man for a crime of which he has already been tried and found not guilty.").

V. THE EGREGIOUS DELAY IN THIS COURT-MARTIAL DENIED MSG HENNIS DUE PROCESS OF LAW.

When the government retries a man already acquitted by his peers, it harms the balance between state and citizen. First it scorns the jury, their solemn duty rendered, and the institution itself. Then it degrades the individual, driving him into further exhaustion and disadvantage. Ultimately it undermines the adversarial system and invites greater abuse. Those harms are abhorrent. Yet they run even deeper when the government retries that man decades after his acquittal, decades after he withdrew from public ordeal, decades after he laid down his defense, and decades after he stopped the search for facts, memories, and proof. When the government does this, as it has done here, it insults liberty in an entirely unprecedented manner. This Court should not allow it.

The Army's decades-long delay to court-martial MSG Hennis was egregious and prejudicial. It was not the result of bona fide "investigative delay," with prosecutors taking extra time to get their case right. *United States v. Lovasco*, 431 U.S. 783, 796 (1977). Rather, it was the result of North Carolina trying to bypass the Double Jeopardy Clause via the Army. Once incurred, the government only sought to exploit this delay throughout trial. The final product is a court-martial further marred by twenty deleterious years, one whose findings and sentence must be set aside.

1. The Due Process Clause protects against egregiously delayed accusations.

The statute of limitation is not only the protection against government pursuit of stale, timeworn cases. The Due Process Clause provides an independent, constitutional against the abuse of time in criminal proceedings. *United States v. Lovasco*, 431 U.S. 783, 789 (1977). The touchstone consideration is whether the government's delay violated "fundamental conceptions of justice which lie at the base of our civil and political institutions." *Id*. at 790. The answer to that question will depend on "the particular circumstances of individual cases." *Id*. at 797.

This Court developed this principle further in *United States v. Reed*, 41 M.J. 449 (C.A.A.F. 1995). To demonstrate that pre-indictment delay resulted in a deprivation of due process, the appellant must "show an egregious or intentional tactical delay and actual prejudice." *Id*. at 452. Prejudice may arise from the loss of a witness or physical evidence, for example. *Id*.; *see also United States v. Niles*, 45 M.J. 455, 460 (C.A.A.F. 1996) (in dictum) (observing the "specter of a delay which gave the Government a tactical advantage over the accused" where "the passage of time had dulled" a witness's recollection and "caused his notes of the investigation and conversation with [the victim] to be lost."). This Court has never limited prejudice to these two considerations, however. Moreover, it consider this in light of the fact that its "duty to search for constitutional error with painstaking

care is never more exacting than it is in a capital case." *Burger v. Kemp*, 483 U.S. 776, 785 (1987).

2. The two decade delay in bringing this court-martial was egregious.

The Army learned of the allegations against MSG Hennis in mid-May 1985. Its first action was to administratively separate him from the service—a clear sign that it would not prosecute him. (JA 1472-76). The Army suspended this separation, however, and allowed MSG Hennis's appeal to play out. A month after the 1989 jury acquitted MSG Hennis, the Army recognized his three years of civilian confinement as "unavoidable" and credited this time against his service obligation. (JA 1472-76). It discharged him well after his enlistment obligation had expired, and then, by reenlisting him after this break in service, the Army relinquished any jurisdiction over the allegations—a definitive sign that it could not prosecute him. *See supra* Assignment of Error I.

For the next seventeen years, then, the Army treated these allegations exactly the way that the Double Jeopardy Clause demands—fully and definitively resolved. *See supra* Assignment of Error IV. The Army never considered prosecuting these allegations itself because, presumably, it understood that it had no jurisdiction to do so. *See supra* Assignments of Error I, II. The Army had fully—and rightly—abandoned any prosecutorial interest in these decades-old allegations. Only after Cumberland County sought referral of this case to a court-

martial did the Army reconsider and revise its sense of jurisdiction and double jeopardy. *See supra* Assignment of Error IV, sec. 3.

Naturally, if Army never saw the need or ability to court-martial MSG Hennis, it could not have delayed trying him for tactical advantage. But that does not extend to the other partner in this prosecution, Cumberland County, North Carolina. Delay gave this half of the government an extraordinary advantage: enhanced DNA testing and a forum through which it could subvert the Double Jeopardy Clause. Nevertheless, MSG Hennis's claim for relief rests on something even more direct: the sheer egregiousness of the delay, and the absence of a compelling need for it. The government has justified this entire court-martial, this overzealous breakaway from the Code and Constitution, on the basis of a DNA test. (JA 1363). That is why it reached beyond its jurisdictional bounds, beyond finality and double jeopardy, beyond the solemn act of a civilian jury, and beyond the costs of 25 withering years. That is why it brought this unprecedented court-martial forward, because of its DNA testing.

But the government could have done this test a decade earlier. The Polymerase Chain Reaction (PCR) tests on which it relied were widely available by 1994. (R. at 276). In cases like *Lovasco* and *Reed*, the delays between offense and accusation were eighteen and twenty-two months, respectively, not 25 years. 431 U.S. at 784; 41 M.J. at 451-52. The delays in those cases were questioned but

excused because the government was actively building these cases, not letting them age idly. In *Lovasco* and *Reed*, the government was trying to figure out what its case would be, not trying to confirm what it had always believed and had already tried twice before. 431 U.S. at 795-96; 41 M.J. at 452. The delay in this case was a world apart in terms of duration and purpose. The delay in this case was "remarkably bad" and "flagrant;" "egregious" under any normal use of the word. *Egregious*, BLACK'S LAW DICTIONARY (8th ed. 2004).

3. By forestalling its prosecution for two decades, the government undermined MSG Hennis's ability to defend himself.

The delay prevented MSG Hennis from presenting witnesses and evidence that were material to both the findings and sentencing phases of trial. It hindered defense efforts to continue investigating the case. At the same time, it emboldened the government, which relied on transcripts of former testimony to prosecute MSG Hennis, and then disingenuous arguments to sentence him. All of this eroded MSG Hennis's ability to defend himself, and the government cannot prove the collective damage to his constitutional rights was harmless beyond a reasonable doubt. *See, e.g., United States v. Toohey*, 63 M.J. 353, 363 (C.A.A.F. 2006).

a. The defense's lack of live, coherent witnesses and meaningful investigative opportunities prejudiced it during the findings phase of trial.

The defense had to contend with several handicaps inflicted by time: the death of its witnesses, the fading coherence of others, the loss of investigative leads, and the government's exploitation of this delay.

i. The defense's forced reliance on former testimony diminished the persuasive value of its witnesses.

Ten defense witnesses passed away or became unavailable before court-martial.[110] The only way defense counsel could convey their evidence was through a staid reading of their former testimony. Yet a "significant part of communication is nonverbal." *United States v. Cook*, 48 M.J. 64, 65 (C.A.A.F. 1998). Both the Code and the Manual acknowledge this. *See, e.g.*, Article 66(c) (a Court of Criminal Appeals must conducting its plenary review must "recogniz[e] that the trial court saw and heard the witnesses."); R.C.M. 703(b) (remote testimony is generally not admissible on the ultimate issue of guilt). This Court's case law reflects the value of live testimony too. *See, e.g., United States v. Lubitz*, 40 M.J. 165, 168 (C.A.A.F. 1994) (noting that "the court members heard the testimony of

[110] These witnesses were: Eugene Verne (R. at 5662); Kaarlo Ward (R. at 5809); Lauder Koonce (R. at 5838); Jack Simmons (JA 961); Dan Smith (JA 967); Donald Tillison (JA 973); Webster McClendon (R. at 5930); James Masters (R. at 5937); Judy Tolbert (JA 1079); and Dr. Walter Saucier (R. at 6108).

the witnesses, observed the personal demeanor of each witness, and were in a superior position to judge the credibility of their testimony.") (citations omitted). Without the gestures, vocal timbres, and overall demeanors of live witnesses, the persuasive value of these "paper witnesses" necessarily suffered.

And these witnesses were important to the defense. Some helped establish MSG Hennis's whereabouts. Others helped prove that his much discussed "Members Only" jacket had no blood on it. The most important, however, were those undermining the government's only evidence that a man looking like MSG Hennis was at the Eastburn home at the time of the murders.

That purported identification came from Patrick Cone, who claimed to see MSG Hennis leave the Eastburn house at 3:30 am May 10, 1985. (JA 668). Three of these witnesses helped establish that the man Cone saw was actually John Raupach, who bore an uncanny resemblance to Hennis. (JA 845). They established how Raupach habitually walked down Summer Hill Drive in the early morning hours wearing clothing, headgear, and a shoulder-slung bag fitting Cone's description. (JA 962-63, 968-69, 974-75). Two other "paper witnesses" further established that, contrary to Cone's claims of a clear starry night, the weather throughout the night and early morning had "light drizzle and fog" with an "overcast" sky. (R. at 5949, 6137). All of these witnesses challenged an essential

part of the government's case, the assertion that someone saw MSG Hennis at the crime scene.

ii. The coherence of a key defense witness degraded considerably over twenty years.

Even the testimony of live witnesses waned with the passage of time. One of these witnesses was Charlotte Kirby, whose coherence diminished significantly after the 1989 trial. At that time, Ms. Kirby was able to describe the events of 1985 clearly and credibly. (JA 2144-60). She described a man significantly smaller than MSG Hennis leaving the Eastburn residence in the early morning of May 10, 1985. *Id*. at 2190. She also described a van outside the victim's home that tended to implicate another suspect, WHJR. *See infra* Assignment of Error VI, sec. 1. She also described phone calls from a man that "scared the hell out of" her. *Id*. at 2202-05. Most importantly, she was certain that the man she saw that morning was not MSG Hennis. *Id*. at 2191-92, 2205.

However, Ms. Kirby could not testify as cogently in 2010. Even though her testimony remained consistent, her strained presentation undercut her credibility. (JA 978-995). She struggled to comprehend questions and tended to make odd statements. (JA 980-82, 992). The members submitted questions that were, or should have been, answered during her direct—an indication that her testimony was simply not landing the way it should have. (JA 1059, 1077). In fact her

examination volleyed back and forth between the defense, government, and members ten times, whereas it proceeded simply and efficiently in 1989.

All of these symptoms tended to diminish the credibility of this critical defense witness. The only witness that could have compensated for this degradation, Judy Tolbert, was deceased, putting the defense back into the pitfall of trying to persuade the members with absent witnesses. (JA 1079, 1811). In 1989, Charlotte Kirby was a compelling witness that someone else murdered the Eastburns. *See*, *e.g.*, INNOCENT VICTIMS 376. In 2010, the intervening decades had sapped away the persuasive value of her testimony, and with it, a key part of MSG Hennis's defense.

iii. The 25 years that came between the accusations and court-martial frustrated defense efforts to investigate further.

The intervening decades also worked against defense efforts to investigate this case. Potential witnesses died or disappeared. (JA 1366). No one on the defense team had actually examined the State's forensic evidence since 1985. The only defense expert to ever do so was Paul Strombaugh. (JA 1968-74). He reviewed the State's evidence in 1985, and testified in the 1986 trial. But he passed away before this court-martial. (R. at 561). The defense's efforts to examine the government's evidence with the assistance of a forensic expert were repeatedly denied. *See infra* Assignment of Error VI. The end result of this was

that defense efforts to question the government's case with new evidence were hampered from the very beginning.

iv. The government's reliance of former testimony precluded any cross-examination tailored to this court-martial.

Time not only harmed the defense's case, but also its ability to attack the government's case. Over defense objection, the government relied on seven deceased or otherwise unavailable witnesses to prosecute this death penalty case.[111] That plainly violated Article 49(d), UCMJ. *See infra* Assignment of Error VII. While the "presentation of 'written' witness 'testimony,' without any of the members seeing the witness's demeanor" may be "constitutionally unremarkable" when the witness is unavailable, this Court has never discounted "the importance of the trier of fact observing witness demeanor to the central concerns of the Confrontation Clause." *United States v. Vazquez*, 72 M.J. 13, 21 (C.A.A.F. 2013). The defense's inability to tailor its cross-examination to the trial at hand was one more limitation to overcome.

[111] These witnesses were: Minnie Renegar (R. at 3962); Margaret Tillison (JA 646); Clarence Brickey and John McCoy (JA 733-740); Elfriede Ballard and John Green (R. at 4914-21); and Vivian Mallonie (R. at 5313-15).

b. The lack of live witnesses held back the defense's case in mitigation and extenuation.

The delay in this court-martial affected its sentencing phase as well. On one front, it hindered defense counsel's pursuit of a mitigation investigation commensurate with this capital case. On another front, it fed into the government's sentencing arguments, which cynically exploited this very delay. Both harms impaired defense counsel's efforts to secure a life, rather than death, sentence.

i. The egregious delay also prejudiced MSG Hennis's ability to mitigate and extenuate the members' findings.

The strongest link to MSG Hennis's past was his parents, Robert and Mary Lou Hennis. Both passed away before this court-martial. Master Sergeant Hennis could only present the former testimony of his father, and because his mother did not testify in 1986, he could not present her testimony at all. (R. at 6900). He lost this opportunity to present what could have been the most emotionally compelling testimony on his behalf.

His defense team also lost the opportunity to perform a meaningful mitigation investigation. Without Hennis's parents, defense counsel were at a great disadvantage trying to trace his social and biological life history. This is a basic requirement in capital mitigation, and the starting point for analyses of

mitigation specialists, mental health professionals, and neuropsychologists.[112] This was a persistent challenge to counsel's ability to meet the expectations of capital defense. *See Wiggins v. Smith*, 539 U.S. 510, 536 (U.S. 2003) (defense counsel were ineffective for failing to investigate defendant's social history of abuse at an early age, as that could have resulted in one juror voting for life).

The egregious delay also led to the loss of MSG Hennis's prison records from 1986-1989. *See infra* Assignment of Error X. These records would have demonstrated MSG Hennis's good behavior while confined, his lack of violent history, and the inappropriateness of a death sentence in this case. *See McCleskey v. Kemp*, 481 U.S. 279, 304 (1987). But the State of North Carolina destroyed these records in the late 1990s. That left MSG Hennis little proof to offer the members that he would have posed no more threat confined than executed.

ii. The Army exploited its egregious delay in arguments.

The government cynically encouraged panel members to convict MSG Hennis and sentence him to death because so much time had passed. The government's final exhortation during its rebuttal argument was: "This case has gone on too long. It has been too long. End this here. End this now. It has been

[112] *See* American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel*, Guideline 5.1 in 31 HOFSTRA L. REV. 913 (2003) [hereinafter ABA Guidelines].

too long. It has been too long." (JA 1180). In other words, convict him because this "has gone on too long." The duplicity and impropriety is obvious.

But where trial counsel truly excelled in the disingenuous use of its own delay was on sentencing. Much of this maneuver was direct:

> I have no words to add that can illustrate for you the pain and suffering, the hurt suffered over the past 25 years by the family of the three victims in this case . . . Their pain is real. Twenty-five years later, it's still palpable on their faces right there for you to see—25 years later, the loss, the hurt . . . 25 years . . . Twenty-five years have passed, and their pain is still real . . . But justice is a significant step in the healing process even after 25 years. It is never too late for justice, never.

(JA 1196-99). Elsewhere, it was less direct, but still implied by necessity:

> I ask you this, how dare they ask you to look at pictures of Sergeant Hennis opening presents with his kids in front of a Christmas tree? . . . The accused, a convicted murderer, sits in this courtroom and wants you to look at pictures of him and his kids and his retirement with his parents at Disneyland.

(JA 1207-08). The government's arguments on findings and sentencing were inflammatory across the board. *See infra* Assignment of Error IX. But this tactic was particularly egregious. The government was overtly foisting these 25 years—25 years of its own making—upon MSG Hennis's neck like an albatross, as if he had somehow forestalled this court-martial by maintaining his innocence. The government's message was unmistakable: punish MSG Hennis more harshly because so much time has passed. But this Court should do the very opposite, and

recognize how the decades of delay between the government's first accusation and its third greatly hindered MSG Hennis's defense.

VI. THE MILITARY JUDGE DENIED MSG HENNIS A MEANINGFUL OPPORTUNITY TO PRESENT A COMPLETE DEFENSE.

Someone savagely murdered Kathryn, Kara, and Erin Eastburn on May 9, 1985. The question is who. The government, as both Army and State, has thrice accused MSG Hennis. He has always maintained his innocence. The merits of this court-martial have always come down to the identity of the killer or killers, and MSG Hennis's ability to confront this question has always been vital to his defense. Vital, and yet withheld by the military judge, who repeatedly and erroneously denied the witnesses, expert assistance, and access of evidence MSG Hennis needed to defend himself in this capital trial.

The Constitution "guarantees criminal defendants a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (citations omitted). That includes challenging the government's case, attacking its assumptions, and testing its evidence. But it also means more than that. The Due Process and Confrontations Clauses safeguard the accused's right to put on his or her own witnesses and evidence too. *Id*. This right is "a fundamental element of due process of law." *United States v. McAllister*, 64 M.J. 248, 249 (C.A.A.F. 2007) (hereinafter *McAllister II*). Just as "an accused has the right to

confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense." *Id.* (quoting *Washington v. Texas*, 388 U.S. 14, 19 (1967)). Indeed, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

A complete defense includes the ability to show someone other than the accused committed the crime. *See United States v. Woolheater*, 40 M.J. 170, 173 (C.A.A.F. 1994) ("The right to present defense evidence tending to rebut an element of proof such as the identity of the perpetrator is a fundamental Constitutional right."). A complete defense also includes the ability to develop a third party theory in the first place, by examining the government's evidence with the assistance of forensic experts. *McAllister II*, 64 M.J. at 249. The rights to witnesses, expertise, and evidence are all expressions of the same essential right, the *sine qua non* of a fair trial, which is a meaningful opportunity to present complete defense. *Holmes*, 547 U.S. at 324.

Beyond this constitutional right, the Code mandates parity between the parties in Article 46, which ensures that the government, court-martial, and defense "shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." 10 U.S.C. § 846(a). The President, in turn, provided that the defense is entitled to: "inspect . . . any . . .

tangible objects in the . . . control of military authorities, and which are material to the preparation of the defense," R.C.M. 701(a)(2)(A), and "the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary." R.C.M. 703(b)(1).

What these constitutional, statutory, and executive rights all recognize is the essence of due process: a contest that is fair in both fact and perception. That can only occur when both sides have equal access to the tools of trial: witnesses, expertise, and evidence. Our adversarial system requires this. Its central premise is that the clash of opposing parties will yield truth, and that justice will then follow. But when one side holds the witnesses and evidence, and blocks its opponent therefrom, the clash ceases to be a fair one.

Master Sergeant Hennis wanted meaningful access to evidence so he could demonstrate another's responsibility for the crimes. He wanted witnesses to achieve the same end. The government could have given him what his defense required, and averted the risk of retrial. But it did not. Once the government had its testing results, it wanted no more "unnecessary" delays for defense testing. The military judge could have stepped in and ensured parity between the parties. But he did not. The result was a contest that was not fair in either fact or perception. The trammels put on MSG Hennis's defense distorted the adversarial process in this court-martial, and this Court should set it aside.

1. **Someone else could have committed the crime, and the defense sought the means to show it.**

For the District Attorney and Sheriff of Cumberland County, Timothy Hennis was guilty "from day one." INNOCENT VICTIMS 368. But not everyone shared their confidence. As the Supreme Court of North Carolina observed, the State's case mainly rested on "circumstantial evidence" and some "direct evidence upon which the witnesses' own remarks cast considerable doubt." *State v. Hennis*, 372 S.E.2d 523, 528 (N.C. 1988). The case against Timothy Hennis was hardly "overwhelming." *Id*. The court's assessment rang true when a second and far less inflamed jury heard the case and acquitted MSG Hennis of all counts.

The lack of any compelling motive further strained the State's case. The government could not articulate a specific grudge, resentment, or gain that would have driven MSG Hennis to murder, so it just begged the question by decrying him as a rapacious "baby killer." (JA 2142). But that monstrous label did not square with Timothy Hennis's actual character. This husband, father of two, Boy Scout troop leader, and successful noncommissioned officer has no history of violent crime, despite the government's quarter century of efforts to find one. (JA 1237).

The State also lacked any physical evidence. Despite conducting a full sweep of the crime scene and Hennis's home, car, and person, everything North Carolina found kept pointing away from MSG Hennis. None of the blood, hairs,

fibers, fingerprints, or footprints matched with him. (JA 939). All of the State's forensic evidence and testing suggested another, unidentified male was present in the Eastburn home. (JA 939-45).

Furthermore, MSG Hennis bore no signs of engaging in a physical struggle Thursday, May 9, 1985. (JA 957). In the waking hours of May 10, 1985, he was standing in formation, wearing shorts and a tee-shirt, and ready for a battalion run; he had no "scratches or bruises," nothing "out of the ordinary." (JA 952, 956-57, 960). Then he went on to work a full day and carry out charge of quarters duty that Friday night and Saturday morning. (JA 960-61). Contrast that with the crime scene, which indicated Kathryn Eastburn had been fighting for her life just a few hours before. Even with MSG Hennis's considerable stature, it was doubtful he could have overpowered and raped a woman, then mortally stabbed her and two children 35 times without so much as a scratch, stray hair, fingerprint, or drop of blood leading back to him. (JA 921-24, 932, 939-41). It is doubtful he could have viciously slaughtered three people, performed the perfect crime scene clean-up, and then reported for duty in a few hours as if nothing was "out of the ordinary." (JA 957). Even with its DNA tests in hand, the government cannot resolve this implausibility.

a. The State's investigation, while deeply flawed, still suggests a third party murdered the Eastburns.

But the lack of forensic evidence inculpating MSG Hennis never derailed the State, which continued to gloss over reasonable suspicious that someone else may have murdered the Eastburns. A week after Gary Eastburn left for training, Kathryn Eastburn received "strange phone calls" that worried her and her husband. (JA 587-89). Around 4:00 or 5:00 a.m, a male voice called and threatened: "Ms. Eastburn, I live around the corner and I'm coming to see you." (JA 587). Kathryn and Gary Eastburn were naturally "frightened," and Gary Eastburn even asked friends to keep an eye on his wife. (JA 589). This all happened seven to eight weeks before the Eastburns advertised their dog, and seven to eight weeks before Tim Hennis could have possibly met Kathryn Eastburn. Tim Hennis could not have been her menacing caller.

Kathryn Eastburn was not the only woman to receive these kinds of calls either. Another Fayetteville resident, Charlotte Kirby, testified to receiving similar threats around the time of the murders and even after Hennis's incarceration. (JA 993). Beyond this, Charlotte Kirby also saw a man significantly thinner and shorter than MSG Hennis exiting the Eastburn home in the early hours of May 10, 1985. (JA 985). Patrick Cone told Cumberland County police the man he saw

"weighed about 167 and was 6-foot tall" leaving the Eastburn home at about 3:30 a.m. May 10, 1985. (JA 707).

That description did not fit MSG Hennis, who stood at 6'5" and weighed more than 200 lbs. But it did fit a man, WHJR, who courted suspicion for other reasons as well. WHJR was 6'1" and 175 lbs in 1985, and thus more consistent with the initial observations of Patrick Cone and closer to that of Charlotte Kirby than was Hennis. (JA 2017-21). WHJR also had scratches on his face the day after the Eastburn murders, and his efforts to explain them were inconsistent and unavailing. (JA 957, 2017-21, 2138). Furthermore, WHJR had access to his roommate's light colored van, the kind two witnesses saw parked outside the Eastburn residence the night of the murders. (JA 982, 2017-21). And finally, to top it off, WHJR was Kathryn Eastburn's backyard neighbor. (JA 2017-21). His home abutted the back of hers, giving him a direct view into the Eastburn residence. WHJR was someone who could have easily known when and how she was vulnerable.

Cumberland County investigators interviewed WHJR in 1986, but never disclosed this to the defense until the end of Hennis's 1989 trial. (JA 1703-05). By the time of Hennis's 1986 conviction, WHJR had left Fayetteville, North Carolina and was working as a trucker. (JA 2017-21). When detectives re-

approached WHJR in August 1989, he refused their requests for hair, fingerprint, and handwriting samples. (JA 2017-21).

Those samples could have shed light on an anonymous letter Cumberland County prosecutors received after Hennis's conviction. Penned by a "Mr. X," the letter stated: "I'm passing through Fayetteville on my way to New Jersey. I murdered the Eastburns. I did the crime. Hennis is doing the time. Thanks again, Mr. X." (JA 1741). The State did not test the letter for prints or other identifiers, but just let it languish in the prosecution's file, only informing MSG Hennis's defense about it when the 1989 trial had nearly come to an end.[113] The government's subsequent efforts to link the letter to MSG Hennis failed, and yet it never tested it for links to WHJR.[114]

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[113] As MSG Hennis's attorneys represented to the 1989 trial court: "This second letter helped to confirm a September, 1988, telephone call received by a secretary for a lawyer in Fayetteville, Mr. Bobby Deaver, from a man who would only identify himself as a Mr. X, who laughingly stated that she should tell 'Mr. Hennis that he had a lousy lawyer and that he, Mr. X, had committed the crime. He further told her to tell Mr. Deaver 'thank you for screwing up Hennis's case and getting the wrong guy convicted.' He concluded the telephone call by stating "'I'm out free' and tell Deaver Mr. X called." (JA 1539). Gerald Beaver, and not Bobby Deaver, was one of MSG Hennis's attorneys throughout the first and second trials. (JA 1539).

[114] The May 12, 2009 report from USCACIL stated this: "[WHJR] is excluded as being a possible contributor to all the interpretable autosomal STR and Y-STR DNA profiles previously obtained in the interim and final reports (finding 1)." (JA 1962). That suggests he was not excluded from the "non-interpretable" profiles generated from Kathryn Eastburn's fingernails, the bloody towel, or the glove tip.

b. The defense sought to test, develop, and present evidence of third party culpability at court-martial.

Master Sergeant Hennis has always maintained his innocence, and his defense has always been that someone else murdered the Eastburns. Although he had no duty to prove his innocence, he still had to contend with the reality that triers of fact find the defense of "it was him" more compelling than a mere "it wasn't me." Whereas the latter only attacks the government's theory, the former attacks it and offers an alternative. A reasonable demonstration of "it was him" may cast powerful doubts over the prosecution, and when a military judge blocks such an effort, he precludes "a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (citations omitted).

And that is what happened here. The defense could have cast suspicion on WHJR and thus greater doubt on the government's case. Such a defense required two lines of effort: first, showing WHJR's connections to the crime, and second, testing those items recovered from the crime scene that the government had so far ignored.

The foregoing facts justified a third party culpability defense at court-martial. But the military judge cut off any such effort by denying the necessary witnesses, expert assistance, and access to evidence. Without the right witnesses,

the defense could never present the circumstances connecting WHJR or someone else to the Eastburn murders. Without expert assistance and equal access to the government's evidence, the defense could never marshal forensic proof that someone else murdered the Eastburns. The military judge shut down this defense with little to no legal analysis but plenty of factual misstatements and broken assumptions. His denials were an abuse of discretion that critically impaired MSG Hennis's ability to defend himself, and this Court cannot have faith in the outcome of this trial beyond a reasonable doubt.

2. The military judge abused his discretion by denying MSG Hennis's request for witnesses.

This Court reviews a military judge's failure to order a witness produced for an abuse of discretion. *United States v. Rockwood*, 52 M.J. 98, 104 (1999). "A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and law." *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008). When an abuse of discretion deprives "an accused of his right to present a defense," it constitutes a constitutional error, and "the test for prejudice on appellate review is whether the appellate court is 'able to declare a belief that it was harmless beyond a reasonable doubt.'" *United States v.*

Buenaventura, 45 M.J. 72, 79 (C.A.A.F. 1996) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

a. The military judge's findings were clearly erroneous.

The defense requested production of three witnesses necessary to its third party theory: Mary Krings, Gary Staley, and WHJR. (JA 1994). Mary Krings was a coworker and friend of WHJR. She observed scratches on his face shortly after the murders, scratches that he first explained away and then later denied. (JA 2001). She also knew he had asked his employer to transfer him to Raleigh shortly after the murders. (JA 2000). Gary Staley was WHJR's roommate, and he owned a light colored van like the one seen outside the Eastburn home the night of the murders. (JA 1996-97). The necessity of WHJR to this defense goes without saying—he was the suspect. (JA 257).

The military judge denied all three requests. In justifying his denial, the military judge copied and pasted the very same grounds for all three witnesses:

> While the defense theory is that Mr. [WHJR] is a suspect in the Eastburn murders, the defense proffered no evidence to support that theory or that Mr. [WHJR] in any way resembles the person seen near the Eastburn residence at the time of the murders. The DNA sample provided by Mr. [WHJR] excludes him as the donor of the semen found at the crime scene. The defense made no proffer that the DNA testing is inaccurate.

(JA 2043-45).

Every line of that reasoning is wrong. First, the defense did indeed proffer evidence that WHJR was a suspect in the Eastburn murders. (JA 250-54, 255-59, 1996). Second, the defense did indeed proffer evidence that WHJR resembled the person seen near the Eastburn residence at the time of the murders—more than MSG Hennis, in fact. (JA 1996, 2017-21). Third, WHJR's DNA sample may have excluded him from the semen found at the crime scene, but that did not appear to exclude him from other equally probative evidence, such as the hairs and fibers found on Kathryn Eastburn's body, or the male DNA profiles under her fingernails, on the bloody towel or the recovered glove tip. (JA 889-91). Fourth, the defense could not proffer against the DNA testing when the government had not even shared the data underlying its conclusion. (JA 247-48). The defense had no duty to indulge a military judge's incursion into the fact-finding purview of the panel, and even if it did so indulge, the defense could not refute the government's testing when this very same military judge denied the resources needed to do so.

***b. The military judge made the very error denounced in* Holmes v. South Carolina *and* United States v. Woolheater.**

The military judge plainly abused his discretion. His ruling ignored both the record and the jurisprudence of this Court and the Supreme Court. In *Holmes v. South Carolina*, for example, the Supreme Court reversed a state law that effectively held "where there is strong evidence of a defendant's guilt, especially

where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt may (or perhaps must) be excluded." 547 U.S. at 329 (citations omitted). The military judge seemed seduced by the very same brand of flawed thinking: the government's forensic tests point to the accused and not WHJR, and so a third party culpability defense is not admissible. (JA 2043-45). He made the uncertain assumption that the forensic tests of the semen recovered from Kathryn Eastburn were reliable and dispositive of guilt, even when the defense was trying to contest them. As the Court explained, the judge does not get to decide that for the jury:

> Just because the prosecution's evidence, if credited, would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case. And where the credibility of the prosecution's witnesses or the reliability of its evidence is not conceded, the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact and that the South Carolina courts did not purport to make in this case.

Holmes, 547 U.S. at 330. The Court's decision in *Holmes* repudiates the military judge's reasoning, jot for jot.

And so does *United States v. Woolheater*, where this Court upheld the defense's right to show that someone else had "the motive, knowledge, and opportunity to commit" the crime. 40 M.J. at 173. This right holds even when the government's case relies on evidence as strong as a detailed confession; "the

members were still free to determine the reliability" of that evidence and measure it against that presented by the defense. *Id.* at 174. Indeed, the "point is that, by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." *Holmes*, 547 U.S. at 331. The military judge does not get to exclude evidence of third party culpability simply because he thinks it does not overcome the government's case—that is a job for the members, not the military judge. By using the government's evidence as a yardstick for the defense's, the military judge stopped being an arbiter of admissibility, and started sitting in judgment of the case. His exclusion of Mary Krings, Gary Staley, and WHJR was an abuse of discretion.

3. The military judge abused his discretion by denying MSG Hennis's request for expert assistance and equal access to evidence.

The dispute over expert forensic assistance was not whether it was needed, but how much the defense would get. The history of defense access to expert assistance in this case has been filled with fits and starts, approvals and denials, reasoned decisions and unreasoned ones. In the end, however, the principle dispute came down to whether the defense could examine the totality of the government's evidence with the help of forensic expertise, and where needed, forensic testing. (JA 1915-35). The government and military judge, in step with

each other, both balked at the idea. For them, MSG Hennis had a right to "equal access," so long as it was less equal than the government's. (JA 1936-65). The defense had no need to examine things with which the government could not incriminate him. (JA 1965). The military judge's failure to see the absurdity in this, his failure to enforce the plain meaning of Article 46, and his failure to ensure MSG Hennis a meaningful opportunity to present his defense was yet another blow against the actual and perceived fairness of this court-martial.

a. The defense wanted expert assistance to review the same forensic evidence that all of the government's experts reviewed.

On March 25, 2009, MSG Hennis requested the aid of a forensic serologist, Dr. William Blake, and a crime scene analyst, Mr. Larry Renner, to review the totality of physical evidence, determine what items could reveal the presence of a third party at the crime scene, and then test those items accordingly. (JA 207, 224, 1915-35). The Convening Authority rejected any proposal to inspect untested items, and only funded Dr. Blake to retest four items already tested by government: the vaginal swabs and smears, and fingernail clippings from Kathryn Eastburn. (JA 1951-52). The defense made its request before the military judge, who adopted the same reasoning and gave the same result. The defense renewed its motion before the military judge, once again to no avail. (JA 1975-76).

b. The military judge's denial of expert assistance and equal access was clearly erroneous.

As with requests for witness production, this Court reviews "a military judge's decisions on requests for expert assistance for abuse of discretion." *United States v. McAllister*, 55 M.J. 270, 275 (C.A.A.F. 2001) (*McAllister I*). And this ruling was an abuse of discretion on many fronts.

To begin with, the military judge's assertion that the defense "has access to all the evidence set out in enclosure 1 to AE 207" was disingenuous, as this "access" consisted of nothing more than the untrained eyes of counsel gazing at bags of evidence. (JA 1975). The idea that this amounted to real "access" in a capital murder case driven by the State's DNA test cannot be taken seriously. The government needed teams of forensic experts to make sense of its evidence and construct its case. The government relied on the labs of North Carolina, the FBI, the Army, and private corporations over the course of 25 years. For defense counsel to catch up and do their job effectively, they would need some expert assistance too.[115] Without it, the defense never had the "equal opportunity to obtain witnesses and other evidence" that Article 46, UCMJ promises. *See United*

[115] Consider defense counsel's arguments before the military judge: "without . . . both our DNA and non-DNA expert being able to look at that evidence, then you've essentially tied one hand behind our backs as defense counsel whereas the government has freedom to test and examine all of the evidence." (JA 226).

States v. Warner, 62 M.J. 114, 118 (C.A.A.F. 2005) (Article 46 includes an equal right to an expert consultant).

But again, this did not matter to the military judge. So long as the defense could test the "linchpins" of the government's case, all was well. (JA 1975-76). Everything else was "exculpatory," with nothing more to offer. (JA 1975-76). Of course that thinking was patently erroneous: "Under Article 46, the defense is entitled to equal access to all evidence, whether or not it is apparently exculpatory." *United States v. Garries*, 22 M.J. 288, 293 (C.M.A. 1986).

The rule in *Garries* is enough to show the military judge abused his discretion. But it is still worth considering just how opposed he was to the idea of the defense exceeding the government's tests. Defense counsel tried mightily to explain how non-inculpatory evidence could become far more exculpatory when analyzed properly, but the concept seemed to elude the military judge at every turn.[116] (JA 221-34). His ruling reads as if he just did not understand this possibility:

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[116] Consider this exchange between the military judge and civilian defense counsel:

> MJ: I'm having problems understanding the need to retest or test any evidence that is already exculpatory in nature?
>
> CDC: But, Your Honor, just to say it has some exculpatory value does not mean that it is exculpatory in totality . . . Each piece of circumstantial

> The other items requested by the defense to be analyzed by its own experts which were not previously tested by government experts are necessarily exculpatory for the accused without any further testing because the trial counsel are precluded from arguing those non-tested items incriminate the accused in anyway.

(JA 1976). *Garries* rejected that thinking, and for good reason. Such a ruling presumes the word "exculpatory" comes in only one size, with no degrees of force or persuasion. Yes, evidence that did not link MSG Hennis to the murder had the value of showing he was not there. But that evidence's exculpatory worth could have gone much further if it pointed towards someone else—especially if that other person had additional connections to the crime. Moreover, when rulings like this become commonplace, they inevitably incentivize willful blindness on the part of government counsel, investigators, and police. They can control their case, and the case of the accused, just by avoiding unfavorable or even unknown possibilities.

> evidence builds on the prior piece of circumstantial evidence; but, if you can't connect a hair fibers to a fingerprint or hair to a fiber to a fingerprint to a shoe print—if you can't connect all the dots, then the government can come in and argue to the court members, "Well, the footprint belonged to one of the investigators. It was just inadvertent. And the hair belonged to somebody who just visited her house. And the fingerprint belonged to potentially some other guests." The inability to connect those to any kind of pattern or one person limits the defense ability to say there actually was another person who committed this crime.

(JA 238-39).

See Warner, 62 M.J. at 120 ("The absence of such parity opens the military justice system to abuse . . ."). That harms the pursuit of justice.

This Court has already recognized the importance of allowing defense experts to conduct independent testing—take *McAllister*, for example. "Not only could this new DNA evidence potentially undermine the conclusiveness and weight of the Government's DNA evidence and the Government's original trial position, it takes on an importance of its own in this otherwise circumstantial case." *McAllister II*, 64 M.J. at 252. Just as in that case, defense testing in this one could have yielded "hard evidence from which to conclude that someone other than" MSG Hennis "was in physical contact with the victim at or near the time of her demise." *Id*. Such "new DNA evidence could be argued to support a conclusion that someone else committed the murder and thereby raise a reasonable doubt about [MSG Hennis's] guilt." *Id*.

The military judge did consider *McAllister I* and *II*, but he misconstrued them. Rather than read them in the spirit of fair play that pervades them, he took a sharp turn to limit them. Reasoning that the *McAllister* only concerned defense testing of the government's "linchpin" DNA evidence, the military judge then concluded that only "linchpin" evidence was subject to defense examination. (JA 244-45, 1975-76). That assumption was tailored from whole cloth and yet it still failed to fit this case. The prosecution's "linchpin" was not just its DNA testing of

the vaginal swab, but also its central assumptions that the "person who slaughtered [Kathryn Eastburn] raped her," and the "person who raped her left his sperm." (JA 1120). No defense counsel should be expected to just acquiesce to those assumptions, especially when there are facts to confront it.

As Dr. Robert Bux testified: "I've seen a number of cases where there's been sperm found and [it] is not related to the death." (JA 933). Spermatozoa could have likely existed inside Kathryn Eastburn's vaginal vault for two to three days prior to her death, and that would have been consistent with the observations of at least one government expert. (JA 929-31, 936). So there was a factual basis for driving a wedge between the sperm and the killer. Such a defense could only pull in the members, however, if the defense could place someone other than MSG Hennis even closer to the murder scene. Someone like WHJR, someone acting evasively immediately after the murders, living immediately adjacent to the victims, fitting a description of the purported assailant, and bearing scratches on his face—someone like this could have been that closer person. And if the defense had been able to test USACIL's conclusion that he was excluded, or allowed to run its own tests, it may have very well upended the government's case.

But the military judge was so dazzled by the government's DNA testing that he could not see this possibility.[117] For him, the only possible defense was one that charged headfirst at the government's DNA testing. When a military judge makes the mistake in *Holmes*, by treating the government's case as so strong that no defense would be relevant, he puts a self-fulfilling prophecy in motion, one that conjures up the spirit of absurdity in CATCH-22: "Sure he's guilty . . . If they're his crimes and infractions, he must have committed them." JOSEPH HELLER, CATCH-22 388 (Laurel Dell Pub., 1994). No defense should have to contend with that.

4. The government cannot show that denying this third party defense was harmless beyond a reasonable doubt.

The denial of witnesses, expertise, and access to evidence all struck at the same fundamental right, the right to present a complete defense. The harm to the defense must be measured as a sum, rather than a procession of unrelated errors. *See, e.g., United States v. Banks*, 36 M.J. 150, 171 (C.A.A.F. 1992) ("where the cumulative errors denied appellant a fair trial, we are required to reverse the decision below'). The harm must also be measured in light of the egregious 25 year delay in bringing this court-martial and the prejudice this put upon the

[117] The military judge repeatedly encouraged defense counsel to reveal the substance of consultations with their experts. *See, e.g*., JA 239 (" It might be helpful if I were to know the results of your expert's analysis of the DNA swab and smear in order to put your argument in context.").

defense. *See supra* Assignment of Error V. These errors took a collective toll on MSG Hennis's defense that cannot be divvied up and downplayed.

The military judge's denials of witnesses, expert assistance, and equal access to evidence cut down the defense's ability to answer central question of the court-martial: who killed the Eastburns? If not the accused, then who? The military judge shackled the defense to one strategy, the only one he could apparently appreciate, which was a direct attack on the government's testing of the vaginal swab and smears. That pattern of denial was an abuse of discretion that deprived MSG Hennis of "relevant and material, and vital testimony and evidence." *McAllister II*, 64 M.J. at 252 (citations omitted). A fair presentation of a third party theory could have raised a reasonable doubt as to guilt. *Id*. The government cannot prove beyond a reasonable doubt that this pattern of denial caused no harm, and this Court must therefore reverse his conviction.

Beyond that, however, this Court should also address the current of unfairness running through this trial. The government had full access to all its evidence. It chose what to test and what not to, and it only chose a few out of the 100 it collected. It relied on four different labs to test its evidence: State, FBI, Army, and a private corporation. Curiously, the closer a lab was to this prosecution the closer its results came to MSG Hennis. That alone should raise our brows in circumspection. But when the government then denies the accused equal

access to this evidence, and thereby denies him the means of pursuing a rational defense, it should raise our resolve to do better. The government doesn't get to decide what is relevant to the defense. It doesn't get to thwart an independent investigation by releasing the crime scene before the defense can fairly inspect it, (JA 1518-42), by sitting on this case for twenty years, or by picking and choosing what it thinks is relevant to the defense. *See supra* Assignment of Error V.

The military judge's denial of witnesses, expert assistance, and equal access deprived MSG Hennis of a reasonable defense. And it deprived the court-martial of its fair trial trappings. For a government that summoned over 40 witnesses to prosecute this man for the third time, three more witnesses for the defense were just too much. For a government that waited 25 years to bring this court-martial, a few more months for defense testing were just too much. For a government that boasted "In the Army, justice does not have a price," $20,000 for defense assistance was just too much. THE NEW YORKER. For a government that pledged to execute MSG Hennis, it would seem that the possibility someone else did the crime was just too much.

VII. THE GOVERNMENT'S RELIANCE ON FORMER TESTIMONY TO PROSECUTE A CAPITAL TRIAL VIOLATED ARTICLE 49(D), UCMJ.

Seven of the government's witnesses never appeared in court—they were deceased, demented, or otherwise unavailable. But the government still needed their evidence to secure a unanimous conviction and expose MSG Hennis to the death penalty. So the government just read their twenty year old testimony into the record. But that was an irreversible mistake. The Code and its earliest antecedents have always forbidden this practice.

While Article 49(d), UCMJ, 10 U.S.C. § 849, generally permits the introduction of depositions in courts-martial, it prohibits the government from using them in capital cases: "A duly authenticated deposition taken upon reasonable notice to the other parties, so far as otherwise admissible under the rules of evidence, may be read into evidence . . . before any military court or commission in any case not capital." This prohibition only applies to the government, however, as Article 49(e), UCMJ exclusively allows "the defense in a capital cases" to present "testimony by deposition." In other words, if the government wants to secure a death sentence, it must use live witnesses.

1. American courts-martial have always guaranteed a military accused the right to confront every witness against him in a capital case.

This prohibition is older than the Republic.[118] It arose during the Revolutionary War, and a 1779 Congressional Resolution provided the "earliest provision on this subject." WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 352 n.55. (2nd ed. 1920). Congress included it in every version of the Articles of War thereafter.[119] The rule marked a great improvement over England's practice of the time, which appears to have been less solicitous of its soldier's lives. *See*

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[118] The prohibition's exact provenance is uncertain, though it clearly shares a lineage with the Confrontation Clause. The American right of confrontation arose, at least in part, from the reviled trial and execution of Sir Walter Raleigh in 1618. *See Crawford v. Washington*, 541 U.S. 36, 44 (2004). Raleigh, founder of the colony at Roanoke, court favorite of Queen Elizabeth, and swashbuckling sailor, was condemned on the basis of a letter implicating him in a treasonous plot. MARK NICHOLLS & PENRY WILLIAMS, SIR WALTER RALEIGH at 210-11 (2011). At his trial, Raleigh pleaded for the right to confront Lord Cobham, his accuser. "I beseech you hear me. This [letter] is absolutely all the evidence that can be brought against me." RALEIGH TREVELVAN, SIR WALTER RALEIGH at 380 (2002). The Framers determined to do better in our country, and Article 49 reflects that.

[119] *See* Article 91, Articles of War (1874) in WINTHROP, *supra,* at 993 ("The depositions of witnesses . . . may be read in evidence before such court in cases not capital."); Article 74, Articles of War (1806) in *id.*at 983 ("On the trials of cases not capital, before courts-martial, the deposition of witnesses . . . may be taken before some justice of the peace, and read in evidence . . ."); Article 10, Articles of War (1786) in *id*. at 973 ("On the trials of cases not capital, before courts-martial, the depositions of witnesses . . . may be . . . read in evidence . . .").

British Articles of War (1765) in WINTHROP, *supra*, at 931-46. The prohibition now lives in Article 49(d) as an unbroken rule of American courts-martial practice.

The strength of the prohibition has never been in doubt. As Colonel Winthrop observed, "This limitation is regarded as absolute, and it is held that a deposition cannot legally be introduced in evidence at a capital case by either party, even if the other party waives objection to its admission." *Id.* at 355. The only thing that has changed in the past two centuries is that the defense, and only the defense, can introduce depositions into evidence when otherwise admissible.

2. The military judge plainly erred in letting the government introduce prior testimony in the court-martial, and that error was prejudicial.

Because the government chose to prosecute a 25 year old case, many of its witnesses had expired. *See supra* Assignment of Error V. But they had testified on behalf of the State before, and so the government decided to use seven of them again, and the military judge let this happen. This was plain error,[120] as this prior testimony served the same purpose—and had the same effect—as a deposition. This should have never happened, and yet it significantly prejudiced MSG Hennis's defense.

[120] The defense repeatedly objected to the admission of former testimony, though on various ground other than Article 49(d). (R. at 607, 617, 642; App. Ex. 104, 130, 318).

a. There is no meaningful difference between a deposition and former testimony.

This Court has always treated prior testimony like a deposition. *See United States v. Connor*, 27 M.J. 378, 383 n.5 (C.M.A. 1989) ("The conditions for admissibility [of prior testimony] in non-capital cases are the same conditions prescribed by Article 49(d), UCMJ, 10 U.S.C. § 849(d), for admission of depositions in non-capital cases."). The current Manual continues to support this conclusion:

> Testimony given as a witness at another hearing of the same or different proceeding, *or in a deposition* taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Mil. R. Evid. 804(b)(1) in MCM at III-44 (2012) (emphasis added). The fact that the Military Rules of Evidence specifically mentions depositions as a form of prior testimony demonstrates that, in the military justice system, prior testimony and depositions are viewed as having the same purpose and effect. Thus, the use of the word "deposition" in Article 49(d) encompasses prior testimony just as the words "former testimony" in Mil. R. Evid. 804(b)(1) clearly encompasses depositions. They are for all practicable purposes one and the same.

b. The government relied on the former testimony of seven individuals to secure its conviction of MSG Hennis.

The government felt compelled to read aloud to the members seven transcripts of former testimony, and that is because their testimony was material to its case on the merits.[121] These were not insignificant witnesses. In 1986, Margaret Tillison was the State's first witness against MSG Hennis, and as the government warranted, "the gist of her testimony was the identification of the accused." (R. at 3831). In fact the exact nature was her in court identification of MSG Hennis as the man she saw outside the Eastburn home on May 9, 1985. (JA 650). The in-person importance of such a witness is obvious, especially when the propriety of her prior out of court identification was disputed. (R. at 586-87). Yet the defense had no chance to confront her; it could not leverage any of the significant information it had gathered for the 1989 trial, or tailor its cross-examination to the 2010 court-martial. What the members received was a calm reading of transcript, rather than a live witness whose gestures, expressions, and demeanor may have belied uncertainty and doubt.

That same concern carried over to the government's other "paper" witnesses. The government used former testimony of Clarence Brickey and John McCoy to

[121] These witnesses were: Minnie Renegar (R. at 3962); Margaret Tillison (JA 646); Clarence Brickey and John McCoy (JA 733-40); Elfriede Ballard and John Green (R. at 4914-21); and Vivian Mallonie (R. at 5313-15).

bolster the story of its unsteady "star" witness, Patrick Cone. Brickey's prior testimony was that Cone, his coworker, told him he had seen somebody break into a house the prior evening. (JA 736). McCoy served the same purpose. (JA 740). The government used all three of these former, unexaminable witnesses in the same way, and for the same purpose of trying to place MSG Hennis at the crime scene, a crucial part of its case.

The erroneous admission of these three non-witnesses' testimony alone was enough to prejudice MSG Hennis's defense. If there is any doubt, just consider the government's own assertions of why they were "important."[122] And that was prejudice the government could have easily averted. It could have let members weigh the case without the influence of unexaminable testimony, or it could have forewent the death penalty. Article 49 demanded that the government make a choice, and having now made it choice, it is stuck with the statutory bargain that Congress put in place. This Court must vacate the sentence of death.

[122] *See, e.g.,* R. at 640 (asserting how the testimony of Brickey shores up that of Pat Cone, which is why it, "in an overall sense, is important.")

VIII. THE MILITARY JUDGE ERRED IN DENYING THE DEFENSE A NEW TRIAL AFTER THE GOVERNMENT FAILED TO DISCLOSE EVIDENCE THAT WOULD HAVE CAST DOUBT ON ITS LINCHPIN EVIDENCE.

Prior to trial the defense requested the government produce evidence affecting the credibility of government witnesses, including Ms. Brenda Bissette Dew, a forensic biology analyst employed by the North Carolina State Bureau of Investigation (SBI) Crime Laboratory. Despite two separate and particularized defense discovery requests, the government disclosed no such evidence. Before trial, the defense learned on its own that the SBI Crime Laboratory was the subject of a state internal review and investigation. Knowing neither the scope nor depth of the investigation the defense requested a continuance to "get to the bottom of that" and to confirm the defense team in fact "received every document related to the work done by the SBI Lab in the 1980s." (JA 261). Specifically, the defense noted that Bissette Dew was possibly under investigation, and that there were definite "questions of contamination." *Id.* The military judge denied the continuance. (JA 263).

The defense counsel's concerns over Bissette Dew are evident throughout the record. (JA 1340-45). She was a government witness. (JA 590). Throughout the proceedings the government assured the defense team that the SBI investigation concerned only one analyst with no connection to this case. Based

entirely on this assurance the defense ceased pursuing the SBI issue altogether. (JA 2073, 2080). Then on March 18, 2010, the North Carolina Attorney General's Office expanded the goals of the investigation, including the goal of "determin[ing] if laboratory *analysts* accurately and completely reported lab reports." (emphasis added). Five months later—after the trial—that same office released "An Independent Review of the SBI Forensic Laboratory (Swecker-Wolf report)." (JA 2081). In that report an investigative team determined that Ms. Bissette Dew either misidentified or incompletely discussed blood evidence in twenty-four separate cases. *Id.*[123]

1. When the government denies a specific discovery request, it must prove its failure was harmless beyond a reasonable doubt.

The Due Process Clause of the Fifth Amendment guarantees that "criminal defendants be afforded a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). That guarantee requires the "trial counsel, the defense counsel, and the court-martial [to] have equal

[123] The Swecker-Wolf report spurred a journalistic investigation into the lab as well, and the results of that investigation are disturbing. Brenda Bissette Dew, who retired from the SBI, botched blood evidence in another capital case, swapping the victim's blood for that of the defendant. Mandy Locke and Joseph Neff, *Ex-SBI Analyst Defends Withholding Results*, Raleigh News and Observer, Aug. 20, 2010. Duane Deaver, a bloodstain analyst from SBI, jeopardized over 200 cases because of his shoddy work. Mandy Locke, *Discredited SBI Analyst Leaves Old Cases in Doubt*, Raleigh News and Observer, Feb. 21, 2011. These mistakes have serious implications, and not only in MSG Hennis's case.

opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." Article 46, UCMJ. Granted by Congress and the President, broad military discovery rules provide "more generous discovery . . . for [the] military accused" than the minimal requirements of pretrial disclosure required by the Constitution. *United States v. Eshalomi*, 23 M.J. 12, 24 (C.M.A. 1986); *see United States v. Guthrie*, 53 M.J. 103, 105 (C.A.A.F. 2000) ("Discovery in military practice is open, broad, liberal, and generous.").

An accused's right to discovery is not limited to evidence that would be admissible at trial. It "includes materials that would assist the defense in formulating a defense strategy." *United States v. Webb*, 66 M.J. 89, 92 (C.A.A.F. 2008). Nor is discovery limited to "matters within the scope of trial counsel's personal knowledge. The individual prosecutor has a duty to learn of any favorable evidence known to others acting on the Government's behalf." *United States v. Jackson*, 59 M.J. 330, 334 (C.A.A.F. 2004) (citations omitted); *see United States v. Williams*, 50 M.J. 436, 441 (C.A.A.F. 1999) (disclosure obligation extends to "the files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses," or "investigative files in a related case maintained by an entity closely aligned with the prosecution."). When the government fails to disclose discoverable evidence with respect to a "specific request . . . the appellant will be entitled to relief unless the Government

can show that nondisclosure was harmless beyond a reasonable doubt." *Jackson*, 59 M.J. at 334.

2. The government cannot disprove the harm caused by its failure to provide material impeaching a key witness.

The government cannot do so here. During trial, Ms. Bissette Dew testified for the government as an expert in forensic serology and established the chain of custody for critical prosecution exhibits, including blood samples (Pros. Ex. 76), a blood stain (Pros. Ex. 77), vaginal swabs (Pros. Ex. 78-79), blood evidence (Pros. Ex. 80), and luminol photographs (Pros. Ex. 94-96). Ms. Bissette Dew also vouched for the laboratory practices at the SBI lab and the blood testing she performed in this case and opined that her laboratory examination of the slides created by Dr. Butts contained spermatozoa. Ms. Bissette Dew's was a crucial witness for the government on matters relating to fact and as an expert witness.

The Swecker-Wolf report excoriated Bissette Dew's failure to properly identify and accurately discuss blood evidence in twenty-four other cases. (JA 2099). For example, the investigation revealed that the SBI analysts inaccurately determined an insufficient quantity of material existed to give a conclusive result, but those findings were erroneous. (JA 2098-99). Ms. Bissette Dew made significantly more errors than other analysts, logging twenty-four such errors compared to the runner-up, who logged five. (JA 2099). The report cast a similar

light on the wider SBI DNA laboratory, noting "disturbing" mistakes involving improper testing and misidentified DNA samples. And the SBI failed to engage in blind testing, which would have identified poor practices and erroneous results in all cases the SBI handled. Furthermore, and more significantly, the report casts doubt on both the credibility and competence of the SBI Lab and particularly Ms. Bissette Dew.

The military judge nonetheless found the Swecker-Wolf report was of "*de minimis* value" and its disclosure "would not have produced a substantially more favorable result for the accused in light of all other pertinent evidence presented at trial." (JA 2124). His ruling presumed the defense would not have impeached Ms. Bissette Dew because, based on other evidence available at trial, the defense opted against an impeachment strategy. This finding ignores the likelihood that the Swecker-Wolf report coupled with the other evidence available at trial would have led to a different trial strategy. The report undermines the credibility of both Ms. Bissette Dew and the entire crime laboratory.

The military judge further noted the Swecker-Wolf report had no bearing on "the results of the DNA testing done by experts other than Ms. Dew." (JA 2124). That finding also ignores that the chain of custody for the DNA testing originated

with Ms. Bissette Dew and the other analysts at the SBI crime lab. Indeed, the Swecker-Wolf report questions the reliability of results for later DNA evidence.[124]

Furthermore, the government's discovery violation must also be considered in light of the military judge's denial of access and testing of evidence and the military judge's denial of production of witnesses relevant to the defense's theory of the case. In short, the defense was denied access and funding to test crime scene evidence, the defense was denied production of witnesses needed to demonstrate that someone else may have committed the offenses, and the government failed to disclose that the lab and technicians responsible for testing the evidence had been impugned by a state investigation. These considerations raise meaningful doubts over the conduct and outcome of MSG Hennis's court-martial that warrant setting it aside.

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[124] The Army Court focused on Bissette-Dew's testimony that no evidence other than the spermatozoa linked MSG Hennis to the crime scene, and thereby concluded her testimony was more exculpatory than anything. In the Army Court's view, her testimony that no other evidence existed would have been diminished, and other witnesses could have testified regarding the spermatozoa on the slide. 75 M.J. at 827. But that simply does not make sense. No other witness could have presented evidence that connected MSG Hennis to the scene, because no other evidence existed. On the other hand, impeaching Bissette-Dew would have impeached the chain of custody, rendering the slide either inadmissible or its authenticity could have been so damaged that the panel would have given it little if any weight.

IX. TRIAL COUNSEL'S IMPROPER ARGUMENTS DENIED MSG HENNIS A FAIR TRIAL.

> Now, you saw evil and you heard an evil argument this morning. It's not enough that Katie Eastburn was murdered. The defense wants you to believe she cheated on you, Gary. She committed adultery. That's what the defense wants you to believe. That is a vile, disgusting, offensive argument. The defense said you don't know Katie Eastburn. There's a reason for that, because he killed her 25 years ago. You can't know her now, can you? Not unless you can pray and talk to her in your prayers. Unless you can hold a séance, you can't know her because she's been dead for 25 years.
>
> And when the defense doesn't get what they want through the DNA evidence, they've got to go for broke. They've got to do the Hail Mary. "Man, I tell you what, this DNA evidence—holy cow, this puts our guy at the scene. Oh, got to go consent now." And there is absolutely no evidence whatsoever before you that that man had consensual sex with Katie Eastburn. That is a vile, disgusting argument; and it is designed to try to plant doubt. It is designed to get you off the ball, to get you off the game. It gets you so shook up about the "should have, could have, would have" world that criminals live in to prey on some sort of doubt that's not reasonable but anything is possible so that you can get away from the main facts of this case. And the reason why is because they can't get behind—they can't get out from under a number and that's their problem. When you're desperate, you got to go for the Hail Mary.

(JA 1125-26).

This case has a history of inflamed arguments and inflamed verdicts. In 1986, "Hennis hysteria" gripped Cumberland County so strongly that it appeared to have a hold on the District Attorney's Office as well. (JA 1819). Despite the risks, the prosecutors purposefully stoked the passions of the jury with incendiary arguments and projections of "grotesque and macabre" images. *State v. Hennis*,

372 S.E.2d 523, 528 (1988). This strategy led to a predictable result: conviction at trial and reversal on appeal. *Id*. Twenty-four years later, trial counsel seemed set on courting the fervor of the members as well. And so government counsel struck up the worst refrains of bad argument: disparagement of defense counsel, allusions to terrorism and evil, personal invective, throwing the Army behind the evidence, and urging the members to imagine themselves as the victims. The outcome of that should be predictable too: reversal on appeal.

1. Trial counsel must argue on the basis of the record and reasonable inferences, not personal views, vitriol, and vilification.

The propriety of trial counsel's argument is reviewed de novo. *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017). The test for improper argument is "whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000). In the absence of an objection, improper argument is court reviewed for plain error, *United States v. Andrews*, 78 M.J. 393, 399 (C.A.A.F. 2018), though the challenges of capitally convicted appellants merit more careful consideration. *See United States v. Thomas*, 46 M.J. 311, 315 (C.A.A.F. 1997)..

Trial counsel's commentary "carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *United States v. Young*, 470 U.S. 1, 18-19

(1985). The members may "place great confidence in the faithful execution of the obligations of a prosecuting attorney," and "improper insinuations or suggestions by the prosecutor are apt to carry great weight against a defendant and therefore are more likely to mislead a jury." *United States v. Carter*, 236 F.3d 777, 786 (6th Cir. 2001) (citations omitted). Trial counsel must therefore adhere to the evidence of record and the reasonable inferences derived therefrom, and forego arguments that "unduly . . . inflame the passions or prejudices of the court members.'" *United States v. Frey*, 73 M.J. 245, 248-49 (C.A.A.F. 2014). Nor may a trial counsel inject irrelevant matters, such as personal opinions and facts not in evidence, into the argument. *United States v. Fletcher*, 62 M.J. 175, 1831 (C.A.A.F. 2005); *see also United States v. Schroder*, 65 M.J. 49, 58 (C.A.A.F. 2007). When trial counsel's commentary tends to incite the members, "there is a fair risk that the accused was prejudiced by the prosecutor's remarks." *See United States v. Shamberger*, 1 M.J. 377, 379 (C.M.A. 1976).

2. Trial counsel's improper arguments denied MSG Hennis a fair hearing.

This Court cannot be confident that the members convicted MSG Hennis on basis of the evidence, as trial counsel used a broad stratagem of inflammatory arguments to incite them to a finding of guilt.

a. The government's litany of improper arguments during the findings phase was clearly erroneous.

At this court-martial, the government put on a tour de force of improper argument: disparaging counsel, fearmongering, encouraging a conviction for the good of the community, personally vouching for the evidence, and exhorting the members to imagine they were the victims. And that was just during the findings phase of trial. It was a display of unrestrained zeal, and it undermined MSG Hennis's right to a fair trial on the evidence of record, not the polemics of trial counsel.

i. Trial counsel disparaged MSG Hennis's defense counsel.

This was not a case of government counsel delivering "hard blows" against defense arguments, but rather "foul" ones leveled directly at defense counsel. *Berger v. United States*, 295 U.S. 78, 88 (1935). A "prosecutor may not simply belittle the defense's witnesses or deride legitimate defenses." *Wogenstahl v. Mitchell*, 668 F.3d 307, 329-30 (6th Cir. 2012) (citations omitted). *Ad hominem* attacks "detract from the dignity of judicial proceedings." *United States v. Fletcher*, 62 M.J. 175, 181 (C.A.A.F. 2005) (citations omitted). Beyond that, however, disparaging remarks about defense counsel "may cause the jury to believe that the defense's characterization of the evidence should not be trusted, and, therefore, that a finding of not guilty would be in conflict with the true facts of

the case." *Id.* at 181. Courting disdain for the defense, when it has the sobering burden of fighting for a man's life, degrades the court-martial and besmirches the government's office.

Trial counsel appears to have forgetten that his "obligation to desist from the use of pejorative language . . . is every bit as solemn as his obligation to attempt to bring the guilty to account." *United States v. Rodriguez–Estrada,* 877 F.2d 153, 159 (1st Cir. 1989). Instead, he launched a rebuttal full of invective, impugning the defense argument as "evil," "vile, disgusting," and "offensive." (JA 1125). As if playing to the tropes some panel members held against defense counsel, *see infra* Assignment of Error XI, trial counsel insinuated that the defense was scurrilously throwing the victim "under the bus. She can't respond, so we threw her under the bus." (JA 1152-54). Trial counsel wanted the defense to be seen as "monstrous," and by association, their client too. (JA 1153). This kind of angry jeremiad goes beyond the bounds of fair commentary. *See Fletcher,* 62 M.J. at 181. It was not a "slip of the tongue," but instead a sustained and calculated strategy. *See United States v. Carter*, 61 M.J. 30, 33-34 (C.A.A.F. 2005). It should pay a cost for such flagrancy.[125]

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[125] *See*, *e.g.*, *United States v. Friedman*, 909 F.2d 705, 709 (2d Cir. 1990) (finding prejudicial error where the prosecutor made several comments highlighting questionable ethics and motivations of defense counsel); *United States v. Murrah*, 888 F.2d 24, 27 (5th Cir. 1989) (reversing because the prosecutor improperly accused defense counsel of hiding an expert witness to prevent government's use

ii. Trial counsel instructed the panel that they were the conscience of the Army and they needed to send the world a message.

Trial counsel encouraged the panel in this capital case to make a message out of its verdict. "You are the conscience of the Army. Well, let me tell you something. Verdicts in courts-martial around the world send a message, and they reflect how our Army, our military values things. What is acceptable behavior and what is unacceptable behavior." (JA 1179). This kind of "send a message" argument is improper anywhere,[126] but it is particularly combustible in military courts. *United States v. Sherman*, 32 M.J. 449, 451 (C.M.A. 1991); *see also United States v. Boberg*, 38 C.M.R. 199, 203-24 (C.M.A. 1968) (comments that accused's conduct embarrassed the United States and frustrated the mission were inappropriate and required reversal of the sentence, even without a defense objection).

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of the witness); *United States v. McLain*, 823 F.2d 1457, 1462-63 (11th Cir. 1987) (reversing under plain error review due in part to prosecutor's repeated statements that defense counsel "intentionally misle[d] the jurors and witnesses and . . . [lied] in court"), *overruled on other grounds United States v. Lane*, 474 U.S. 438, 449 (1986); *McDonnell v. United States*, 457 F.2d 1049, 1052-53 (8th Cir. 1972) (censuring a prosecutor for describing defense counsel's offer of proof as a "common trick.").

[126] Recognizing the power such an argument can have on a jury, Pennsylvania has a per se prejudice rule when a prosecutor asks a jury to "send a message" in a capital case. *Commonwealth v. DeJesus*, 860 A.2d 102, 119 (Pa. 2004).

iii. Trial counsel compared MSG Hennis's motive to that of a terrorist.

Trial counsel then alluded to the terrorist attacks of September 11, 2001, and shootings on military installations, thereby conjuring some association between those acts and MSG Hennis. (JA 1124, 1171). Linking or likening the accused to "evildoers" invites prejudice. The case of *Cauthern v. Colson*, 736 F.3d 465, 474-75 (6th Cir. 2013) serves as a good example. There, the prosecutor used his rebuttal argument to call the accused "the evil one," liken him to serial killers and cannibals, and ask the jury to "send a message" and "destroy" the accused. *Id.* The "extensive and egregious nature of the prosecutor's remarks" precluded confidence in the jury's result, and the court reversed. *Id*. at 478, 489.

Trial counsel's arguments were no better than those in *Cauthern*. While the defense argued that MSG Hennis had no motive to kill the Eastburns, trial counsel took it as license to state: "And he asked you why—why would someone do that? Why would they do that? How could they? Why would someone fly a plane into a building? Why would someone take a weapon in a military installation and start firing it?" (JA 1124). This was not fair commentary; it was incitement.

iv. Trial counsel personally vouched for the government's "linchpin" evidence.

Trial counsel had one more round to fire on rebuttal: implying that the Army itself was vouching for its DNA evidence. "What is more credible? What is more

believable? DNA in this case, that number right there [pointing to Appellate Exhibit 510] —that number—everyone of you know Army regulations require you to give a DNA sample. Why is that? Because the Army believes in DNA." (JA 1144). The military judge properly sustained the defense objection, but that could not divert trial counsel, who continued:

> You give a sample and it may be used for identification. Now, if DNA is good enough to inform grieving family members that. 'It's okay now.' Your husband, your wife, your son, your daughter can rest easy because he or she has been identified,' then why is DNA not good enough to identify a murderer? That's a question I want you to think about. With all of these whys and should have, would have, could have, I ask you why is it that we can identify fallen heroes around the world and yet we cannot identify a murderer when it's locked, solid shut?

(JA 1144). Trial counsel then misstated the law and claimed the DNA evidence was credible because defense counsel did not object to its admissibility. (JA 1146).

v. Trial counsel used "Golden Rule" arguments to further inflame the members.

Rule for Courts-Martial 919 confines the bounds of closing argument to reasonable comments on the evidence and reasonable inferences concerning "testimony, conduct, motives, interests, and biases of witnesses to the extent supported by the evidence." This precludes trial counsel from the so-called "Golden Rule" arguments of asking the members to put themselves in the shoes of the victims or relatives. This "'Golden Rule' appeal . . . is universally recognized

as improper because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence." *United States v. Teslim*, 869 F.2d 316, 328 (7th Cir. 1989). This Court has soundly rejected it.[127]

Yet again, trial counsel was prepared to jettison this norm too. The "Golden Rule" was central to its entire trial strategy. The government's opening statement invited the members to stand in for the father and husband of the murder victims, to imagine themselves away on duty waiting for his family to answer his phone call, unable to protect them. (JA 575, 578-79). "Members of the Panel, the phone is ringing. Justice is calling; and at the end of this case, it will be time for every single one of you to answer that call." (R. at 3878). Trial counsel picked up the refrain in closing arguments, returning to the ringing telephone and role of father and husband. (JA 1123). This was all meant to have members weigh the evidence as if they were victims' father and husband.

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[127] *See*, *e.g.*, *United States v. Marsh*, 70 M.J.101, 107 (C.A.A.F. 2011) ("Trial counsel's invitation to the court members to imagine themselves as potential future victims only served to inflame a fear as to what might happen if the panel did not adjudge a discharge."); *United States v. Shamberger*, 1 M.J. 377 (C.M.A. 1976) (trial counsel inflamed the panel by asking the members to imagine being a soldier pinned to the ground as the accused and two other men took turns raping his wife); *United States v. Wood*, 40 C.M.R. 3 (C.M.A. 1969) (trial counsel's argument was improper when he asked the panel to sentence the accused as if their own sons had been the victims).

If there was any doubting that, the government's rebuttal made clear that it wanted the members to imagine themselves as the victims' loved one, and also as the victims themselves:

> You have to think, what's going on in her mind? 'Oh my God, my husband's not here. Help is not on the way. I've got to protect my children. Do anything you want to me, but save my children. I will submit. I'll do anything, but please save my children.'

(JA 1176).

b. The government continued its improper arguments in order to get MSG Hennis sentenced to death.

What the government started in the findings phase it continued in sentencing. Improper arguments deserve repudiation in court-martial, but when the irreversible penalty of death is considered, there can be no room for doubt in the members' decision. Trial counsel's improper arguments ensured any sentence of death would engender such doubts.

Trial counsel took a three step approach to inflaming the members at sentencing. First, delegitimize MSG Hennis's right to present mitigation. Second, blame him for the 25 years of delay he had no part in making. Third, return to the "Golden Rule" arguments and argue for death.

i. Trial counsel made derogatory comments concerning MSG Hennis's fundamental right to present mitigation.

Trial counsel cannot gainsay the accused's right to present mitigating evidence. *See United States v. Paxton*, 64 M.J. 484, 487 (C.A.A.F. 2007). The Constitution guarantees capital defendants' ability to present evidence relating to "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion). Rule for Court Martial 1004(b)(3) further ensures the capital accused's right to present robust mitigation and extenuation evidence. *See United States v. Gray*, 51 M.J. 1, 39 (C.A.A.F. 1999). Sentencing juries "must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future." *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007).

Trial counsel denigrated that right. During the government's sentencing argument, trial counsel openly questioned the propriety of MSG Hennis's mitigation matters, exclaiming: "I ask you this, how dare they ask you to look at pictures of Sergeant Hennis opening presents with his kids in front of a Christmas tree?" (JA 1207). Defense counsel objected, and the military judge sustained the

objection and reminded the members to give "due consideration" to MSG Hennis's sentencing matters. (JA 1207). But it clearly had no effect on trial counsel, who continued to vilify MSG Hennis for having lived his life. (R. at 7161). "How dare they ask you to look at pictures of Sergeant Hennis sitting on the couch reading a book to his kids." (JA 1207). Trial counsel followed this up later with this: "The accused, a convicted murderer, sits in this courtroom and wants you to look at pictures of him and his kids and his retirement with his parents at Disneyland." (JA 1208). For a trial counsel bent on sending "messages," this one was clear: MSG Hennis has no right to humanize himself, and disregard the military judge if he tells you otherwise.

This was a boldly ludicrous attack, one that would have fit beautifully in a Joseph Heller novel.[128] But it had no place in a court-martial. If living a normal, upright life merits the death penalty, then nothing can mitigate; the argument was a naked attack on mitigation in any form. These arguments were "so egregious that they effectively foreclose[d] the jury's consideration of . . . mitigating evidence," and the members were "unable to make a fair, individualized determination as required by the Eighth Amendment." *See DePew v. Anderson,* 311 F.3d 742, 748

[128] *See*, *e.g.*, JOSEPH HELLER, CATCH-22 406 (Laurel Dell Pub., 1994) ("he was jeopardizing his traditional rights of freedom and independence by daring to exercise them.").

(6th Cir. 2002) (citations omitted). Such conduct warranted reversal in *DePew*, and it warrants the same here.

ii. Trial counsel encouraged the panel to sentence MSG Hennis more harshly because the government had taken 25 years to bring this court-martial.

Trial counsel peppered the government's argument with references to the "25 years" it took to "get justice." (JA 1196-99). As Assignment of Error V, sec. 3(b)(ii), *supra*, developed in detail, this was disingenuous and improper *ipso facto*. When the government waits 25 years to try a case, it cannot blame the accused for the time that passed.

iii. Trial counsel asked the members to place themselves in the shoes of the victims and victims' relatives.

The government returned to the "Golden Rule" strategy of argument it had relied on during the findings phase, and then ran it to the hilt. "Imagine the fear," trial counsel urged. (JA 1204). Imagine, he continued, the "age where your parents tell you monsters aren't real. And when you lay [*sic*] in bed and you close your eyes and hide under the blanket thinking I can't see them so they can't see me. Imagine the screams." (JA 1205). Finally, trial counsel directed the panel to imagine what Kathryn Eastburn was thinking while she was being murdered in determining an appropriate sentence. "I wonder if Katie begged for mercy in her living room and in her bedroom. I wonder if Katie begged for mercy for her

children. I wonder if her children begged for mercy before they were slaughtered. Remember that when the defense talks about—if they talk about—mercy." (JA 1213).

It is clear that trial counsel sought for the members to fashion their findings "upon blind outrage and visceral anguish, not cool, calm consideration of the evidence and commonly accepted principles of sentencing." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000) (citations omitted). Trial counsel never addressed whether death was the appropriate sentence based on the evidence presented. Instead, the government sought to personalize the experiences of the victims, in other words to imagine that they were away while their family members were being slaughtered. While victim impact evidence is permissible, speculation as to fear and emotion is not. Master Sergeant Hennis did not receive the individualized sentencing determination required by the Eighth Amendment.

3. The sustained and severe nature of trial counsel's arguments vitiated any certainty that MSG Hennis was fairly tried and sentenced on the merits.

In determining whether prejudice resulted from prosecutorial misconduct, this Court looks at "the cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial." *United States v. Hornback*, 73 M.J. 155, 160 (C.A.A.F. 2014). The "best approach" to this inquiry is to the balance the following factors: "(1) the severity of the misconduct,

(2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." *Id.* In doing so, this Court will find for an accused if "trial counsel's comments, taken as a whole, were so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone." *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005).

a. The sustained and determined pattern of improper argument was severe.

Trial counsel's comments were not isolated statements but a persistent leitmotif throughout opening, closing, rebuttal, and sentencing. *See Jenkins v. Artuz*, 294 F.3d 284, 294 (2d Cir. 2002) ("Standing alone, a prosecutor's comments upon summation can 'so infect [a] trial with unfairness as to make the resulting conviction a denial of due process.'") (citations omitted). Some of trial counsel's worst invective spewed during the government's rebuttal argument, when defense counsel could not reply; impropriety that infected "the last words from an attorney that were heard by the jury before deliberations." *United States v. Carter*, 236 F.3d 777, 788 (6th Cir. 2001). "The potential for prejudice is great during closing arguments, especially when the defense has no opportunity for rebuttal." *United States v. Holmes*, 413 F.3d 770, 774-77 (8th Cir. 2005) (finding reversible error); *see also United States v. Cannon*, 88 F.3d 1495, 1503 (8th Cir. 1996) (reversing a

conviction because the prosecutor's improper "remark came during rebuttal arguments, [when] defense counsel was unable to respond except by objection.").

Trial counsel's improper comments strayed well outside the bounds of any evidence in the record and any legitimate response to the defense's arguments. They were an invitation to favor irrelevant and inflammatory considerations over the evidence, and they permeated MSG Hennis's court-martial. *Fletcher*, 62 M.J. at 184.

b. The military judge's curative measures were too few, too weak, and too fleeting to deter trial counsel.

The military judge made minimal efforts to remedy trial counsel's misconduct. In *Fletcher,* this Court noted that "the judge should have interrupted trial counsel before she ran the full course of her impermissible argument. Corrective instructions at an early point might have dispelled the taint of the initial remarks." *Fletcher*, 62 M.J. at 185 (citations omitted). A military judge has a sua sponte duty to ensure an accused receives a sentence which is not the product of an improper inflammatory argument; in this case the military judge failed to instruct the panel on the improper nature of trial counsel's theme throughout MSG Hennis's court-martial. *See Shamberger,* 1 M.J. at 377.

When the military judge did issue curative instructions, they had little effect. Trial counsel would just return to the same thread of improper argument. (JA

1143, 1179, 1208). Then trial counsel would move on to another improper insinuation or incitement. The military judge never once scolded trial counsel or warned the government that some consequence might result from this injurious course of conduct. Indeed, by the time of closing remarks, trial counsel had learned that there were no consequences to theatrics and inappropriate argument, the military judge's admonishments were toothless.[129] This was a capital murder trial, as grave and as solemn a proceeding as a court-martial may try, and trial counsel just rode roughshod over the norms of prosecutorial conduct. Trial counsel must have forgotten that he was a "servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer . . . . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger*, 295 U.S. at 88. On the facts of this case, it is "impossible to say that the evil influence upon the

[129] Trial counsel repeatedly disregarded the military judge's directions to conduct redirect examination, and not argument, for example. *See*, *e.g.*, JA 852 ("Counsel, let's save some things for argument and ask some questions."); JA 854 ("Counsel, let's ask questions . . . And let's pick up the litter here."); JA 855 ("Editorial comments are not appropriate during questioning."); JA 856 ("Counsel, you may ask the questions; but you need to save some things for argument."); JA 856 ("This is not cross. Please ask non-leading questions in a non-theatrical manner."); JA 859 ("You may ask some questions in a non-leading manner. Just try to focus on this case."). Defense counsel's exasperation eventually boiled over: "Your Honor, I object again. He's doing the exact same thing . . . he's not following your instruction, and he needs to focus this witness to information that he has and stop giving speeches to the court members." (JA 856).

[members] of these acts of misconduct was removed by such mild judicial action as was taken." *Id.* at 85.

c. This was a case that could have resulted in yet another acquittal, and failing that, a life sentence.

Master Sergeant Hennis was acquitted of the same charges once before, and this panel could have come to the same conclusion; a finding of guilt was not inevitable. Indeed, had the trial actually been a fair one, unencumbered by the decades of delay and disserving denials of defense resources, acquittal was far more certain. As for the sentence, the members had more than enough evidence to reject a death sentence, even if what they had fell short of what they should have had. "The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity." *Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J., concurring). If a man has any humanity left, then the State should spare him and itself from the grim and irreversible task of execution. The members may have maintained this view of capital punishment, and no one fairly looking at the *evidence* could conclude that MSG Timothy Hennis—a father, husband, and career servant of this country—is so utterly lacking in humanity that he is "not fit for this world." *Id*. This Court cannot be confident that a death sentence was inevitable in this case, and so it must set this one aside.

X. THE DESTRUCTION OF EVIDENCE HINDERED MSG HENNIS'S ABILITY TO PRESENT A COMPLETE MITIGATION CASE, AND THE MILTIARY JUDGE ERRED BY FAILING TO SET ASIDE THE CAPITAL REFERRAL.

Master Sergeant Hennis served over three years in confinement in North Carolina for the same charges he was convicted and sentenced by court-martial. From May 16, 1985 to December 15, 1985, MSG Hennis was in pretrial confinement pending his first trial in North Carolina. Following his conviction MSG Hennis spent nearly three years in civilian confinement from July 4, 1986 to April 19, 1989 before his conviction was overturned on appeal and he was acquitted at his second trial. All of his confinement was within the North Carolina penal system.

In 2009 the defense requested MSG Hennis's inmate records in preparation for his court-martial. The defense received from the North Carolina Department of Corrections only MSG Hennis's visitor logs and cell assignments. (JA 1987-89). These "records" were simply a computerized summary record of MSG Hennis confinement; a similar printout is retained for every inmate in the state. (JA 1987-89). But MSG Hennis's physical prison record was no longer retained. (JA 1987-89). The North Carolina records custodian stated that because MSG Hennis was

released his record had been destroyed.[130] (JA 1987-89). No other state agency could provide a prison record for MSG Hennis.

On December 2, 2009, the defense filed a motion requesting that the court set aside the capital referral because MSG Hennis was deprived of important mitigation evidence. (JA 1987-89). The defense proffered that MSG Hennis had been a model prisoner, thus his prison records would be key mitigating evidence in arguing for a life sentence. (JA 1987-89). The destruction of the prison records combined with the lengthy delay in prosecuting MSG Hennis's case by the military eliminated the defense's ability to present non self-serving sources of this evidence.

1. An accused is entitled to present mitigation evidence showing his ability to peacefully adjust to life in prison.

An accused has a constitutional right to present mitigating evidence during sentencing. *Lockett,* 438 U.S. 586. This is especially true in capital cases where the sentencing authority must not "be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."

[130] The electronic record merely indicates that the North Carolina Department of Corrections released MSG Hennis on October 31, 1988. At that time he was transferred to civilian confinement in Cumberland County and New Hanover County, North Carolina, until his acquittal.

Eddings v. Oklahoma, 455 U.S. 104, 110 (1982). Equally important is the principle that the "sentencer may not refuse to consider or *be precluded from considering* any relevant mitigating evidence." *Id.* at 114 (emphasis added).

To impose a death sentence requires the panel member to be able to consider a defendant's ability "to make a well-behaved and peaceful adjustment to life in prison." *Skipper v. South Carolina,* 476 U.S. 1, 7 (1986). In addressing the role of the panel member the Supreme Court has also acknowledged that "consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing: any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose." *Jurek v. Texas*, 428 U.S. 262, 275 (1976). These character traits are "by [their] nature relevant to the sentencing determination." *Skipper*, 476 U.S. at 7. Precluding a panel from considering such evidence violates the Eighth Amendment.

2. The destruction of MSG Hennis's inmate records harmed his ability show he would serve confinement peacefully, and thereby merit a sentence less severe than death.

The state's destruction of MSG Hennis's prison records prevented MSG Hennis from presenting a full and fair mitigation case. Master Sergeant Hennis spent three years confined in circumstances that would mirror any future confinement—precisely the type of information a panel would find compelling in

deciding upon a sentence of life or death. Yet, when defense counsel brought this issue before the military judge pursuant to *Skipper*, the military judge provided no remedy to protect MSG Hennis's constitutional right to present evidence of his character and behavior during this three-year period. (JA 2042). The government even conceded this evidence was mitigating. (JA 1991).

Master Sergeant Hennis was denied the opportunity to present relevant mitigating evidence in a form that the panel members would likely credit. The government destroyed the records and then offered appellant no way to work around that destruction. The only alternative presented to MSG Hennis was that he could himself testify as to his adaptability to confinement based upon available records. This facile response misses the holding in *Skipper* that a defendant has a constitutional right to present mitigating evidence in a way the jury would credit, not simply through the defendant's self-serving testimony. 476 U.S. at 8. Master Sergeant Hennis was left with the choice of testifying, which the panel would consider self-serving and thus less credible, or presenting the testimony of prison officials with no independent recollection of MSG Hennis and no extant records to rely upon to refresh their recollection. The government decided to refer this old case capitally, but it is MSG Hennis that was placed at a disadvantage.

While failing to recognize the critical importance of the *Skipper* evidence, the military judge also failed to understand that the absence of such evidence, through

government action and not the fault of MSG Hennis, prevented the court-martial from considering the full range of punishments. (JA 2042). Nothing in *Skipper* indicates that those Eighth Amendment principles can be overridden by the government's destruction of evidence, even if done so in good faith. The Eighth Amendment demands more. Allowing this case to proceed as a capital trial, with MSG Hennis eventually being sentenced to death absent such relevant and powerful mitigating evidence is a clear violation of his constitutional rights. This Court should set aside MSG Hennis's capital sentence.

XI. THE MILITARY JUDGE ABUSED HIS DISCRETION IN RESTRICTING DEFENSE COUNSEL'S VOIR DIRE AND IN SEATING, OVER OBJECTION, MEMBERS WHO DISTRUSTED DEFENSE COUNSEL AND COULD NOT CONSIDER MITIGATING EVIDENCE.

An accused's due process protections are for naught if the panel members judging him are not fair and impartial. Whether out of ignorance, misunderstanding, or a rush to get the trial over and done, the military judge's restrictions on defense counsel's voir dire were unreasonable and unwise. In a case so prone to inflamed passions and presumptions, a meaningful examination of the venire is imperative. Liberal voir dire and the liberal granting of defense challenges are the best tools for ensuring a fair panel. The military judge used neither, however, and the result was a panel unable to follow its instructions in this

life or death case. This undermines the reliability of their findings and sentence, and this Court should set them aside.

1. Master Sergeant Hennis was entitled to a panel that would fairly consider matters in mitigation and extenuation.

A sentence of death may not be imposed unless, *inter alia*, "All members concur that any extenuating or mitigating circumstances are substantially outweighed by any [admissible] aggravating circumstances." R.C.M. 1001(b)(4)(c). This rule recognizes not only the right of a capital accused to extenuating and mitigating evidence, but also its extreme importance. It is, fundamentally, a constitutional matter: a sentence of death can only be imposed where the members have rendered "a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime." *Kansas v. Marsh*, 548 U.S. 163, 174 (2006). Procedures like R.C.M. 1004 are necessary, but they are meaningless if the members will not follow them. The defense's ability to ensure a fair panel that will apply R.C.M. 1004(b)(4)(C) faithfully is just as vital as its ability to present mitigation evidence in the first place.

a. The right to present evidence in mitigation and extenuation only has value when the members will weigh it fairly.

"As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel." *United States v. Wiesen*, 56 M.J.

172, 174 (C.A.A.F. 2001). In the context of capital sentencing, the accused also has a right to an individualized verdict, one that accounts for the offender as well as the offense. The gravity of capital offenses and capital punishment can strain the fairness and impartiality of some members to the point that they may be unable to deliver an individualized verdict. The touchstone question is whether the prospective member's views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *United States v. Quintanilla*, 63 M.J. 29, 36 (C.A.A.F. 2006) (citing *Wainwright v. Witt*, 469 U.S. 412, 424 (1985)).

A member "who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do." *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). The accused must be able to present his case for life, and the members must be open to it. It is "not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence." *Tennard v. Dretke*, 542 U.S. 274, 278 (2004) (citations omitted).

b. Voir dire is a vital tool for rooting out bias, partiality, and unfairness.

Sometimes members openly reveal their inflexible views on capital punishment. The defense may challenge such members for cause, and "if even one

such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence." *Morgan,* 504 U.S. at 729. Oftentimes, however, prospective members do not voice their opinions fully. As the Supreme Court observed, many potential members "may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings." *Wainwright*, 469 U.S. at 425. Moreover, a member could, "in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her of doing so." *Morgan*, 504 U.S. at 735-36. Few people think themselves unfair, and fewer still will acknowledge it in open court.

This means the military judge must give defense counsel sufficient freedom to voir dire the venire.[131] Robust voir dire "plays a critical function in assuring the criminal defendant that his constitutional right to an impartial jury will be honored;" without it, the military judge's duty to remove members harboring inflexible views on capital punishment "cannot be fulfilled." *Morgan*, 504 U.S. at

[131] At least in civilian capital cases, "defense counsel are expected to do a searching inquiry of potential jurors to 'life-qualify' a jury, meaning they should 'conduct a voir dire that is broad enough to expose those prospective jurors who are unable or unwilling to follow the applicable sentencing law, . . . [or] unwilling to consider mitigating evidence" in order to strike them from the panel." *United States v. Akbar*, 74 M.J. 364, 424 (C.A.A.F. 2015) (Baker, J., dissenting) (citing ABA Guideline at 10.10.2.).

729-30. Even if "the adequacy of voir dire is not easily the subject of appellate review," military judges must still use their discretion wisely. *Id*. In the context of a capital murder case, "[v]oir dire is, without exaggeration, a matter of life and death." *United States v. Akbar*, 74 M.J. 364, 423 (C.A.A.F. 2015) (Baker, J., dissenting).

2. The military judge unreasonably restricted defense counsel's efforts to uncover panel member views on capital punishment.

Unfortunately the military judge did not exercise his discretion appropriately in this court-martial. Defense counsel sought to reach a panel member's views through a series of hypothetical questions. The purpose of the hypothetical was to test whether, at the point of findings, a prospective member would be "prevented or substantially impaired" from considering evidence in mitigation. The vast majority of panel members lack legal background and training. It would be of little use in uncovering bias to ask a prospective panel member's view on the death penalty without defining premediated murder, eliminating confusion regarding mitigation evidence, and considering this particularly aggravated class of cases.

In this case, the military judge conducted voir dire over the course of ten days, stretched over three weeks. There were four groups of prospective panel members who were subject to voir dire for a total of thirty-nine members, of whom, fourteen were empaneled. At the outset of voir dire, the military judge

permitted defense counsel some limited opportunity to ask panel members hypothetical questions to frame the issue of their death penalty views, particularly in a case involving the premeditated murder of children. During the voir dire of CSM Lincoln, who was questioned near the end of the first group, the military judge limited defense counsel's voir dire to "generally what their views are on the death penalty." (R. at 2437). In response to additional argument and request for clarification, the military judge provided a list of "abstract questions about the death penalty" that he would permit. (R. at 3010-11). After his ruling, there were fewer questions and four members were selected out of the final group.

After the military judge's ruling, the defense challenged CSM Kirkover for cause based on his statements that he was inclined to find law enforcement to be more credible and on his views on the death penalty. During the defense's group voir dire, CSM Kirkover agreed that death was the appropriate punishment in cases involving premeditated murder. In individual voir dire, defense counsel posed the question: "If I put it to you this way, if a panel were to unanimously find an accused guilty beyond a reasonable doubt of the premeditated murder of a mother and two children, do you, based upon your personal, moral and ethical values believe that the death penalty is appropriate?" Command Sergeant Major Kirkover responded: "I would think that it would be appropriate." (JA 561). The military asked a few follow-up questions and CSM Kirkover amended his answer to "an

appropriate punishment." (JA 563). Defense counsel asked whether he could consider specific information in mitigation. He responded: "I would listen to everything that's furnished. It seems to be—I just can't imagine why anybody would kill a child. I can't imagine that." (JA 565). He later listened to defense counsel's explanation of mitigation evidence and concurred that it should be considered. Ultimately, the defense challenge of CSM Kirkover for cause was denied. (R. at 3496-99).

The impact of the restrictions was also apparent in the questions posed to SGM Delgado. The defense questioned: "Now if the panel were to unanimously find an accused guilty beyond a reasonable doubt of the premeditated murder of young children, would you automatically vote to impose the death penalty in that case?" (R. at 3741). The military judge cut off the questioning of Delgado before counsel could establish grounds for challenge. Lacking a clear basis, defense counsel declined to challenge him.

The military judge erred in restricting the defense's ability to voir dire potential panel members. The military judge failed to refer to or apply the requirements of *Morgan* and *Wainwright*. (JA 383, 512; R. at 1917, 2092, 2321, 2359, 2467). The military judge denied the use of appropriate hypothetical questions, and questioning that would assist in determining a juror's ability to

consider and give effect to mitigation evidence. (R. at 2099, 2369, 2494, 2529, 2550, 2552, 2611, 2702).

Here, the military judge's restrictions prevented the defense from establishing grounds to challenge the remaining prospective panel members. The record is unclear and incomplete because the defense was foreclosed from conducting sufficient inquiry consistent with the constitutional standard. The rulings of the military judge raise the issue of structural error. *See generally*, *United States v. Brooks*, 66 M.J. 221 (C.A.A.F. 2008). "Structural errors involve errors in the trial mechanism" so serious that "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence."). In such an instance, there are two tests for whether reversal is appropriate based on the error: 1) when the effect of the violation is difficult to ascertain and 2) when harmlessness is irrelevant. In this instance, the impact of the military judge's ruling restricting voir dire after CSM Lincoln is impossible to determine. The statements of CSM Kirkover and Delgado highlight thet likelihood that members harbored inelastic beliefs that were not properly explored.

3. The military judge failed to exclude members who viewed defense counsel with disfavor and expressed an ability to impose an individualized sentence in this case.

At least two members of the panel, Lieutenant Colonel Boyd and Major Weidlich, could not be impartial in a case involving the premeditated murder of

children. Their answers to open-ended questions revealed a predetermined view that death was the only penalty fitting such a crime. (JA 438, 504). Their views flowed from their experiences as fathers of young children, and the government's efforts to rehabilitate them only highlighted how strongly their beliefs would overshadow their abilities to fairly consider mitigating evidence.

Lieutenant Colonel Boyd believed that the premeditated murder of a child was "unforgivable" and believed that death was the more merciful alternative because "it frees them from having to think about it for the rest of their lives." (JA 547). Major Weidlich stated that he was inclined to vote for death in cases involving the premeditated murder of children. (JA 507). Their answers reflected actual bias and, also, created an unacceptably high "risk that the public will perceive that the accused received something less than a court of fair and impartial members." *United States v. Townsend*, 65 M.J. 460, 463 (C.A.A.F. 2008). They should have been excluded fomr this court-martial.

They may have been unsuitable for this court-martial, but LTC Watson may not have been suitable for any court-martial. His stated prior experience as a police officer led him to distrust defense counsel. A member who will presume defense counsel is less credible because he or she is representing the accused is a member who's already started on one side of the case. Lieutenant Colonel Watson should have been excluded from this court-martial as well.

a. The military judge's failure to exclude members from the panel is reviewed for an abuse of discretion.

The Court reviews "implied bias challenges pursuant to a standard that is 'less deferential than abuse of discretion, but more deferential than de novo review.'" *United States v. Peters*, 74 M.J. 31, 33 (C.A.A.F. 2015) (citations omitted). Although the Military Judge may be afforded greater deference when he places his analysis on the record, "[i]ncantation of the legal test for [implied bias] without analysis is rarely sufficient in a close case." *Id*. at 34. Further, the record must show that the grounds for the challenge were given serious and careful consideration. *Id*. (citations omitted). When the military judge fails to provide a clear signal that he applied the correct law, the "analysis logically moves towards a de novo standard of review." *United States v. Dockery*, 76 M.J. 91 (C.A.A.F. 2017) (citations omitted).

The Court reviews a military judge's ruling on a challenge for cause based on actual bias for "a clear abuse of discretion." *United States v. James*, 61 M.J. 131, 132 (C.A.A.F. 2005). An abuse of discretion occurs "if the military judge's findings of fact are clearly erroneous or if the decision is influenced by an erroneous view of the law." *United States v. Quintanilla*, 63 M.J. 29, 35 (C.A.A.F. 2006) (citation omitted).

Furthermore, this review should be understood in light of this Court's liberal grant mandate, which is just that: a mandate and not a suggestion. *United States v. Clay*, 64 M.J. 274, 277 (C.A.A.F. 2007). "This mandate stems from a long-standing recognition of certain unique elements in the military justice system including limited peremptory rights and the manner and appointment of court-martial members that presents perils that are not encountered elsewhere." *Peters*, 74 M.J. at 34 (citations omitted). Military judges must grant defense counsel's challenges for cause liberally. This military judge, however, displayed considerable parsimony in ruling on the challenges of MSG Hennis's defense, and clearly unsuitable members were seated and tasked with determining guilt or innocence, life and death.

b. Lieutenant Colonel Watson expressed impermissible bias against defense counsel and in favor of law enforcement.

The defense challenged LTC Watson for cause because of his experience as a law enforcement officer and his negative views towards defense counsel. (JA 416-18). Lieutenant Colonel Watson previously served as a city police officer for four years. (JA 264). He was subject to cross-examination as an officer, and defense counsel had suppressed evidence by challenging his credibility. (JA 378-80). Lieutenant Colonel Watson explained "that didn't sit well with him" and it caused him to dislike defense counsel. (JA 380).

This was an obvious candidate for excusal. A member's personal distrust of defense counsel is not a handicap any accused should suffer. The military judge's conclusion that "no reasonable person could conclude that he is biased against any party in this case" is hard to take seriously. (JA 427). A panel member who still smarted from being successfully cross-examined years ago should not have sat in judgment in a case that required so much lawyering. The military judge's failure to follow the liberal grant mandate is inexplicable.

c. Lieutenant Colonel Boyd's predisposition to impose a death sentence in any case involving the killing of children prevented him from fairly considering mitigation evidence.

Beginning in group voir dire, LTC Boyd affirmed his strongly held belief that the death penalty was the only appropriate punishment for the premeditated murder of children and remained steadfast in this belief despite the military judge's efforts to rehabilitate him. Defense counsel questioned "do you agree with the statement that life in prison is not really punishment for premeditated murder?" (JA 345). All the members responded negatively. Defense counsel continued: "Let me ask the follow on. Do you agree with the statement that life in prison is not really punishment for the premeditated murder of children?" (JA 345). Four members, including LTC Boyd, agreed with this statement. Defense counsel followed up with LTC Boyd during individual voir dire confirming "that in the case of premeditated murder of innocent children, [that] you believe that life in

prison is not an appropriate punishment for that crime….?" LTC Boyd responded: "No. You are not misstating me that is correct." (JA 438). When questioned as to the basis of his belief, LTC Boyd responded:

> Well[,] I am a father first and foremost; and I love my kids as most of us do . . . . And because kids bring a great deal of innocence to their being, to take—to premeditate and to actually take a child's life is unforgiveable in my mind.

(JA 438). Lieutenant Colonel Boyd expounded on how his beliefs might impact his ability to deliberate, offering that:

> As I sit here and think about it, to be honest with you, for someone who fits that category to actually execute them or however way that they are terminated—their life is terminated, it kind of frees them from not having to think about it for the rest of their lives . . . .

(JA 438). Following this, the trial counsel asked LTC Boyd a series of "follow the law" type questions, which he answered affirmatively. The military judge recognized that LTC Boyd's answers were problematic, and so he elicited the following:

> Now as I sat here and I was thinking about it, I had also indicated that to take someone's life as a result of premeditation in the murder would free them from having to be reminded of it for the rest of their lives. So, simply what I am saying, sir, is that I would be open-minded. I know what my views are, but I would be open minded to listen to other panelists.

(JA 447). The military judge then asked, "Are you open-minded to be persuaded by other members to what an appropriate sentence should be….?" Lieutenant

Colonel Boyd responded, "In terms of being persuaded, sir?" The military judge then characterized the tension in his answers as "divergent statements" and attempted to rehabilitate LTC Boyd's belief as an "initial emotional response." (JA 448-49).

The defense challenged LTC Boyd on the bases of actual and implied bias, arguing that his strong and unwavering beliefs regarding the premeditated murder of children left him closed to persuasion. Defense counsel reminded the military judge of *Wainwright*'s distrust of "follow the law" questions, and that bias need not be demonstrated with "unmistakable clarity." (JA 468-69). Unmoved, the military judge characterized LTC Boyd'd first, and arguably most revealing, response as an "understandable visceral reaction." (JA 546). He concluded that LTC Boyd "is not unalterably in favor of imposing the death penalty." (JA 547). The military judge characterized LTC Boyd's initial statements and relied upon his statement that death would free the individual from having to think about it for the rest of their lives as evidence of his open-mindedness with respect to the sentence. *Id*. The Military Judge concluded: "Viewing all of LTC Boyd's responses as a whole, a reasonable person would not conclude that he is biased under the implied bias standard. The liberal grant standard does not warrant granting the challenge." *Id*.

That was an abuse of discretion. *Wainwright* and *Morgan* show the error in finding LTC Boyd suited for this court-martial. Lieutenant Colonel Boyd distinguished cases involving children, and never changed his core beliefs: "I know what my views are." (JA 447). He recognized that another panel member may hold the opinion that life is the more severe punishment "because [execution] frees that individual from having to think about it for the rest of their lives." (JA 447). When confronted, LTC Boyd expressed reticence over changing his beliefs. His answers demonstrated a willingness to listen, but not a willingness to change.

The most alarming part of the military judge's reasoning, however, was this: "Lieutenant Colonel Boyd believes a life sentence may in some ways be more of a punishment than the death penalty." (JA 547). This was not evidence of open-mindedness. Rather, it was a paradox: the best way to get a life vote from LTC Boyd is put on a case in *aggravation*, not mitigation. That should have been reason enough to excuse him in accordance with the liberal grant mandate.

d. Major Weidlich could not fairly consider mitigation evidence in this case.

Major Weidlich's strongly held commitment to imposing the death penalty on those who murder children reflected an actual bias. His statements during voir dire indicated no willingness to consider mitigation evidence in such cases, and they tended to place a burden on the defense to prove MSG Hennis deserved a life

sentence. Indeed, his bias was based on something he could not change, his status as afather of four children under the age of ten. The military judge abused his discretion when he determined that MAJ Weidlich was not biased and that his presence on the panel would not create the perception that the panel was not fair and impartial, particularly with respect to sentencing.

Major Weidlich was among the first group of panel members questioned. He agreed that "life in prison is not really punishment for the premeditated murder of children." (JA 345). The government tried to rehabilitate him with "follow the law" type questions. (R. 2174-79). Major Weidlich then offered that where children are murdered, "it would be more difficult for me to, you know being the father of four small children under the age of 10—to have their lives cut short, I think that would be hard." (JA 482).

Major Weidlich returned to this concern during the defense voir dire. (JA 518). The relevant factors swaying him towards death included the "circumstances" surrounding the offense. (JA 504, 519).

> The premeditation would be part of it; perhaps the ferocity of it or whatnot, you know; and for me personally, I mean having four children of my own under the age of 10, you know the killing of children would be difficult, would make me think of the death penalty; but at the end, it would depend on all of the evidence and circumstances behind it.

(JA 504). Those circumstances were simply the elements of capital murder; premeditation, violence, death and children. Then defense counsel asked:

> Q: So as I understand and just so I can get it clear in my mind is that if you were to find beyond a reasonable doubt—you and a panel unanimously determine beyond a reasonable doubt, that there was a premediated murder of children . . . and that it was done in a violent way that was upon those children, that that would be a case where you are inclined to view the death penalty as the appropriate punishment for that crime?
>
> MAJ W: That is correct.

(JA 507).

Major Weidlich's reply to a written questionnaire averred that he "strongly disagreed" with the statement that "A person's background should be considered when it comes to deciding whether or not he should be sentenced to death for murder." (JA 487). Major Weidlich emphasized:

> it's really the facts of the case that are important to me . . . . You know so I would consider [an accused's background], but I don't think that the background would sway me one way or another towards or against the death penalty. But again it would really depend in my mind on what background information is presented.

(JA 520). Like LTC Rawlings, the only potential mitigating factor Major Weidlich could conceive as important was an expression of remorse. (JA 519-20). But unlike LTC Rawlings, MAJ Weidlich sat on this panel. Although he expressed a willingness "to wait to hear" all the information presented before deciding on a sentence, if the case involved the premeditated murder of children, MAJ Weidlich he did not need to hear anything more.

Three times during voir dire, Major Weidlich expressed the opinion that death was the appropriate punishment for the premeditated murder of children. (JA 345, 482, 507). During individual voir dire, these statements were punctuated by agreement to "follow the law" that revealed nothing meaningful and failed to clarify the tension with his fuller answers. As with LTC Boyd, the liberal grant mandate demanded MAJ Weidlich's excusal.

4. The panel that tried and sentenced MSG Hennis was unable to render a fair and impartial verdict.

At least three panel members expressed views incompatible with their obligations. Two others raised significant doubts over their suitability for this court-martial, but the military judge curtailed further voir dire that would have probed their potentially disqualifying biases. Any one of these was enough to vitiate the panel's impartiality. *Morgan,* 504 U.S. at 729. This was a capitally-referred case, and that should have only summoned forth the best instincts of trial counsel and the military judge to get this right. Instead, they retained members who compromised the effort. There is "a heightened need for reliability in capital punishment cases." *United States v. Loving*, 41 M.J. 213, 278 (C.A.A.F. 1994). This case could not meet it with this panel.

XII. THE PANEL'S VARIABLE SIZE UNCONSTITUTIONALLY LIMITED MSG HENNIS'S RIGHT TO CONDUCT VOIR DIRE AND PROMOTE AN IMPARTIAL PANEL.

A general court-martial authorized to adjudge a sentence to death must be composed of at least twelve members. Art. 25a, UCMJ. At the time of MSG Hennis's court-martial, however, nothing capped the maximum number of members who could compose such a court-martial.[132] Accordingly, the ultimate size of a panel could not be known until after voir dire and challenges, when the panel was finally set. In this case, the panel began with nineteen members and ultimately fourteen members were seated. (R. at 1710-11).

The variable size of a capital court-martial panel violates the Eighth Amendment because of the unique requirement in capital courts-martial for the members to unanimously agree to a sentence of death. *See* Dwight H. Sullivan, *Playing the Numbers: Court-Martial Panel Size and the Military Death Penalty*, 158 MIL. L. REV. 1, 33 (1998).[133] In fact, the members must unanimously agree

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[132] With the Military Justice Act of 2016, Congress removed the incongruity between capital courts-martial and federal death penalty trials, amending Article 25a to require exactly twelve members for a capital court-martial. 10 U.S.C. § 825a (2016).

[133] The Military Justice Review Group cited Mr. Sullivan's article in support of its recommendation that Congress establish a fixed number of twelve members in capital courts-martial. REPORT OF THE MILITARY JUSTICE REVIEW GROUP: PART I: UCMJ RECOMMENDATIONS at 259 (December 22, 2015).

three times during the sentencing phase to adjudge a death sentence. R.C.M. 1004(b). First, the members must unanimously conclude that the government proved at least one aggravating factor beyond a reasonable doubt. R.C.M. 1004(b). Second, the members must all find that the evidence in aggravation substantially outweighs any mitigating circumstances. *Id.* Finally, the members must unanimously agree to adjudge the death penalty. *Id.* The members are also required to reach a three-quarters concurrence for any sentence greater than ten years. *Id.*

At first blush, the requirement for three unanimous votes to adjudge a death sentence creates a powerful incentive for the defense to facilitate the seating of the largest possible court-martial panel. The more members that vote, one would assume, the greater the chance at least one of them will vote against death at some point in the process, and thus save the accused's life. Sullivan, *supra*, at 35-36. On the other hand, the government has an incentive to empanel as few members as possible beyond twelve, since this increases the chances of obtaining the three unanimous votes needed for a death sentence. *Id.* at 37.

But as Mr. Sullivan points out, the variable size of panel perversely incentivizes the government to aggressively conduct voir dire of members and exercise challenges liberally in order to minimize the size of the panel, while at the same time eliminating any members who are predisposed to voting against death.

Sullivan, *supra*, at 34-37. Conversely, the defense has a powerful incentive to avoid probing voir dire that would create reasons to challenge a member for cause and thereby reduce the panel's size. Indeed, the defense may prefer to keep an openly biased member on the panel, rather than challenge him or her, since removing that member merely reduces the chance for a vote for life, even if that chance is remote. *Id.* at 36. This is often referred to as the "Ace of Hearts" strategy. *See United States v. Simoy*, 46 M.J. 592, 625 (A.F. Ct. Crim. App. 1996) (Morgan, J., concurring).

The most likely outcome of this bizarre process is a panel carefully vetted by the government and poorly vetted by the defense, unless the latter foregoes the perceived benefit of a larger panel. Thus, the capital defense team cannot navigate between Scylla and Charybdis:[134] the only choices are a large but biased panel or a small but less biased panel. A variably sized panel forces defense counsel into this dilemma, where neither option is good and both threaten death. The law should avoid such outcomes for, unlike the Argonauts, it can promise only defense counsel's competence and diligence, not their heroics.

Defense counsel attempted to use extensive voir dire to ensure the members

[134] The mythical hero Jason and his Argonauts had to navigate two challenges: the giant whirlpool Scylla that would swallow their ship, and the rocky cliff Charybdis that would wreck it. EDITH HAMILTON, MYTHOLOGY: TIMELESS TALES OF GODS AND HEROES 132, 233 (1942).

could deliver a life sentence. But the military judge unreasonably curtailed this effort. *See supra* Assignment of Error XI. The calculus of getting fair consideration for a life sentence was further complicated by the military judge's confusing instructions that eleven of fourteen panel members must vote for life, even though it was a mandatory minimum sentence. *See infra* Assignment of Error XIII. Should the defense whittle down the panel to require fewer votes to achieve a life verdict? Under such muddled conditions, the soonest thing to emerge will always be arbitrariness and unreliability in violation of the Fifth and Eighth Amendments.

1. Variably sized panels violate the Due Process Clause of the Fifth Amendment.

An accused has a constitutional "due-process right to a fair and impartial fact finder." *United States v. Carter*, 25 M.J. 471, 473 (C.M.A. 1988) (Cox, J., concurring). Voir dire is the primary means by which the defense determines and obtains that fair and impartial fact finder. Thorough voir dire is particularly important in courts-martial, where the convening authority that refers the case to trial is also the same authority that selects the potential members. Civilian trials do not have to contend with this kind of connection between the prosecuting agency and the venire. Military defense counsel thus have a heightened motive to aggressively probe the panel member. But a variable court-martial panel exacts an

unfair price for doing so. The exercise of a right should not come at a cost; "there are rights of constitutional stature whose exercise a state may not condition by the exaction of a price." *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967).

2. Variably sized panels violate the Equal Protection Guarantee of the Fifth Amendment.

Furthermore, a variable panel size serves no compelling purpose that could justify treating servicemembers differently from civilians. "Requiring service members to choose between accepting trial by biased members or diminishing their own statistical chances of escaping a death sentence a choice faced by no civilian death penalty defendant in the nation offends this equal protection principle." Sullivan, *supra*, at 41. If there is a legitimate interest in trying capital courts-martial before a variable number of panel members, it is not apparent. Indeed, Congress's recent amendment of Article 25a proves as much.

3. Variably sized panels violate the Eighth Amendment's prohibition on cruel and unusual punishments

The Eighth Amendment prohibits cruel and unusual punishments, and that means "there is a heightened need for reliability in capital punishment cases." *United States v. Loving*, 41 M.J. 213, 278 (C.A.A.F. 1994). The system in place at the time of MSG Hennis's court-martial, with a variable number of panel members, jeopardizes the reliability of its findings and sentence: first, because it

discourages meaningful voir dire and challenges by the defense; and second, because it encourages the government to dismiss potential members with qualms about capital punishment. This imbalance invites the seating of a biased panel, and thus reduces the reliability of any findings and sentence adjudged.

Additionally, the prohibition against cruel and unusual punishments prohibits the arbitrary imposition of death sentences. The variable size of the panel, however, "injects an entirely arbitrary factor into the death penalty equation . . . Such an irrelevant factor in determining who lives and who dies is precisely the sort of arbitrariness that the Supreme Court has condemned." *See* Sullivan, *supra,* at 42-43. That kind of arbitrariness is exactly what the Court was trying to squeeze out of the capital punishment systems in this country when it decided *Furman v. Georgia*, 408 U.S. 238 (1972).

Arbitrariness not only arises from the changing number of panel members, it enters into their voting procedures as well. Under the military judge's instructions, MSG Hennis needed three-quarters of the votes for a sentence to life. That returned his defense to the numbers game again. Should counsel challenge a member with the hopes of reducing the panel size, making it easier to get ten votes for life instead of eleven? Such was counsel's conundrum. Master Sergeant Hennis needed eleven of fourteen possible votes to get to life. Had another member been challenged it would have only been ten of thirteen, but then the

government needed to garner fewer votes to get a death sentence.

The difference between life and death at trial should not depend on a numbers game, or hang from the horns of a dilemma. The practice of variably sized panels disrupts the protections of the Fifth and Eighth Amendments, and Congress has since repudiated it. This Court should repudiate the practice as well, and set aside the findings and sentence in this case.

XIII. THE MILITARY JUDGE ERRED WHEN HE FAILED TO CLARIFY THE PROPER PROCEDURE FOR VOTING ON A DEATH SENTENCE.

On April 13, 2010, the military judge instructed the members on pre-sentencing voting procedures. (JA 1215). Earlier that day, the military judge held an Article 39(a), UCMJ, session with counsel to discuss those instructions. (JA 1195). The defense had requested an instruction that would have allowed the panel to vote only once on a proposed death sentence. (JA 2053-54). The military judge denied the request opting instead for the standard "Benchbook" sentencing instructions. (JA 1194-1238).

Seven hours into deliberations the members returned with the following question:

> If there is one person who votes against the death penalty does that mean that all other votes are for a life sentence? i.e does this automatically

> fulfill a confinement for life sentence considering a 3/4 concurrence (understanding para. 3, pg 21)?

(JA 2072). The military judge interpreted the members' question "as a hypothetical. I don't know that they have done any voting. I'm not going to assume that for this moment." (JA 1315).

The defense objected, arguing that the form of the question suggested a vote on death had already occurred. The defense asked the judge to inquire, without revealing the result of any vote, as to whether the panel had already voted on a sentence including death. (JA 1326-28). To this end, the defense asked the military judge to answer the members' question, in part, with the following language: "[I]f there is a vote on a proposed sentence that includes the death penalty, and the vote is not unanimous for the death penalty, then the death penalty is no longer an option." (JA 1321).

The military judge denied the request, reasoning "[t]here's nothing in the rules that indicate[s] the voting procedures are different in the death penalty case than they are in any other case." (JA 7301-02). Then he answered the members' question as follows:

> You need a required concurrence for any proposed sentence; unanimous for death, three-quarters or 11 votes for a life sentence. If you vote on a proposed sentence or sentences without arriving or reaching the required concurrence, you should repeat the process of discussion, proposal of sentence or sentences, and then voting.

(JA 1330).

The military judge had a duty to instruct the members in a manner consistent with Congressional intent and the Constitution. Both parties offered the military judge reasonable alternatives to accomplish those goals. According to the government, "If there are votes for death but it is not unanimous–because the panel only has the two choices with regard to life or death—if it's not unanimous for death then, yes, the other votes would *automatically revert to life* to get to the three-fourths concurrence." (JA 1314) (emphasis added). The defense proposed that "[i]f there is a vote, a proposed—a vote on a proposed sentence that includes death that is non-unanimous, then that takes death off the table. Death is no longer an option." (JA 1317). The defense noted that the Benchbook had a "Hung Jury" instruction which provides that in "capital cases, only one vote on the death penalty may be taken." DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK [hereinafter Benchbook], para. 2-7-18 (Jan. 1, 2010).

The military judge declined both proposals, however. Instead, he reasoned that R.C.M. 1006(b)(5) established the proper voting procedures and required concurrences even when there is a mandatory minimum. The military judge's instruction failed to dispel the panel's confusion, and it put the panel's procedures in conflict with MSG Hennis's constitutional protections. "It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if

a reasonable alternative interpretation poses no constitutional question." *Gomez v. United States*, 490 U.S. 858 (1989). The members resumed deliberations and sentenced MSG Hennis to be reduced to the grade of E-1, to forfeit all pay and allowances, be dishonorably discharged from the service, and be put to death. (JA 1334).

The panel's confusion in MSG Hennis's case should not be a surprise. The statutory provisions relating to capital sentencing procedures in the Benchbook fail to make clear how the members are to vote. Article 52(b), UCMJ, contains a blanket requirement of a three-fourths vote for any sentence over ten years. "No person may be sentenced to life imprisonment . . . except by the concurrence of three-fourths of the members present at the time the vote is taken." Art. 52(b)(2), UCMJ, 18 U.S.C. § 852(b)(2) (2008). That same provision requires a unanimous concurrence for a death sentence. Art. 52(b)((1), UCMJ, 18 U.S.C. §852(b)(1) (2008). Article 118, UCMJ, however provides that an accused who is found guilty of murder "in the perpetration. . . of . . . rape" shall suffer death or imprisonment for life as a mandatory minimum. Art. 118, UCMJ, 18 U.S.C. § 918 (1984).

The military judge, however, found neither inconsistency nor ambiguity in the statutes. "There's nothing in the rules that indicate the voting procedures are different in the death penalty case than they are in any other case." (JA 1322-23). The military judge further instructed that no "sentence may include both

confinement for life and death. Those two are inconsistent." (JA 1232). He also instructed that no member could vote for both life imprisonment and death. *Id.*

Thus, the panel was left in a quandary about the appropriate voting procedure. To vote appropriately, the members had to do the following math. In the fourteen-member panel, either eleven must vote for life or fourteen must vote for death. But the military judge further provided, "If you vote on all of the proposed sentences without reaching the required concurrence, then you repeat the process of discussion, proposal, and voting" until a sentence is adopted. (JA 1233). That means even if the members vote on death and do not reach a unanimous concurrence then 79% (11 of 14) of the members must agree on a *fundamentally* different sentence-life imprisonment. (JA 1233). And if that vote falls short of 79% no sentence is adopted and the deliberation necessarily devolves into a tug-of-war between competing sentences. Is that what the members did in this case? Was that their understanding of the military judge's instructions? How many votes did they take, and did those votes meet the algebraic requirements?

"In regard to form, a military judge has wide discretion in choosing the instructions to give but has a duty to provide an accurate, complete, and intelligible statement of the law." *United States v. Behenna*, 71 M.J. 228, 232 (C.A.A.F. 2012). A military judge must tailor his instructions to the facts and circumstances of the case and ensure the instructions complete their intended purpose. *Id.*; *see*

United States v. Curry, 38 M.J. 77, 80-81 (C.M.A. 1993). That obligation applies equally to a panel member's question. *See United States v. Wallace*, 35 M.J. 897, 899 (Army Ct. Crim. App. 1992) ("A military judge should issue additional instructions to the members if they do not understand the procedures to follow during sentencing.").

It is clear from the members' question that the panel had voted at least once, and that vote was not for death. Thus the panels' question, "If there is one person who votes against the death penalty does that mean that all other votes are for a life sentence?" (JA 2072). It is also plain one person abstained from death. Yet the military judge's statutory interpretation now required that *one* person to convince *ten* from the other camp to side with him. Conversely the majority only needed to convince one. The passing clock weakens resolve. This is the voting trap the military judge's interpretation created. Neither of the other two interpretations created such a trap. At the very least a hung jury instruction would have reminded the sole hold out member, "It is not mandatory that the required fraction of members agree on a sentence and therefore you must not sacrifice conscientious opinions for the sake of agreeing upon a sentence." Benchbook, para. 2-7-18. That simply did not happen here.

The military judge's response also failed to fully answer the panel members' question. First, his refusal to consider the question as anything but "a

hypothetical" foreclosed any inquiry into whether a vote had been taken. (JA 1618). The military judge reasoned that question would necessarily pierce the veil of deliberations. But to the contrary, asking whether a panel voted is no more intrusive than asking whether a panel reached a verdict. Is it possible for a panel to reach a verdict *without* first voting? That is a far cry from the concerns contemplated by Mil. R. Evid. 606. The military judge failed to ask one simple question, thus he left the panel without the necessary guidance.

Second, the military judge's response failed to reconcile his contradictory voting instruction provided earlier in the trial. For example, during voir dire, a panel member, defense counsel, and the military judge engaged in the following colloquy:

> [CPT EIKE] "kay. So if one person votes for life, this it is?
>
> [DEFENSE] That is what the sentence would be. One person, one vote, if it is life, that's what the sentence would be. Okay. So one person votes for life ----
>
> [MJ] And, Captain Eike, that's solely because the law requires that if the death penalty is imposed, it must be by a unanimous decision. So, ergo, if it is not unanimous, the death penalty cannot be imposed.
>
> [CPT EIKE] Okay.

(R. at 2252). The tenor of those questions and answers would indicate to the panel member that all that was necessary for a life sentence was that one vote. The

military judge's answers and instructions failed to alleviate the panels' clear confusion, and in a capital case more is required.

Nor did the military judge take into account the complex nature of this case, but approached the instructions as if this were an ordinary run-of-the-mill case, and indeed said he saw no difference in the voting procedures than "in any other case." (JA 1322-23). But the complexity of the case and the panel's apparent confusion alerted the military judge that this was not "any other case." The unique circumstances of this case cried out for more. *United States v. Greaves*, 46 M.J. 133 (C.A.A.F. 1997). In *Greaves,* the panel requested an instruction regarding the effect of a bad-conduct discharge on Greaves's retirement. 46 M.J. at 135-36. The military judge refused to provide an instruction, telling the panel the loss of retirement benefits was a collateral consequence of the court-martial.

Under the unique facts of *Greaves*, this Court found the military judge abused his discretion. 46 M.J. at 139. This Court emphasized that the panel had requested guidance, and while retirement benefits could usually amount to a collateral consequence, the panel's query coupled with how close Greaves was to retirement required the military judge to provide clarity. *Id.* This Court found the broad instruction provided by the military judge wa "inconclusive" and that it failed to answer the members' questions based on the "unique facts" of the case. *Id.* at 138-39."

The same thing happened here. The military judge failed to address the members' concern, and provided no guidance for their deliberations and voting. The complex nature of the voting requirements, coupled with the awesome sanction the government was seeking, required that the military judge provide clear instructions. He abused his discretion in failing to do so. And because the military judge's instructional errors in this case materially prejudiced the substantial rights of MSG Hennis, this court should set aside MSG Hennis's sentence.

XIV. THE PANEL PRESIDENT'S FAILURE TO PROPERLY ANNOUNCE THE AGGRAVATING FACTORS MEANS THIS COURT CANNOT AFFIRM A DEATH SENTENCE.

This court-martial was flawed from beginning to end—and even after. Even after the court-martial adjourned, it was still generating errors. In this instance, the panel president announced a sentence to death. But he never stated why; he never announced whether the panel found any aggravating factors, or whether any aggravating factors substantially outweighed the mitigating ones. (JA 1334).

At 1452 hours, after the president of the panel had informed the military judge that the panel's verdict was "death" but said nothing more, the military judge adjourned the court-martial and excused the members. (JA 1335). Then the military judge brought the members back at 1701 hours, more than two hours later,

to have the panel president announce the aggravating factors and that they substantially outweighed extenuating and mitigating circumstances. (JA 1338).

1. The prohibition on increasing a sentence after adjournment is a hard and fast rule.

A court-martial may not adjudge a sentence of death unless the members find that at least one aggravating factor existed. R.C.M. 1004(b)(4)(A). If death is adjudged, "the president *shall*, in addition to complying with R.C.M. 1007, announce which aggravating factors under subsection (c) of this rule were found by the members." R.C.M. 1004(b)(8) (emphasis added).

An incorrect announcement of sentence can be re-announced under R.C.M. 1007(b) subject to Art. 60(f)(2), UCMJ. 10 U.S.C. § 860 (2006). Revision is allowed if "there is an apparent error or omission in the record or if the record shows improper or inconsistent action by a court-martial with respect to the findings or sentence that can be rectified without material prejudice to the substantial rights of the accused." Art. 60 (f)(2), UCMJ. However, such revision cannot "increase the severity of the sentence unless the sentence prescribed for the offense is mandatory." *Id*. This limitation is straightforward: "the sentence cannot be upwardly corrected after adjournment of the court-martial, even to correct clear errors in announcement of the sentence." *United States v. Jones,* 34 M.J. 270, 271-72 (C.M.A. 1992). The rule does not admit exceptions, even if there is

"overwhelming evidence that the announcement was erroneous," and that the error was one merely of "a clerical nature," Article 60(e)(2)(C) still prevents any corrective action. *Id*. at 271. This is necessary to curtail "the appearance of command influence when courts-martial are reassembled after adjournment, to take corrective action on sentences." *Id*. "Ample opportunity exists prior to adjournment for all parties to verify the sentence. Although this rule can operate only to the detriment of the prosecution . . . it assures the integrity of the proceedings and eliminates even the remote possibility of abuse." *United States v. Baker*, 32 M.J. 290, 293 (C.A.A.F. 1991).

2. The panel did not sentence appellant to death because it did not comply with RCM 1004(b).

The panel's failure to announce the aggravating factors implicates a cornerstone of the rights of an accused in a capital case–a right the court failed to uphold in MSG Hennis's case.

The death penalty only comports with the Constitutiona when stripped of its arbitrary nature and individually imposed. *See Furman v. Georgia,* 408 U.S. 238 (1972). To that end, the sentencing authority "must find and identify at least one statutory aggravating factor before it may impose a penalty of death." *Gregg v. Georgia*, 428 U.S. 153, 206 (1976). The first time this Court confronted a death sentence post-*Furman*, it observed that:

> neither the Code nor the Manual requires that the court members specifically identify the aggravating factors upon which they have relied in choosing to impose the death penalty. Since they provide no insight into their sentencing deliberations, it is impossible upon review to determine whether they have made an individualized determination on the basis of the character of the individual and the circumstances of the crime, and whether they have adequately differentiated this case in an objective, evenhanded, and substantively rational way from the other murder cases in which the death penalty was not imposed.

United States v. Matthews, 16 M.J. 354, 379 (C.M.A. 1983). The failure to announce aggravating factors meant the death penalty could not be imposed in Matthews' case. *Id*. at 359. In response, the President added R.C.M. 1004(b)(8) requiring announcement of any aggravating factors.

But the panel president did not do this. Instead he announced that MSG Hennis was "to be reduced to the grade of E-1; to forfeit all pay and allowances; to be dishonorably discharged from the service; and to be put to death." (JA 1334). The military judge accepted the sentencing worksheet and adjourned the court without any heed to the absence of aggravating factors. *Id.*

The panel sentencing worksheet indicates they considered aggravating factors, but "the Court's principal concern has been more with the procedure by which the State imposes the death sentence." *California v. Ramos,* 463 U.S. 992 (1983). Master Sergeant Hennis had a constitutional right to know which factors the panel found that made him, as an individual, eligible for the death penalty. The panel president's failure to announce aggravating factors in *United States v. Hennis*

repeats the error in *United States v. Matthews,* and like the latter, the death sentence in *Hennis* should be reversed.

3. The court could not correct the re-announced sentence to include a finding of aggravating factors that a sentence of death requires.

More than two hours after adjournment, the court was re-opened. (JA 1335). The military judge attempted to correct the failure to comply with R.C.M. 1004(b)(8) by having the president read the aggravating factors into the record. (JA 1337-38). But this violated Article 60(f) and its implementation in R.C.M. 1102(c). The only increase in sentence that is permitted under Art. 60 is that which provides for a minimum sentence. 10 U.S.C. § 860 (2008). *Id.*[135]

A panel may clearly intend for a specific sentence to be announced, the evidence may be overwhelming that the announcement was erroneous, but that is immaterial. *Baker*, 32 M.J. at 293. In the military system, unlike in state or federal court, Congress has set limits on the correction of a sentence to ensure there is no possible command influence. *Id.* at 290. This is a "bright-line" rule. *See United States v. Dodd,* 46 M.J. 864, 871 (Army Ct. Crim. App. 1997).

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[135] There is an apparent conflict between R.C.M. 1007(b), which allows the correction of an erroneous announcement of an adjudged sentence, and R.C.M. 1009(c)(1), which allows for clarification of an ambiguous sentence, and R.C.M. 1102(c), which does not allow revision that will increase the severity of a sentence. *See Baker*, 32 M.J. at 292-93.

In this case the panel returned a verdict that omitted the aggravating factors a death sentence demands. When the military judge called the post-trial Article 39(a) session, only one clarification could be made: that MSG Hennis was sentenced to the required minimum, which was a life sentence. Aggravating factors cannot be "announced" after adjournment. Rule for Courts-Martial 1004(b)(4)(A) addresses core constitutional issues, and the application of R.C.M. 1007(b) has always been strictly mechanical for good reason. The nature of neither one should have surprised the government or military judge. The failure to satisfy them precludes affirming a death sentence in this case.

PART B: ISSUES NOT RAISED BEFORE THE ARMY COURT

XV. THE COURT-MARTIAL OF MSG HENNIS VIOLATED ARTICLE 44(A), UCMJ.

Article 44(a), UCMJ, guarantees that "[n]o person may, without his consent, be tried a second time for the same offense." This Court should enforce the Article as it would any other Article of the Code, and give effect to its plain meaning. *See United States v. Mooney*, 77 M.J. 252, 255 (C.A.A.F. 2018). ("It is a fundamental tenet of statutory construction to construe a statute in accordance with its plain meaning.") (citations omitted). That plain meaning prohibits the court-martial of MSG Hennis, as he did not consent to another trial for the same offense. That is exactly what Article 44(a) prohibits, and it is unambiguous. It makes no exception

for offenses tried by state or foreign courts, and this Court should have never imported such an exception into it. This Court erred in *United States v. Stokes*, 12 M.J. 229 (C.M.A. 1982), and it should correct that error here.

Of course this Court does not follow the statutory text blindly into unconstitutional or absurd conclusions. *See United States v. Lewis*, 65 M.J. 85, 88 (C.A.A.F. 2007) ("The plain language will control, unless use of the plain language would lead to an absurd result."). The law must always answer to the Constitution and reason, and enforcing Article 44's simplest, plainest, and most obvious meaning would certainly do so. There is no constitutional harm in forbidding successive trials of servicemembers—the Constitution already forbids this. *See supra* Assignment of Error IV. Even if the Constitution admits a "dual sovereigns" exception, it certainly does not compel the government to use it, and there nothing unconstitutional in legislating adherence to the principle of double jeopardy. The Nation's laws can never deny citizens their constitutional protections, and they can always extend those protections further. *See United States v. Coleman*, 72 M.J. 184, 187 (C.A.A.F. 2013) (noting that the Code can provide greater rights than the Constitution). Enforcing the plain language of Article 44 would not offend the Constitution.

It would not offend reason either— in fact, it would honor it. As Assignment of Error IV shows, there are compelling reasons to shield

servicemembers from repeat prosecutions. Hectoring them with prosecutorial power more harshly and more often than their fellow citizens serves no legitimate end. It diverts from the chief mission of our military—winning wars—and it undermines the critical balance between civil and military authority Americans have so jealously guarded. When civilian authorities hear, try, and punish the criminal allegations against a servicemember, military authorities have no need to repeat the effort if a distinct military crime is not also involved. Commanders can always ensure discipline and order within their ranks using their wide array of administrative tools. *See*, *e.g.*, *United States v. Tucker*, at 5 n.4, No. 18-0254 (C.A.A.F. Nov. 29, 2018) (noting how commanders can use administrative actions to impose good order and discipline).

So how has a dual sovereigns exception grafted itself into Article 44? It appears to be the result of assumption, rather than analysis. In a line, this Court concluded that "[u]ndoubtedly" Article 44 "was not intended to abolish the dual-sovereignties rule that had been applied in interpreting the constitutional guarantee against successive trials for the same offense." *United States v. Stokes*, 12 M.J. 229, 231 (C.M.A. 1982); *see also United States v. Green*, 14 M.J. 461, 462 (C.M.A. 1983). The *Stokes* court's confidence does not fend well against the centuries of practice preceding the Code, however, and it simply presumes that the Article 44 offers nothing more than the Constitution. That is not the best

foundation. The plain language represents the will of Congress, and it should prevail over unexamined assumptions. When Congress stated that "[n]o person may, without his consent, be tried a second time for the same offense," our only presumption should be they meant exactly that.

1. Military practice shielded servicemembers from dual prosecutions for the same offense prior to the Code.

For most of American military history, servicemembers never had to worry about being court-martialed for offenses of which civilian courts acquitted them. A solider *autrefois acquit* was a soldier forever acquitted, and rightly so, as our military successes have never depended on repeatedly prosecuting our warfighters. As Colonel Winthrop observed:

> Where indeed the offences are crimes of which military courts are invested with jurisdiction concurrently with the criminal courts, (as for example, the crimes cognizable by courts-martial under Art. 58, in time of war), the same are not distinct but identical in law, and an acquittal or conviction of one of such offences, or rather of the actual single offence, in a civil court, will be *a complete bar to a prosecution of the same in a military court*, and vice versa.

WINTHROP, *supra*, at 265 (emphasis added). This is the way it always was, and the way it should be today.

The Founders understood this. At the dawn of our Republic, military justice was limited to military crimes. Courts-martial did not try soldiers, Marines, and sailors for common law offenses like arson, burglary, or murder. Rather,

commanders had "to use their utmost endeavors to deliver over such accused person or persons to the civil magistrate, and likewise to be aiding and assisting to the officers of justice to bring him or them to trial." Article 33, Articles of War (1775). Civilian courts dealt with the civilian crimes, and this was a successful arrangement that remained largely unchanged for 175 years.

Although Congress later provided court-martial jurisdiction over certain common law crimes in the mid-Nineteenth Century, it conditioned this on the most military of conditions: war. There was no need for duplicative courts-martial in times of peace. Nowhere was this clearer than in crimes punishable by death:

> The power to try soldiers for the capital crimes of murder and rape was long withheld. In fact, it was not until 1863 that general courts-martial were given the power to impose the death penalty for the civilian capital offenses of murder and rape, and then only during wartime. Until the Uniform Code of Military Justice became effective, military courts were prohibited from trying those offenses if committed within the geographical limits of the States and the District of Columbia in time of peace. It would thus appear that prior to 1950, offenses which carried the death penalty and which were common to both the military and civilian communities could not be tried by military courts during time of peace.

United States v. French, 27 C.M.R. 245, 251 (C.M.A. 1959) (citations omitted).

As a matter of both design and practice, then, soldiers never had to fear successive prosecutions for the same offense. Those who committed crimes outside a military reservation answered to civilian courts for the civilian offenses,

and to courts-martial for any military offenses.[136] Military men may have occasionally faced two trials, but never two trials for the same offense. A soldier's protections against double jeopardy were never in doubt.

The case of Private Fredie Stubbs gives a clear example. Prosecutors in Pierce County, Washington, accused Stubbs of shooting another infantryman to death during a training exercise in their jurisdiction. *In re Stubbs*, 133 F. 1012 (W. D. Wash., 1905). The Army duly delivered Stubbs to the State, which then tried him for murder. The jury acquitted him. The Army reclaimed Private Stubbs and promptly court-martialed him for an assault prejudicial to good order and discipline. *Id*. Convicted, he sought habeas relief in federal court, but to no avail. The district court noted that, while the Constitution "exempt[ed] him from a second prosecution for that identical offense," the command had taken "special care . . . to charge him with an offense different from the one of which he was acquitted by the superior court." *Id*. at 1014. His court-martial addressed "unsoldierly conduct by a soldier, subversive of military discipline," and for that he remained "amenable to military law, notwithstanding the verdict of the jury." *Id*. It was beyond question, however, that after "having surrendered [Stubbs] to the

[136] *See*, *e.g.*, 6 Op Atty Gen 506 (1854) (captain who beat his subordinate to death was tried for manslaughter by the state and cruel treatment at court-martial); 6 Op. Atty Gen 413 (1854) (surgeon who shot and killed his superior was tried for murder by the state and mutiny at court-martial).

civil authorities, his military superiors could not lawfully deal with the petitioner for murder, manslaughter, or a criminal assault considered as a crime against society in general." *Id*. at 1013.

State courts mirrored this understanding. *See State ex rel. Cobb v. Mills*, 163 P.2d 558, 573 (Ct. Crim App. Ok, 1945) ("the trial and acquittal of the defendant by the general court-martial at Will Rogers Army Air Field is a bar to his prosecution in the state court for the offense of manslaughter, with which he stood charged before the court-martial."). Colonel Winthrop's observations capture the state of the law prior to the Code, and it is abundantly clear that courts-martial have never been a backup forum for the civilian justice system.

2. Congress intended Article 44 to be more, not less, protective against successive prosecutions.

Nothing indicates Congress wished to disturb this long history when it enacted the Code. Article 44(a), UCMJ, "reiterates the command of Article of War 40 . . . that '[n]o person shall, without his consent, be tried a second time for the same offense.'" *United States v. Stringer*, 17 C.M.R. 122, 127 (C.M.A. 1954). The fact that Article 44(a) carries the exact wording of its predecessor shows that it guarantees the same protections.[137] That is precisely what the Senate intended: "all

[137] *See* Article 40, Article of War (1920) ("No person shall, without his consent, be tried a second time for the same offense."); *see also* Article 87, Article of War

three [paragraphs of Article 44] have their source in present AW 40 and AW 52 and incorporate the traditional military rules of jeopardy." S. REP. NO. 81-486, at 19 (1949). The overall hope for Article 44, UCMJ, was "a substantial strengthening of the rights of an accused," not a regression of them. *Id*. at 20.

The legislative record reveals no qualms with cases like *Stubbs* or *Cobb*. Rather, Congress was preoccupied with *Wade v. Hunter*, 336 U.S. 684 (1949), the moment at which jeopardy attached, and ensuring that the military's automatic appeals system did not frustrate servicemember's double jeopardy protections. *See 1949 Housing Hearings* at 669, 801-04. The possibility of military prosecutions following civilian ones was discussed at points, generally with disdain for the idea, yet was never a focus of debate.[138] What seemed roundly accepted, however, was that lawmakers "have increased the protections of double jeopardy." 96 CONG.

(1806) ("and no officer, non-commissioned officer, soldier, or follower of the army, shall be tried a second time for the same offence.").

[138] When asked, "And you believe double jeopardy, when it relates to the service—in civilian courts or the service itself—should be prohibited?" the American Bar Association's representative testified "Absolutely." *1949 House Hearings* at 727. Law professor Arthur John Keefe echoed the same sentiment before the House: "From the cases our board reviewed we were worried about the prevalence of double jeopardy in the armed services. An enlisted man gets into trouble. He is arrested and tried and jailed in the civil courts or his case is heard and he is acquitted or his sentence is suspended. When he is released by the civil authorities he is promptly tried again by the military for the same offense. This is wrong." *Id*. at 839.

REC. 1353-1368 (1949) (statement of Sen. Estes Kefauver, Member, S. Comm. on Armed Services).

That understanding comports with the larger project of the Code. Congress enacted it to stave off the injustices suffered during the Second World War. The Code was never considered a tool for clawing back "unneeded" rights. The overarching spirit of this legislation centered on protecting essential liberties within a well-functioning, disciplined military; we wanted a military that could defeat authoritarian enemies, not mirror them. The only conclusion that can be drawn from the Code's legislative history is that Congress intended to preserve and then further the double jeopardy protections already in place. And those protections would have precluded this court-martial.

3. The *Stokes* ruling should be reversed, and the double jeopardy protections of servicemembers restored.

This Court has recognized that, although "the doctrine of stare decisis is of fundamental importance to the rule of law," its "precedents are not sacrosanct." *United States v. Dinger*, 77 M.J. 447, 452 (C.A.A.F. 2018) (citations omitted). When considering the application of stare decisis, this Court looks to "whether the prior decision is unworkable or poorly reasoned; any intervening events; the reasonable expectations of servicemembers; and the risk of undermining public confidence in the law." *Id*. Taken together, these considerations support

withdrawing from *Stokes* and returning to the rights Colonel Winthrop and his contemporaries recognized.

First, *Stokes* was poorly reasoned, as it skipped the plain meaning of Article 44(a) for nothing more than an unexamined assumption. Its rule is also unworkable in that it subjects servicemembers to a regime of incongruous and largely symbolic policies that ultimately foster arbitrary outcomes. *See supra* Assignment of Error IV, part 1(a)(ii). An understanding of Article 44 that preclude repeat prosecutions would be far more workable and fair than what we have now.

Second, the military justice system has been under constant revision since *Stokes*. These changes have only expanded the reach of courts-martial into civilian affairs. The current emphasis on prosecuting sexual crimes underscores this growing reach and the expectation to use it. Many sexual assault trials of military personnel involve off-post offenses against civilians; state prosecutors can pursue these, but often do not because the evidence is weak and the costs high, so they turn to the command instead. This trend continues to draw military justice further into civilian policing, and *Stokes* adds a dangerous accelerant.

Third, the reasonable expectations of servicemembers are the exact opposite of *Stokes*. The vast majority of uniformed personnel take the Double Jeopardy Clause at face value. It often shocks them to learn their command might court-martial them right after (or perhaps twenty years after) a civilian jury had acquitted

them of the same accusation. The dual sovereigns exception is a creation of lawyers and a surprise to laymen; indeed, even some of the most brilliant lawyers have found the "legal logic used to prove one thing to be two . . . too subtle . . . to grasp." *Abbate*, 359 U.S. at 202 (Black, J., dissenting).

Fourth, reversing *Stokes* would not undermine public confidence in the law, it would burnish it. The Armed Services do not exist to backstop state prosecutors, and the public has no expectation that they should. Most states have no need for a dual sovereigns exception—see note 86, *supra*. Public confidence in military justice is best served when it remains military in character. The civilian verdicts should not be subject to a form of military review. *Stokes* and its progeny should be reversed, and Article 44(a) should reclaim for servicemembers the protection against double jeopardy they had long since held.

XVI. APPELLATE DEFENSE COUNSEL HAVE FAILED TO INVESTIGATE HIGHLY EXCULPATORY EVIDENCE, AND HAVE THUS DEPRIVED MSG HENNIS OF HIS RIGHT TO EFFECTIVE ASSISTANCE.

On May 4, 2016, Walter C. Cline executed a death-bed declaration. (JA 2140). In that declaration, Cline revealed that "AC," the mother of the Eastburn's babysitter "JC," told him that on the night of the Eastburn murders, that her daughter came home with blood on her clothes. (JA 2140). Ms. AC washed Ms. JC's clothing, and then went to the Eastburn home to wipe the walls and floor for

blood. (JA 2140). Walter Cline promised to keep this information secret, but because MSG Hennis's life may depend on it, he felt a duty to come forward with this information. (JA 2140).

Law enforcement and writers with an interest in this case have always considered JC a person of interest in Eastburn murders. (JA 1745-1813, 1895). That interest has centered on her association with the Eastburns, her involvement in botched drug deals, her work as a police informant, and her unusual interest in an earlier Cumberland County crime, the so-called "MacDonald murders." *See generally* INNOCENT VICTIMS; (JA 1895). Defense counsel requested production of JC as a witness at court-martial, however the military judge precluded any inquiry into her potential involvement in the murders. (JA 2044).

Walter Cline's affidavit merits further investigation. The American Bar Association advises that counsel at every stage, including at the appellate stage, have an obligation to conduct a thorough and independent investigation relating to issues of guilt and sentencing.[139] To date, however, MSG Hennis's counsel have been unable to conduct the intensive, localized, and skilled investigation needed to effectively pursue the information Walter Cline disclosed. They lack the time,

[139] American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel*, Guideline 10.7(A) in 31 HOFSTRA L. REV. 913, 1015 (2003).

training, and local connections necessary to follow this new lead in what is now a thirty-four-year-old case. Master Sergeant Hennis requested funding for a fact investigator that could have undertaken this work, but met with no success; the appropriate authorities in the Army, the Army Court, and this Court have all denied these requests. *United States v. Hennis*, 77 M.J. 7 (C.A.A.F. 2017). Verification of the declaration would strongly support MSG Hennis's innocence, and the need to investigate it is obvious. The remedy for this failure to do so, at this late point, should be the setting aside of MSG Hennis's conviction.

XVII. DENYING MSG HENNIS THE POSSIBILITY OF A SENTENCE TO LIFE WITHOUT PAROLE VIOLATED THE DUE PROCESS CLAUSE OF THE AMENDMENT V AND AMENDMENT VIII OF THE CONSTITUTION.

In *Simmons v. South Carolina*, 512 U.S. 154 (1994), a plurality of the Supreme Court reasoned that withholding the capital defendant's ineligibility for parole from the jury created the risk that jurors would assume a defendant could be released unless sentenced to death. "To the extent that this misunderstanding pervaded the jury's deliberations, it had the effect of creating a false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration." *Id.* at 161. As a result, the Court held the jury must be informed of the life without parole option when future dangerousness is at issue. *Id*.

In the course of their deliberations, the panel members questioned whether MSG Hennis could possibly receive parole and whether confinement for life was applicable to each specification. (JA 2057). The military judge initially responded by instructing the panel members as follows:

> Life means life; however, you should keep in mind your responsibility to adjudge a sentence which you regard as fair and just at the time that you impose it and not a sentence that will become fair and just only by action by the convening or higher authority.

(JA 1257). Defense counsel requested that the military judge instruct on life without the possibility of parole. (JA 1269). The military judge rejected this, and essentially repeated his original sentencing instruction. (JA 1311). Later that day, the panel returned a sentence of death. Had life without parole been an option available to them, the members could have chosen it over death. Consequently, this Court should set aside this sentence.

PART C: SYSTEMIC ISSUES PREVIOUSLY DECIDED BY THIS COURT

XVIII. SUBJECTING MILITARY RETIREES TO COURT-MARTIAL IS NOT NECESSARY FOR THE REGULATION OF THE ARMED FORCES AND IT VIOLATES AMENDMENT V OF THE CONSTITUTION.

In *Toth v. Quarles*, the Supreme Court held that the armed forces could not constitutionally court-martial "civilian ex-soldiers who had severed all

relationship with the military and its institutions," 350 U.S. 11, 14 (1955), even for offenses committed while on active duty. Master Sergeant Hennis is a retired soldier. As a retiree, he is no longer a member of land and naval forces. *Id.* The fact that MSG Hennis received retirement pay does not change that analysis, because retired pay is nothing more than deferred compensation. *Barker v. Kansas*, 503 U.S. 594, 605 (1992). *But see United States v. Dinger*, 76 M.J. 552, 555 (N-M. Ct. Crim. App. 2017) *aff'd on other grounds*, 77 M.J. 447 (C.A.A.F. 2018): *Pearson v. Bloss*, 28 M.J. 376 (C.M.A. 1989). The exercise of court-martial jurisdiction over a retiree is unconstitutional, and this court should set aside the findings and sentence.

XIX. THE DEATH SENTENCE IN THIS CASE VIOLATES AMENDMENTS V, VI, AND VIII OF THE CONSTITUTION AND ARTICLE 55, UMCJ, BECAUSE THE MILITARY SYSTEM DOES NOT GUARANTEE A FIXED NUMBER OF MEMBERS.

See Irvin v. Dowd, 366 U.S. 717, 722 (1961). Wherefore, this court should set aside MSG Hennis's sentence.

XX. THE DISCUSSION OF FINDINGS AND SENTENCING INSTRUCTIONS AND OTHER SUBSTANTIVE ISSUES AT R.C.M. 802 CONFERENCES DENIED MSG HENNIS HIS RIGHT TO BE PRESENT AT EVERY STAGE OF THE TRIAL.

Wherefore, this court should set aside the findings and sentence.

XXI. MASTER SERGEANT HENNIS WAS DENIED HIS RIGHT TO A TRIAL BY AN IMPARTIAL JURY COMPOSED OF A FAIR CROSS-SECTION OF THE COMMUNITY IN VIOLATION OF AMENDMENT VI OF THE CONSTITUTION.

See Duren v. Missouri, 439 U.S. 357 (1979); *but see United States v. Curtis*, 44 M.J. 106, 130-33 (C.A.A.F. 1996). Wherefore, this court should set aside the findings and sentence.

XXII. THE SELECTION OF PANEL MEMBERS BY THE CONVENING AUTHORITY IN A CAPITAL CASE DIRECTLY VIOLATED MSG HENNIS'S RIGHTS UNDER AMENDMENTS V, VI, AND VIII OF THE CONSTITUTION AND ARTICLE 55, UCMJ, BY EFFECTLY GIVING THE GOVERNMENT UNLIMITED PEREMPTORY CHALLENGES.

Wherefore, this Court should set aside the findings and sentence.

XXIII. THE PRESIDENT EXCEEDED HIS ARTICLE 36 POWERS TO ESTABLISH PROCEDURES FOR COURTS-MARTIAL WHEN HE GRANTED TRIAL COUNSEL A PEREMPTORY CHALLENGE AND THEREBY THE POWER TO NULLIFY THE CONVENING AUTHORITY'S ARTICLE 25(D) AUTHORITY TO DETAIL MEMBERS OF THE COURT.

Wherefore, this Court should set aside the findings and sentence.

XXIV. IN CAPITAL CASES, A PEREMPTORY CHALLENGE PROCEDURE THAT LETS THE GOVERNMENT REMOVE ANY ONE MEMBER WITHOUT CAUSE VIOLATES AMENDMENTS V AND VIII OF THE CONSTITUTION AS THE PROSECUTOR CAN REMOVE A MEMBER WHOSE MORAL BIAS AGAINST THE DEATH PENALTY DOES NOT JUSTIFY A CHALLENGE FOR CAUSE.

But see United States v. Curtis, 44 M.J. 106, 131-33 (C.A.A.F. 1996); *United States v. Loving*, 41 M.J. 213, 294-95 (C.A.A.F. 1994). Wherefore, this Court should set aside the findings and sentence.

XXV. THE SENIOR MEMBER'S DESIGNATION AS THE PRESIDING OFFICER FOR DELIBERATIONS DENIED MSG HENNIS A FAIR TRIAL BEFORE IMPARTIAL MEMBERS IN VIOLATION OF AMENDMENTS V, VI, AND VIII OF THE CONSTITUTION AND ARTICLE 55, UCMJ.

Wherefore, this Court should set aside the findings and sentence.

XXVI. DENYING MSG HENNIS THE RIGHT TO POLL THE MEMBERS ON THEIR VERDICT AT EACH STAGE OF TRIAL DEPRIVED HIM OF A FAIR TRIAL BEFORE IMPARTIAL MEMBERS IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS OF THE CONSTITUTION AND ARTICLE 55, UCMJ.

Wherefore, this court should set aside MSG Hennis's sentence.

XXVII. THERE IS NO MEANINGFUL DISTINCTION BETWEEN PREMEDITATED AND UNPREMEDITATED MURDER, ALLOWING DIFFERENTIAL TREATMENT AND SENTENCING DISPARITY IN VIOLATION OF AMENDMENTS V, VI, AND VIII OF THE CONSTITUTION AND ARTICLE 55, UCMJ.

Wherefore, this court should set aside MSG Hennis's sentence.

XXVIII. MASTER SERGEANT HENNIS WAS DENIED HIS RIGHT TO A GRAND JURY PRESENTMENT OR INDICTMENT UNDER AMENDMENT V, AND HIS RIGHT TO A JURY TRIAL UNDER ARTICLE III OF THE CONSTITUTION.

See Solorio v. United States, 103 U.S. 435, 453-54 (1987) (Marshall J., dissenting); *but see United States v.* Curtis, 44 M.J. 106, 132 (C.A.A.F. 1996). Wherefore, this court should set aside MSG Hennis findings and sentence and remand his case for a rehearing.

XXIX. MASTER SERGEANT HENNIS WAS DENIED EQUAL PROTECTION OF THE LAWS IN VIOLATION OF AMENDMENT V IN THAT ALL CIVILIANS IN THE UNITED STATES MAY HAVE THEIR CASES REVIEWED BY AN ARTICLE III COURT, BUT SERVICEMEMBERS MAY NOT.

But see United States v. Loving, 41 M.J. 213, 295 (C.A.A.F. 1994).

Wherefore, this court should send MSG Hennis's case to an Article III court for direct review.

XXX. ARMY REGULATION 15-130, PARA. 3-1(D)(6), DENIES MSG HENNIS EQUAL PROTECTION OF THE LAW UNDER AMENDMENT V OF THE CONSTITUTION BECAUSE IT PREVENTS THE ARMY CLEMENCY AND PAROLE BOARD FROM REVIEWING APPROVED DEATH SENTENCES.

But see United States v. Thomas, 43 M.J. 550, 607 (N.M. ct. Crim. App. 1995). Wherefore, this court should order the Army Clemency and Parole Board to review MSG Hennis's case.

XXXI. MASTER SERGEANT HENNIS'S DEATH SENTENCE VIOLATES AMENDMENT VIII'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT BECAUSE THE CAPITAL REFERRAL SYSTEM OPERATES IN AN ARBITRARY AND CAPRICIOUS MANNER.

Wherefore, this court should set aside MSG Hennis's sentence.

XXXII. THE DEATH PENALTY PROVISION OF ARTICLE 118, UCMJ, IS UNCONSTITUTIONAL AS IT RELATES TO TRADITIONAL COMMON LAW CRIMES THAT OCCUR IN THE UNITED STATES.

But see United States v. Loving, 41 M.J. 213, 293 (C.A.A.F. 1994).

Wherefore, this court should set aside MSG Hennis's sentence.

XXXIII. THE DEATH SENTENCE IN THIS CASE VIOLATES AMENDMENTS V AND VIII OF THE CONSTITUTION AND ARTICLE 55, UCMJ, BECAUSE THE CONVENING AUTHORITY HAS NOT DEMONSTRATED HOW THE DEATH PENALTY WOULD ENHANCE GOOD ORDER AND DISCIPLINE IN THE ARMY.

Wherefore, this court should set aside MSG Hennis's sentence.

XXXIV. THE CAPITAL SENTENCING PROCEDURE IN THE MILITARY IS UNCONSTITUTIONAL BECAUSE THE MILITARY JUDGE LACKS THE POWER TO ADJUST OR SUSPEND A SENTENCE OF DEATH THAT IS IMPROPERLY IMPOSED.

Wherefore, this court should set aside MSG Hennis's sentence.

XXXV. THE DEATH PENALTY AS APPLIED IN THE MILITARY VIOLATES THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT UNDER ALL CIRCUMSTANCES.

Wherefore, this court should set aside MSG Hennis's sentence.

XXXVI. THE DEATH PENALTY NO LONGER COMPLIES WITH CURRENT EIGHTH AMENDMENT JURISPRUDENCE.

See Callins v. Collins, 510 U.S. 114, 1144-1159 (1994) (Blackmun, J., dissenting)(cert. denied). Wherefore, this court should set aside MSG Hennis's sentence.

XXXVII. RULE FOR COURTS-MARTIAL 1209 AND THE MILITARY DEATH PENALTY SYSTEM DENY DUE PROCESS AND CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT BECAUSE THEY PROVIDE NO EXCEPTION FOR ACTUAL INNOCENCE TO THE FINALITY OF COURTS-MARTIAL REVIEW.

Cf. Triestman v. United States, 124 F.3d 361, 378-79 (2d Cir. 1997). Wherefore, this court should set aside MSG Hennis's sentence.

XXXVIII. THE MILITARY JUDGE ERRED IN ADMITTING THE GOVERNMENT'S CRIME SCENE PHOTOGRAPHS AND VICTIM FAMILY PHOTOS AS THEY WERE UNDULY PREJUDICIAL TO MSG HENNIS'S DUE PROCESS RIGHTS UNDER AMENDMENTS V AND VIII OF THE CONSTITUTION.

See, *e.g.,* App. Ex. 53, Pros. Ex. 149-151. Wherefore, this Court should set aside MSG Hennis's findings and sentence.

XXXIX. THE DEATH SENTENCE IN THIS CASE VIOLATES THE EX POST FACTO CLAUSE, AMENDMENTS V AND VIII OF THE CONSTITUTION, THE SEPARATION OF POWERS DOCTRINE, THE PREEMPTION DOCTRINE, AND ARTICLE 55, UCMJ, BECAUSE NEITHER CONGRESS NOR THE ARMY HAD SPECIFIED A MEANS OR PLACE OF EXECUTION WHEN IT WAS ADJUDGED.

Wherefore, this court should set aside MSG Hennis's sentence.

XL. THE UNPREDICTABLE PERIOD OF DELAY PRECEDING THE ACTUAL EXECUTION OF THE RANDOM FEW FOR WHOM MAY BE EXECUTED VIOLATES AMENDMENT VIII'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

See Jones v. Chappell, 2014 U.S. dist. Lexis 97254, 1 (C.D. Cal. July 16, 2014). Wherefore, this court should set aside MSG Hennis's sentence.

CONCLUSION

Wherefore, appellee respectfully requests this Honorable Court dismiss the findings and sentence.

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APPENDIX

APPENDIX

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Master Sergeant Timothy B. Hennis, through appellate defense counsel, personally requests that this Court consider the following matters:

I. THE CONDITIONS OF CONFINEMENT ON MILITARY DEATH ROW ARE ARBITRARY, CRUEL, AND UNUSUAL.

The United States Disciplinary Barracks (USDB) has four inmates that have been sentenced to death: Ronald Gray, Hasan Akbar, Timothy Hennis, and Nadal Hasan. All four reside in the Barracks' Death Sentence Inmate (DSI) cellblock. They are the only four inmates in the USDB. Because of their sentences, all four DS inmates are segregated from the Barracks' other inmates, i.e. the "general population," and they are subjected to significantly greater restrictions than general population inmates. The conditions of confinement in the DSI cellblock are often arbitrary, and they infringe on important constitutional rights.

1. The USDB's comingling of sane and mentally ill inmates amounts to cruel and unusual punishment.

Hasan Akbar suffers from severe mental illness that has gone untreated for years. This is obvious to anyone who has observed him for more than a few hours, and it should be well known to the Army by now. Akbar is non-communicative;

he appears unable or unwilling to speak to anyone beyond a few mumbled words. His principle vocalizations are screams, shouts, and imitations of gunfire and explosions. To a lay observer, it sounds as if Akbar is repeatedly reliving acts of violence. To that same observer, his noises become so loud, incessant, and distracting that sleep and concentration becomes difficult, if not impossible.

Akbar is not only a disruption in terms of sound, but in smell too. He has abandoned any hygiene practices. He does not shower or clean his cell. He purposefully clogs his toilet but continues defecating and urinating into, and then, on top of, it. An odor of feces, urine, and sewage wafts out of his cell and throughout the DSI cellblock. And then inmates Gray and Hennis are forced to clean this up. Nadal Hasan, a paraplegic, takes no part in these cleanup efforts; in fact he exacerbates this unsanitary conditions. His colostomy bag often leaks while he is in his wheelchair, resulting a trail of human waste that follows his wheelchair tracks through the DSI cellblock.

For some seven years, a team of guards come at regular intervals to subdue Akbar, restrain him, and forcibly shave him. Akbar has ceased resisting this, but Nadal Hassan has continued as well, though less force is needed. These operations present yet another disruption within the DSI cell block.

For a brief period of time in 2017, Hasan Akbar behaved calmly, lucidly, and somewhat responsibly. This is when USDB officials were forcibly medicating

him. They did this for two weeks or so, and then they stopped. Akbar returned to his erratic and seemingly psychotic behaviors shortly after that, and he has continued to this day.

Comingling mentally stable inmates with others who are not constitutes a cruel and unusual punishment. Constant exposure to the wailings, ravings, and human waste of a mentally ill inmate inflicts significant harms: sleep deprivation, risk of illness, and elevated anxiety and stress. That anxiety and stress is exacerbated by the consideration that the Army intends to execute someone who is clearly in need of serious psychological treatment. The message is that mental health does not matter on death row.

2. The USDB's unnecessary restrictions on the free exercise of religion violate the First and Eighth Amendments.

The USDB is not only ignoring the mental health needs of its DS inmates, but also their religious needs. A chief component of worship is the ability to worship with others. The DS inmates are denied this privilege. Master Sergeant Hennis is Episcopalian, but he is prevented from practicing his religion with other adherents. The USDB allows a chaplain to enter the DS cellblock to administer brief one on one discussions, but religious practice is about more than the mere performance of rites. It is also about communing with a group of people who

believe the same creed and hold the same faith. Community is an essential element of the free exercise of religion, and the USDB denies this to its DS inmates.

Moreover, the individualized religious instruction authorized in the DSI cellblock is not private, as nothing in the cellblock is private. Rather, all DS inmates are exposed to any such service. When an imam leads Nadal Hasan in Muslim rites of worship, for example, the entire cellblock is subjected to the entire service whether they agree with it or not. In this sense, such "services" take on a proselytizing tone that interferes with the faith one already has. On the other hand, the USDB's general population inmates are able to attend religious services with others who share their faith, and they can avoid the services of those religious groups to which they do not adhere. There is no compelling reason why DS inmates should be denied both the rights to practice their religion freely, and to be free of others practicing their religions.

3. The USDB's restrictions on capital inmates are arbitrary and capricious.

The DS inmates are subject to other arbitrary restrictions that general population inmates avoid. The DS inmates cannot access the USDB's law library directly, for example. Instead, they must make requests without any list of resources on which to base that request. They cannot recreate with others, they are forced to work out in solitude. DS inmates are denied "contact" visits with

anyone, whereas general population inmates are permitted visits from any approved visitor, where they can engage with some semblance of normalcy and dignity, DS inmates must communicate with their list of approved family members through a plate of Plexiglas and a telephone line. There is no individualized determination as to whether such conditions are warranted in particular case.

II. THE ARTICLE 38, UCMJ, REQUIREMENT THAT CIVILIAN COUNSEL SERVE AS LEAD COUNSEL VIOLATED MASTER SERGEANT HENNIS'S FIFTH AND SIXTH AMENDMENT RIGHTS TO COUNSEL.

The Sixth Amendment guarantees the right to counsel in a criminal proceeding. Implicit in that right is an appropriate balance of responsibility between the accused and his counsel. When an accused has multiple counsel, the selection of lead counsel should be his or her sole prerogative.

While Article 38(b), UMCJ, recognizes an accused's right to military defense counsel as well as his right to hire civilian defense counsel, it frustrates the accused's ability to designate his or her lead counsel:

> If the accused is represented by civilian counsel of his own selection, military counsel detailed or selected under paragraph (3) shall act as associate counsel unless excused at the request of the accused.

10 U.S.C. § 38(b)(4), UCMJ. This presumes that an accused has hired civilian counsel to be his lead counsel. That presumption may hold in most cases, but not in all, and not in this case.

The Army assigned two military counsel to MSG Hennis's defense. Neither was stationed at Fort Bragg. Master Sergeant Hennis determined that he would need the assistance of a third counsel to contest the capital murder allegations against him, so he hired attorney FS. MSG Hennis's military counsel considered Mr. FS to be the lead attorney, in accordance with Article 38(b). This was against MSG Hennis's wishes. As a result, MSG Hennis's military counsel did not always inform him of case developments, or of disagreements they may have had with Mr. FS. The accused should always be informed of important strategic decisions, he was not in this case.

It should have been MSG Hennis's absolute right to determine who, if anyone, was his lead counsel. Article 38(b)(4) undermined that right. The Appellant would have made all his counsel coequal associate counsel to ensure he was informed of all important decisions in his case. Instead, Mr. FS, was put in charge over MSG Hennis's objections and will. The Air Force Court of Criminal Appeals subsequently found Mr. FS ineffective for his 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). This directly harmed MSG Hennis's rights to the effective assistance of counsel and due process.

III. THE ARMY IS INCAPABLE OF PROVIDING THE SAME STANDARD OF JUSTICE AS CIVILIAN COURTS, AND ITS PURSUIT OF CAPITAL PUNISHMENT FOR CIVILIAN CRIMES VIOLATES THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE CONSTITUTION.

Complex capital cases that can be tried by civilian authorities should be tried by civilian authorities. That is the only way to ensure justice is fully done in both fact and perception. Simply put, the Army is incapable of prosecuting and reviewing complex capital cases to a standard approaching its civilian counterparts. It has so far failed to guarantee that its counsel meet the high threshold of specialized experience needed for capital defense, and it cannot ensure continuity of the counsel it does assign to such tasks. Moreover, the Army JAG Corps remains too small and tight a community to overcome the perception, subtle influence, and implicit biases in favor of its leadership.

1. The Army has proven unable and unwilling to provide counsel learned in capital defense, or even counsel who can commit to such lengthy litigation.

The military has failed to guarantee capital accused in the military the same standard of representation that civilian accused received. *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). Military counsel cannot reasonably acquire this level of expertise, due to the rarity of capital litigation in the Armed Forces, frequent reassignments, and the belief that judge advocates should be generalists rather than specialists. Furthermore, the absence of established standards of practice for death penalty cases means that:

> 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).

These problems are further compounded by the lack of continuity of counsel, particularly on appeal. Complex capital cases require years of investigation and attentive legal work that the rotating door of counsel often fails to provide. As one member of this Court expressed:

> 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).

2. The Army cannot ensure judicial independence in capital cases.

A basic requirement of a fair proceeding is a fair judge. The military struggles to produce judges who can be perceived as fair and impartial. The nature of their rotating assignments and the lack of fixed terms of office make them subject to influence. The few capital cases tried in the Army attract high levels of attention with its legal circles, and this can only work to detract from their actual and perceived independence. *But see United States v. Loving*, 41 M.J. 213, 295 (C.A.A.F. 1994).

a. The convening authority's involvement overshadowed the appearance of fairness.

The role of the convening authority in the military justice system precluded a fair trial in capital cases this case. To begin with, the convening authority acts as a grand jury in referring capital criminal cases to trial. But in the military system, he personally appoints members of his choice, who he also rates and works with. He has the ultimate responsibility for law enforcement functions within his command. He rates his legal advisor, and performs the first level of post-trial review. These facts create an appearance of impropriety and suggest the convening authority acts as prosecutor, judge, and jury. This violated MSG Hennis's rights under Amendments V, VI, and VIII of the Constitution and Article 55, UCMJ.

b. The Army Court could not review this case fairly and impartially.

The judges of the Army Court are appointed to that position by the Judge Advocate General of the Army (TJAG). The Deputy Judge Advocate General of the Army (DJAG) rates their performance. This simple fact inevitably influences and shapes the Army Court to conform to the Corps' leadership. This does not present a problem in the vast majority of courts-martial, as neither TJAG nor DJAG had any direct involvement or personal investment in a particular case. But in high profile, protracted cases such as this one, that does not hold.

For the pendency of MSG Hennis's appeal before the Army Court, September 2013 to October 2016, LTG Flora Darpino served as TJAG. But years before, in 2006, then COL Darpino was the Chief of the Criminal Law Division within the Office of TJAG. She was instrumental in advising on, reviewing, and approving the effort to recall MSG Hennis for court-martial. She encouraged the decision to recall MSG Hennis, and she shepherded that request through to the Acting Assistant Secretary for the Army (Manpower & Reserve Affairs). She oversaw and validated the research on which the Army's erroneous theories of jurisdiction relied. Everything relating to the inception of this effort and the legality of the ensuing court-martial carried her stamp of approval. And as she herself foresaw, "this will hit the press big time and then it will [be] to[o] late to back off gracefully." (JA 1484). It is hard to see how the judges she appointed

could remain uninfluenced by her involvement, even if they told themselves they were not.

Likewise, it is hard to see how the Army Court judges could have ignored the fact that their rater, MG Thomas Ayres, had previously endorsed this court-martial as well. As the Staff Judge Advocate, XVIII Airborne Corps, then COL Ayres provided the convening authority's pretrial advice on the referral of this case to court-martial. That means he did not perceive any problem with jurisdiction, double jeopardy, due process, or a capital referral in this case. Again, it is hard to see how the judges he evaluated could remain totally unaffected by his endorsement.

In fact every staff judge advocate who approved or advised the convening authority on this case also sat on the Army Court at some point during MSG Hennis's appeal before it. Brigadier General Paul Wilson served a year as the Army Court's Chief Judge, and he had previously served as the Staff Judge Advocate, XVIII Airborne Corps. Colonel Lorianne M. Campanella, another member of the Army Court, had served as the Acting Staff Judge Advocate, XVIII Airborne Corps. Even though these officers, like six other members of the Court, recused themselves due to their involvement, their close peers and subordinates were still reviewing their work in what must have been one of the highest-profile courts-martial of their careers.

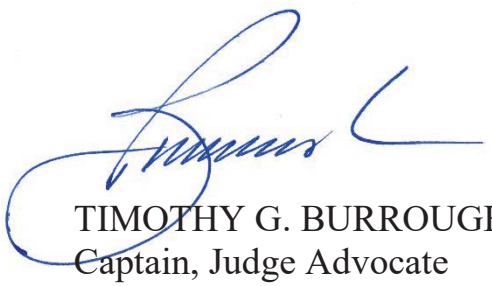
The influence of rank, proximity, and esteem for one's colleagues can be suppressed, but not extinguished. All officers involved in this may have honestly believed their judgement was sound and uninfluenced by such matters. The overwhelming majority of Army judge advocates are committed to fairness and due process. But all of them are human, and all humans are susceptible to bias even when they consciously believe themselves free of it. To them, there is no problem. But to anyone outside, such a court loses the appearance of independence. And that cripples the appearance of justice:

> independent trial judges and independent appellate judges have a most important place under our constitutional plan since they have power to set aside convictions.

Toth v. Quarles, 350 U.S. 11, 19 (1955). It is hard to escape the conclusion that the Army Court had a bias to affirm this case. Under such conditions, members of the public cannot have faith in the results of MSG Hennis's court-martial or the Army Court's review of it.

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Hennis,* Crim. App. Dkt. No. 20100304, USCA Dkt. No. 17-0263/AR, was delivered to the Court and Government Appellate Division on January 31, 2019. I further certify that this brief complies with this Court's orders dated March 6, 2017 and January 16, 2019 concerning brief organization and page limitations.



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