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*	REPLY 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:

TIMOTHY G. BURROUGHS
Major, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0668
USCAAF Bar No. 36756

JONATHAN F. POTTER
Senior Capital Defense Counsel
USCAAF Bar No. 26450

CHRISTOPHER DANIEL CARRIER
Lieutenant Colonel, Judge Advocate
Chief, Capital & Complex Litigation
USCAAF Bar No. 32172

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SUMMARY OF REPLY ARGUMENT

What the government misses more than anything else in this case is the big picture. While it has jousted with the merits and minutiae of some errors, and just evaded others, its greatest omission lies in ignoring the novel and grasping nature of this prosecution. The legality of this case strains at every seam: in its jurisdiction, in its merits and procedure, in the fairness of its panel and in the conduct of the government. And what it seeks to achieve is something Americans have never heard of before: a military execution of a citizen for allegations of a civilian character, of which civilian jurors acquitted him decades before, when the military had long ago relinquished its jurisdictional claims, and where the man had already retired from active service. That is unprecedented. But then consider the

decades of delay, the denial of a viable defense, the partiality of the panel and the attempts to inflame them against the accused. Then consider that the Army's justification for all of this is the truly remarkable absurdity that Timothy Hennis's constitutional protection against double jeopardy is what subjects him to double prosecution. This is not a court-martial conceived, executed, or justified within the strictures of the Code or the Constitution. Swept away with a flawed confidence in its case, the government still has not taken stock of its cost.

And that cost is profound. This endeavor runs against Americans' long-standing recognition that the military is "a necessary institution, but one dangerous to liberty if not confined within its essential bounds." *Reid v. Covert*, 354 U.S. 1, 23-24 (1957). These essential bounds, of course, are those essential to warfighting; "the primary business of armies and navies" is to "fight or be ready to fight wars should the occasion arise" and the "trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function." *Toth v. Quarles*, 350 U.S. 11, 17 (1955). Our earliest laws and traditions have always resisted extensions of court-martial powers, as "[e]very extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections." *Covert*, 354 U.S. at 21. Every extension comes at a cost, and the government has not accounted for that here.

The desire to extend courts-martial beyond their natural and essential bounds presents a perennial danger. "Throughout history," such efforts have often been "called 'slight' and have been justified as 'reasonable' in light of the 'uniqueness' of the times," or even just the "uniqueness" of this case. *Covert*, 354 U.S. at 40. But yielding to minor encroachments is how "illegitimate and unconstitutional practices get their first footing in . . . by silent approaches and slight deviations from legal modes of procedure." *Id*. at 39-40. The founders of our democracy steadily warned against this, and our Supreme Court has steadily heeded their warnings.

It is no wonder, then, that "[f]ree countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service." *Toth*, 350 U.S. at 22. It is not just a wise policy, but a constitutional imperative, that the authority to court-martial remain limited to "the least possible power adequate to the end proposed." *Id*. at 23. Courts-martial are creatures of limited jurisdiction and power, not laboratories for legal experimentation.

Of course concerns of this nature can recede from the fore when cries of "unique circumstances" clamor for exceptions and innovations that expand martial power into the civilian realm. But these concerns persist, and they overshadow this entire case. This court-martial has not confined itself to the narrowest jurisdiction,

it was not essential to discipline, and it has not represented the least possible exercise of power. It is a runaway effort well beyond its bounds; this Court should do what the Code and Constitution demand and reject it.

ASSIGNMENTS OF ERROR

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

The break in MSG Hennis's service ended court-martial jurisdiction over this case, and his acquittal in the courts of North Carolina ensured that jurisdiction would never revive. Twice he stood trial in state court, and as far as Congress and the Code are concerned, that was enough. The government fights this with little more than a riddle. That riddle is the claim that, under Article 3(a), MSG Hennis can be tried because he "cannot be tried" because he has already been tried. (Gov. Br. at 11-13). That's the claim in its barest form, and no degree of legal fiction can dress up or disguise its *Catch-22* absurdity.

The purpose of Article 3(a), as it bears on this case, is to provide court-martial jurisdiction over offenses that could *never* be tried in American courts. Indeed, the Supreme Court already observed that "under the present law courts-martial have jurisdiction only if no civilian court does." *Toth*, 350 U.S. at 20. Article 3(a) has never served the entirely cross purpose of retrying cases already

tried, and repetitive prosecutions are hardly "the least possible power adequate to the end proposed." *Id*. at 23. Nor has the Double Jeopardy Clause ever justified a re-prosecution after acquittal on the very same charge. This constitutional guarantee is not a two-edged sword for the government to spring and swing upon its citizens. It is solely a shield, personal to all, that protects against repeat prosecutions; the Double Jeopardy Clause prevents successive trials, it does not enable them. In a case beset by serious errors, the government's claims under Article 3(a) mark an especially bold effort that must end in failure. Riddles, paradoxes, and perversions of the law do not yield a court-martial "convened strictly in accordance with statutory requirements." *United States v. Padilla*, 5 C.M.R. 31, 34 (C.M.A. 1952).

Confronted with the absurdity of its claim, the government offers no reason to let double jeopardy protections justify double prosecutions. (Gov. Br. at 10-13). Confronted with the legislative history's confirmation of Article 3(a)'s purpose,[1] the government offers no counter. (Gov. Br. at 10-13). Confronted with its flip-

[1] *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.").

flopping interpretations of "cannot be tried," which treat the term narrowly for one purpose and then expansively for another, the government offers no theory of consistency. (Gov. Br. at 10-13). Confronted with these challenges, the government offers nothing in response. It has had thirteen years to answer these questions, and silence is all it can muster.

The government has nowhere left to turn except *Willenbring v. Neurauter*, 48 M.J. 152 (C.A.A.F. 1998). This case is the only one it cites for its argument, and while it notes *Willenbring*'s reversal, the government does not actually address that reversal or give reason to rely on this declawed case. (Gov. Br. at 10-13). That is because there is no reason to rely on *Willenbring*; its *raison d'être* has been removed, and further review has shown it was never actually an Article 3(a) case to begin with. *See United States v. Willenbring*, 56 M.J. 671 (A. Ct. Crim. App. 2001) (finding that Willenbring had no break in service). *Willenbring* has lost any controlling force here, and it offers the government's case no succor.

Indeed, the government cannot overcome the defining distinction between *Willenbring* and *Hennis*: SSG Willenbring never faced a civilian trial for those charges referred to court-martial, and there was no prior judgment on the merits. 48 M.J. at 155. Master Sergeant Hennis, on the other hand, was tried twice and acquitted on the merits of the very same allegations. Again, the government has no answer here either, because there is no answer save this: to the extent fragments of

Willenbring survive, they only confirm what the text and legislative history of Article 3(a) already establish, that its sole purpose was to ensure some American forum—state court, federal court, or court-martial—could try serious charges against servicemembers that would go untried otherwise. Article 3(a) contemplates one trial on the merits, not multiple trials in multiple forums.

Congress entrusted the government with the power of prosecuting courts-martial. This is an awesome responsibility that must be exercised "strictly in accordance" with the Code. *Padilla*, 5 C.M.R. at 34. Paradoxes, tacit concessions, and overturned cases do not constitute "strict accordance," and they do not satisfy jurisdiction in 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.

The government treats *Solorio v. United States*, 483 U.S. 435 (1987), as a "sweeping" decision that "unequivocally" makes an accused's military status the only constitutional requirement for court-martial jurisdiction, capital or otherwise. (Gov. Br. at 14, 17). But at least four Supreme Court justices and six judges of this Court have refrained from leaping to that conclusion. *See Loving v. United States*, 517 U.S. 748, 774 (1996)*; United States v. Gray*, 51 M.J. 1, 11 (C.A.A.F. 1999); *United States v. Curtis*, 44 M.J. 106, 118 (C.A.A.F. 1996). And their reluctance is

well founded: *Solorio* was not a capital case, and the historical analysis on which it rested "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." *Loving*, 517 U.S. at 774 (Stevens, J., concurring). Justice Stevens's observation remains as valid today as when he made it, and the constitutionality of courts-martial for civilian capital crimes is still the "important question" this Court understood it to be in *Gray*, 51 M.J. at 11. The only thing that has changed is that this case now presents the issue squarely before this Court.

1. **Capital courts-martial have always been limited to service-connected offenses, and the government gives no reason to break from that practice.**

Solorio grappled with history, and a thorough review of court-martial history shows that capital murder allegations have never "aris[en] in the land and naval forces" when they occur within the jurisdiction of a state, during peacetime, and without exploitation of military weapons, abuse of military authority, targeting of military victims, or commission of collateral military offenses. U.S. Const. Amend. V. This is especially true when the state prosecutes those allegations to a final verdict ending in acquittal. *See United States v. Borys*, 40 C.M.R. 259 (C.M.A. 1969). Cases of this character arise in the realm of civilian justice and not "the land and naval forces." As this Court observed once before, the accused's military status is "only a happenstance of chosen livelihood," not a cause of the

crime and not a cause for suppressing the rights every other citizen receives when facing the most severe punishment of the law, which is death. *Id*.

Despite this, the government contends that "nothing limits the holding in *Solorio* to non-capital cases." (Gov. Br. at 18). That statement is true only if we discard the reasoning of *Solorio* and the history of court-martial practice in this country. *Solorio* examined British and American court-martial practice in the 17th and 18th Centuries, and relied on avowedly non-capital sources to arrive at its holding that this history was "too ambiguous" to restrict Congress. 483 U.S. at 442-47.

But no such ambiguity exists in the history of capital punishment. From the founding of our Nation until the enactment of the Code, the services had no authority to pursue domestic allegations of murder when not at war. *See Lee v. Madigan*, 358 U.S. 228, 233 (1959); *United States v. French*, 27 C.M.R. 245, 251 (C.M.A. 1959). And, prior to this court-martial, the services had never claimed any authority to prosecute capital murder allegations without a clear connection to military service.[2] The reasons for this have already been readily summarized:

> 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

[2] *See* Appellant's Brief, Jan. 31, 2019, at 55-59 (summarizing all 31 capital cases reviewed by this Court since 1950).

> 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. The most significant of these is the right to trial by jury, one of the most important safeguards against tyranny which our law has designed.

Lee, 358 U.S. at 234. *United States v. Hennis* is the first capital court-martial that did not clearly arise in the Armed Forces. Over two centuries of courts-martial mean something; that kind of time turns practice into precedent and custom into law—law that governs this case.

The government has no answer to this. It has no counterexample, it has no opposing jurisprudence, and it has no alternative explanation. Its only retort is to slight these facts as an "erroneous interpretation" of history, even though it comes directly from both the Supreme Court[3] and this Court.[4] (Gov. Br. at 16). There is no question that, prior to this case, our Armed Forces have always treated capital murder allegations as a matter beyond the bounds of courts-martial, unless the crimes themselves, and not just the accused, arose in military service. The court-

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[3] *See*, *e.g.*, *Lee v. Madigan*, 358 U.S. 228, 233-34 (1959) ("The power to try soldiers for the capital crimes of murder and rape was long withheld. Not until 1863 was authority granted. And then it was restricted to times of 'war, insurrection, or rebellion.' The theory was that the civil courts, being open, were wholly qualified to handle these cases.").

[4] *See*, *e.g.*, *United States v. French*, 27 C.M.R. 245, 251 (C.M.A. 1959) ("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.").

martial of Timothy Hennis is a sharp break from that practice and custom, and it presents an unconstitutional expansion of military jurisdiction.

The government looks for support in *Gray* and *Loving*, but those cases cannot offer it. (Gov. Br. at 17-18). Neither decision recognized the constitutional imperative present in this case because neither one had to. The courts-martial of Gray and Loving concerned murders on military installations that clearly arose within the Armed Forces, and there was no need to embroider their holdings with dicta not raised by their facts. *See Relford v. Commandant*, 401 U.S. 355, 369 (1971). In fact, *Gray* and *Loving* only confirm the need for a service connection in capital courts-martial. The Army only prosecuted Ronald Gray for the murders he committed on Fort Bragg, and it left those he committed elsewhere in North Carolina to the State of North Carolina. *United States v. Gray*, 51 M.J. 1, 11 (C.A.A.F. 1999). Likewise, the only death-eligible offenses for which Dwight Loving was court-martialed occurred on or originated on Fort Hood and they involved victims subject to the Code. *United States v. Loving*, 41 M.J. 213, 229-32 (C.A.A.F. 1994).

The Constitution limits courts-martial to cases "arising in the land or naval forces," and for the history of our Republic, that has meant something more than just the military status of the capitally accused. Without countervailing proof or a competing history, the government tries to meet its constitutional burden by

stretching *Solorio* beyond its bounds. That effort must fail, and this Court should affirm the principle that capital courts-martial require connections to military service.

2. The government has failed to show this prosecution arose in the Armed Forces.

This case arose in North Carolina, not in the Armed Forces. The interests in prosecuting the Eastburn murders were overwhelmingly civilian, and had it been otherwise, the Army would have presumably done something—anything—to vindicate any unanswered military interests, whether in 1985 or any of the two decades that followed. But it did not, and for the obvious reason that this was a civilian case. The offenses occurred in an entirely civilian neighborhood entirely subject to civilian jurisdiction, and they were entirely independent of military operations, duties, equipment, and authorities. *Relford*, 401 U.S. at 364-65. Even when presented at court-martial, this case failed to reflect any meaningful military connection; trial counsel themselves saw it as just a replay of the former state trials, and that's just how they tried it—as a civilian case.[5]

[5] Consider the statement of Captain Nate Huff, assistant trial counsel: "The only difference between this trial and the previous trials is the discovery of this new DNA evidence." 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"]. The government's findings and sentencing arguments reflect the same understanding. Except when government counsel was throwing the Army's credibility behind DNA testing on findings, or

Contrary to the government's argument, the situs of the offenses a mile from Fort Bragg did not make them Fort Bragg offenses; they occurred in Fayetteville, North Carolina and have always been Fayetteville, North Carolina offenses. (JA 117). Legal boundaries have legal consequences. The line between a military installation and the state surrounding it marks the point at which the authority of one ends and the other begins. Had the offenses occurred on Fort Bragg, their military nature would be certain. Had the offenses occurred just outside the gate, in a neighborhood "immediately adjacent" to the installation and officially recognized by its "command referral list for off-post housing," and if "80% of the residents were military members and their dependents," then perhaps the government could draw support from *United States v. Abell*, 23 M.J. 99, 100, 103 (C.M.A. 1986). But that just is not this case. *Abell*'s reasoning does not stretch to crimes in a private home in an ordinary neighborhood separated from post by other ordinary neighborhoods and commercial properties.[6]

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asking the members to resent MSG Hennis for retiring, the government focused very little on any service related subjects. *See* Assignment of Error IX.

[6] To the extent *Abell* suggests that having an "impact" on the military on military relations is relevant, it misses the mark. 23 M.J. at 103. The question under the Fifth Amendment is whether the matters "arise" in the Armed Forces, *i.e.* whether they "originate," "stem from," or "result from" uniquely military conditions, and not whether they produced some effect on military relations afterward. *Arise*, BLACK'S LAW DICTIONARY (8th ed. 2004). An infinite variety of off post crimes

The government's strongest claim of a service connection is that the victims, though civilians, were dependents of an Air Force officer. (Gov. Br. at 18-19). Being their strongest argument does not make it strong enough, however. The nature and gravity of the crimes would not have been changed if the Eastburns had been family members of a businessman, police officer, or teacher. And just as with legal boundaries, a person's legal status carries legal consequences. Servicemembers and civilians are different, even when the latter are family members of the former; the "term 'land and naval Forces' refers to persons who are members of the armed services and not to their civilian wives, children and other dependents." *Reid v. Covert*, 354 U.S. 1, 19-20 (1957). Master Sergeant Hennis's alleged interactions with the Eastburns did not involve any military relationship with then-Captain Eastburn either. At most, the Eastburns' status as civilian dependents created a single consideration that could not overcome the overwhelmingly civilian nature of this case.

And perhaps nothing displays civilian nature more immediately than how all parties treated it: as a North Carolina case. The government's claim that "only the military had jurisdiction" is wishful; North Carolina tried Timothy Hennis twice for these very allegations and the State certainly had jurisdiction—indeed it still

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could "impact" a military installation, but that does not mean they would "arise" within it.

does.[7] (Gov. Br. at 20). The government may think *Abell* erases that fact, but it does not. *Abell* concerned offenses over which a state had jurisdiction *but never exercised it*. 23 M.J. at 100, 103. But this appeal presents the opposite scenario: a case where the state had jurisdiction and exercised it aggressively, with full military acquiescence.

The government correctly notes that "initial deference to civilian authorities" does not necessarily preclude court-martial jurisdiction; indeed, an initial declination to prosecute would not even bind the state, let alone the service concerned. (Gov. Br. at 20). But "initial deference" is not our argument. Rather, our argument concerns two different points, and the government misses both of them. First, this was a not a case of "initial" deference, but one of *total* deference. The Army deferred to North Carolina's prosecution so thoroughly that it discharged MSG Hennis and relinquished its jurisdiction in 1989. *See* Assignment of Error I, *supra*. Then it deferred to North Carolina again when it preferred charges against MSG Hennis in the latter's stead in 2006. *See* Assignment of Error IV, *infra*. Even when it played the role of third string prosecutor, the Army still

[7] Master Sergeant Hennis's protection against double jeopardy in North Carolina is not a jurisdictional matter, but an affirmative defense. *See State v. McKenzie*, 232 S.E.2d 424, 428 (N.C. 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). The government repeatedly confounds this waiveable right with the unwaiveable demands of jurisdiction—they are entirely distinct.

deferred to North Carolina's experts and law enforcement, because that was nearly the sum-total of its case, a North Carolina replay. Each of these facts reflects the lack of service connection, and the Army's conduct over the course of two decades is powerful proof that this case never truly concerned military operations, never truly disrupted discipline, and never truly "arose" from within the Armed Forces.

Second, the retrial of acquitted cases—at least capital cases—does not "arise" within the Armed Forces either. Our military's mission is winning wars, not re-litigating acquittals; 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 v. Quarles*, 350 U.S. 11, 17 (1955). Smuggling cases past the Double Jeopardy Clause is not a military function, a point already recognized in *Borys* where state courts were "not only open and functioning, but resort to the former's facilities led only to accused's acquittal." 40 C.M.R. at 259. A civilian crime tried in state court, then reinvestigated by the state, and then brought to trial again at the state's urging simply does not arise in the Armed Forces—it arises in the state. The government has the burden of establishing jurisdiction in every case, and it fails in this one. This court-martial violated the Fifth Amendment, and it must be dismissed.

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

Even now, 13 years after the government began this litigation, it still cannot pin down its theory of personal jurisdiction. Instead, it presents another jurisdictional paradox, this time arguing that it tried Hennis as both a retiree and an active servicemember at the same time. But that proposition rebels against the basic meaning of those terms—a servicemember cannot be retired and active at the same time, as retirement and active service are mutually exclusive statuses. *See United States v. Smith*, No. ACM 38157, 2013 CCA LEXIS 1084, at *10 (A.F. Ct. Crim. App. Dec. 5, 2013). This logic is simple, self-evident, and fully reflected in the structure of Article 2(a), UCMJ.

The government does not disturb that. It certainly has no lexical, statutory, or deductive argument against the exclusive natures of active and retired statuses. At most, the government cites *United States v. Hooper*, 26 C.M.R. 417 (C.M.A. 1958), but to no avail. *Hooper* did not say a servicemember can be active and retired at the same time. Rather, it merely rejected the appellant's claim that he had to be recalled to active duty in order to be court-martialed. *Id*. at 420-25. That is the sum of its holding, and that does not mean the government can double up on jurisdictional claims, stacking inconsistent statuses on top of each other with hopes that one might prevail. To the contrary, *Hooper* emphasized how the

provisions of Article 2 were not "redundant" or products of "needless repetition," and that "courts should hesitate in ascribing careless and needless tautology to the lawmaking body." *Id*. at 421 (citations omitted). If anything, *Hooper* reaffirms that Article 2(a)(1) and 2(a)(4) are separate and exclusive provisions from which the government must pick one and only one for a given court-martial.

So which one did the government choose? Even now it cannot say. The only provision of Article 2(a) that the government expressly mentions in its brief is subparagraph 4, *i.e*. jurisdiction over "retired members of a regular component of the armed forces who are entitled to pay." (Gov. Br. at 23). But at no stage of these proceedings did the government treat "First Sergeant (Retired) Timothy B. Hennis" like a retiree—in fact it deliberately denied "Master Sergeant Timothy B. Hennis" that status. The charge sheet alone proves this, and the government has no response to that either. (JA 117). Acknowledging that Hennis "could be tried by the court-martial while in a retired status," the government forewent that option and purposefully recalled him to duty in order to exercise "positive control over him," collect statements to use against him, and ensure that there would be no "issue regarding confinement." (JA 1484, 1491, 1493).

The Army had the chance to pursue this case under Article 2(a)(4) and it declined. That decision distorted the nature of this court-martial and subjected MSG Hennis to prejudices that the government simply ignores. (App. Br. at 72-

77; Gov. Br. at 23-27). That omission is an admission. The government manipulated the military status of Timothy Hennis for its own advantages, and it should be estopped from asserting theories on appeal that conflict with its conduct at trial.[8] That is what fair play demands, and the government cannot give a good reason to do otherwise. (Gov. Br. at 23-27).

The government is stuck with its decision to try this as an active duty case under Article 2(a)(1), and that decision was unlawful. Although the government relied on reserve component authorities, (JA 1353), the Army could not rely on Hennis's reserve status to recall him for court-martial of a 1985 offense.[9] *United States v. Caputo*, 18 M.J. 259, 266 (C.M.A. 1984). In light of that, the government claims it recalled him from the retired list under 10 U.S.C. § 688. But it had no authority to do that either, as such an action was not "necessary in the interests of

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[8] *See*, *e.g.*, *United States v. Brown*, 48 C.M.R. 778, 779 (C.M.A. 1974) (where a 16 year old enlisted with false papers, the government was estopped from asserting he constructively enlisted because its own conduct led to ongoing retention of minor).

[9] The government misstates our argument as "alleg[ing] that by virtue of his assignment to the "Reserve Component," the Army could not recall [MSG Hennis] for purposes of court-martial." (Gov. Br. at 24). That's not our argument. The fact that the Army put him in a reserve status as part of his retirement did not, in and of itself, preclude the exercise of jurisdiction under Article 2(a)(4). It was the Army's deliberate action of recalling him under reserve component authorities—something expressly forbidden under *Caputo*—that precluded the Army from relying on his retired status. Again, the Army had to pick one status, and it chose and acted on one for which it had no authority. The result is a nullity.

national defense." *Id*. at (b)(1), (c). Recalling Timothy Hennis for a court-martial already tried twice in state court was not a matter of national defense, let alone a matter *necessary* thereto.

The government suggests that "the discovery of new evidence" is somehow relevant here, but it's not. (Gov. Br. at 27). There was no "discovery of new evidence" at all, but rather a retesting of old evidence, and in any event, new evidence has never justified retrial after an acquittal. *See Burks v. United States*, 437 U.S. 1, 11 (1978) ("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.").

Beyond this, the government repeats its confounding mantra that only the Army had jurisdiction to prosecute these allegations. (Gov. Br. at 20, 27). Assignment of Error I has already demonstrated why that is false. But even if that untruth turned true, it would still not make the court-martial "necessary" to "national defense." In the twenty years between Hennis's acquittal and this court-martial, no matter of national defense suffered as a result. Even after Cumberland County officials leaked information about their DNA testing, and after the Army recalled MSG Hennis, and after the media coverage ensued, nothing in our national defense posture changed.

This is how the government tries to tie this court-martial to interests of national defense, and the effort never gets off the ground. The government has the burden of proving jurisdiction over MSG Hennis, and it fails on each point. It tried to gain the advantages of both statuses, but lost them both. The court-martial was convened on the basis that Hennis was "lawfully called" to active duty, and yet Hennis was not in fact lawfully called to active duty. The court-martial was improperly convened and invalid *ab initio*, its results cannot stand.

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

In *Gamble v. United States*, 139 S. Ct. 1960 (2019), the Supreme Court affirmed that our governments can potentially try citizens twice, when acting as separate sovereigns and independently exercising their legislative and prosecutorial powers. *Id*. at 1968-69. But when the state and federal governments do not act separately and independently, and instead collude in a sham prosecution, their departure from the plain sense of the Double Jeopardy Clause should fail. *See Bartkus v. Illinois*, 359 U.S. 121, 123 (1959).

This case presents that scenario. The State of North Carolina tried and ultimately acquitted Timothy Hennis. The Double Jeopardy Clause protects Hennis from another prosecution in that state if he chooses to invoke it. *See State v. McKenzie*, 232 S.E.2d 424, 428 (1977). Confronted with the prospect of Hennis

actually using his rights, Cumberland County prosecutors implored the Army to do what they would no longer do: try him again. (JA 184). This court-martial was not a separate, independent action by the Army, as from 1985 until Cumberland County's 2006 request, the Army eschewed any pursuit of criminal charges in this case. It deferred to the State authorities for the obvious reason that this was not a service-related crime, but a civilian offense outside military jurisdiction. *See* Assignment of Error II. The Army was right to defer to the State in 1985, but it was wrong to do so in 2006. This court-martial originated in a deliberate effort to bypass the rights of Timothy Hennis and not out of some exercise in unvindicated sovereign interests.

Our main brief has already arrayed the underlying facts, and the government has presented few considerations not already addressed there. What matters most in the government's response, however, is what it has *not* presented. The government has not presented any reason against applying *Bartkus* with a military-specific understanding. The government has not presented any reason to expose servicemembers to successive prosecutions more frequently than their civilian neighbors. The government has not presented any reason to accept the unequal protection across the Department of Defense caused by the services' divergent policies. The government has not presented any reason to encourage civilian prosecutors to use courts-martial as a second-chance forum. The government has

not presented any reason to think commanders need to court-martial troops already acquitted of the exact same offenses. In short, the government has not presented any reason to deny servicemembers a meaningful protection against sham prosecutions like this one.

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

The government tries to soften two decades of its delay by first introducing an "abuse of discretion" standard into this question that does not exist. (Gov. Br. at 38-39). The governing case is *United States v. Reed*, 41 M.J. 449 (C.A.A.F. 1995), and it did not review for an abuse of discretion.[10] Rather, it focused on the presence of two things: "an egregious or intentional tactical delay" and "actual prejudice." *Id*. at 452. That is the test, and it should apply to the entire court-martial, not just the military judge's decision.

Indeed, it makes sense to consider this matter de novo, rather than through the narrower prism of a trial ruling, as the scope of prejudice may not reveal itself until the case has been fully tried. This Court enjoys an advantage over the military judge in assessing how egregious delays affected the proceedings.

[10] Only the dissenting view of *Reed* believed the Court was "required to use an abuse-of-discretion standard." 41 M.J. at 453 (Sullivan, J., dissenting). That view is not the law of the case.

Defense counsel should certainly address that delay as early as possible, but they cannot always predict the future and foretell how severely it will deny the accused due process. Much of this depends on how the government presents its case, and how it exploits the delays it engendered—these are all things beyond the defense's control, but well within an appellate court's perception once the trial has concluded.

This case illustrates the point. Yes, all parties knew that 17 witnesses were deceased or unavailable, and that the absence of live testimony would hinder the defense's ability to cross-examine witnesses and present compelling testimony. *See* Assignment of Error VII. The parties also knew that MSG Hennis's prior incarceration records had been destroyed, and his efforts to present mitigating evidence would be significantly diminished. *See* Assignment of Error X. But others harms only became obvious during trial. Consider the testimony of Charlotte Kirby, whose coherence and persuasiveness in 1989 had degraded markedly by 2010. (JA 978-995, 2144-60). The defense could not know exactly how strained her testimony would appear until she actually delivered it, and even if they had reason to suspect as much beforehand, they should not have to aid the government's cross-examinations by telegraphing just how much time has enfeebled the defense's witnesses.

Likewise, the defense could not have predicted how the government would disingenuously blame MSG Hennis for the delay it alone created. (JA 1207-08). The government abstained from prosecution for two decades, but once it had MSG Hennis on the docket, it tried to cast him as the cause of "25 years" of "pain and suffering" and the reason why the case has "gone on too long." (JA 1180, 1196-99). The message was clear and improper: convict MSG Hennis and sentence him to death because this has "gone on too long." The defense could not have addressed this when moving pretrial to dismiss on grounds of delay, unless it was supposed to presume prosecutorial misconduct in advance. *See* Assignment of Error IX.

Beyond that, the depth of this delay continues to deprive MSG Hennis of due process to this day. Since 2016, there is reason to believe that JC, the Eastburns' babysitter, came home covered in blood the night of the murders, and that her mother, AC, went back with her to the Eastburn home to remove signs of JC's involvement. (JA 2140). Hennis's defense might have discovered this earlier, and had better chances of acting on it, if the investigative trail was not left cold for so long. Today, however, the sources needed to build upon this lead are evanescing, its difficulty is ever-growing, and the Army's willingness to resource this necessary investigation is still nonexistent. *See* Assignment of Error XVI. The egregious delay has not only prejudiced MSG Hennis's defense at trial, but

also his defense on appeal, and limiting the review of this error to matters presented *in limine* would wrongly shut out matters affecting the justice of this case.

This Court should adhere to *Reed* without raising the appellant's burden higher. But even if this Court weighs the military judge's exercise of discretion, it should still find that he abused it, as he only considered whether the government delayed its case in order to gain "some sort of tactical advantage." (App. Ex. 237 at 2). That was an erroneous interpretation of *Reed* and a failure to consider whether the delay was "egregious," which gives independent grounds for relief. While deliberate, bad faith delays certainly undermine due process, unintended but egregious delays do too. *Reed*, 41 M.J. at 452. Although the government conflates "egregious" with "intentional," the two concepts are independent—that's why *Reed* recognized them as such. *Id*. Even an honest or inadvertent delay can trammel the pursuit of truth as thoroughly as a deliberate plan when the delay goes for too long. After a certain point, the government's intent dwindles in importance, and the magnitude of its delay overshadows the cause that created it. Twenty years after the investigation and second trial of this case is certainly beyond that point, and certainly an "egregious" delay under any reasonable standard.

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

The merits of this court-martial centered on one question: who murdered the Eastburns? Evidence tending to show that someone other than MSG Hennis committed the offenses was undoubtedly "relevant" and "necessary," despite the government's contrary view. (Gov. Br. at 47-50). Very little debate exists that "evidence establishing third-party culpability is material," and the military judge should have protected the defense's ability to present this kind of evidence. *Wade v. Mantello*, 333 F.3d 51, 58 (2d Cir. 2003). His failure to do so was a denial of due process and a yet another reason to reverse this court-martial.

The government appears to argue that anything less than conclusive proof of another's guilt is irrelevant. (Gov. Br. at 47-50). That is wrong. "Fundamental standards of relevancy . . . require the admission of testimony which tends to prove that a person other than the defendant committed the crime that is charged." *United States v. Armstrong*, 621 F.2d 951, 953 (9th Cir. 1980). If the defense's evidence tends to prove someone else did it, then it makes a matter of consequence more likely and thus relevant. *See* Mil. R. Evid. 401. Anything that moves that needle is relevant. The evidence need not prove the third party's guilt conclusively; merely casting some doubt on the prosecution's case is enough, and this need not be "particularly compelling," just "plausible." *United States v. Urias*

Espinoza, 880 F.3d 506, 519 (9th Cir. 2018). Evidence that tends to show someone else "had knowledge, motive, and opportunity" to commit the crimes certainly casts doubt, as it can provide "the missing link to establish reasonable doubt for the jury." *Id.*; *see also United States v. Woolheater*, 40 M.J. 170, 173 (C.A.A.F. 1994). That is what Mary Krings, Gary Staley, and WHJR would have provided had the members actually heard them testify.

But the military judge prevented the defense from presenting that missing link. Deprived of this defense, the members were "left without a plausible alternative theory that a person other than" Hennis committed the offenses. *Urias Espinoza*, 880 F.3d at 518. Such an alternate theory was a necessary part of this capital defense. Even if MSG Hennis was able to "poke holes in the prosecution's case and offer innocent explanations for some of [his] behavior," the "exclusion of third-party culpability evidence precluded [him] from answering the only question that mattered," *i.e*. if Hennis didn't murder the Eastburns, then who did? *Id*. The military judge had no discretion to deprive MSG Hennis of such evidence, and to so severely handicap his defense.

The harm to MSG Hennis's defense is obvious, and the government cannot meet its burden of disproving this beyond a reasonable doubt. *See United States v. Buenaventura*, 45 M.J. 72, 79 (C.A.A.F. 1996). So instead the government just tries to recalibrate the standard for relevancy. And just like the military judge, the

government presumes that the defense had some duty to rebut the prosecution's evidence by "challeng[ing] the testing procedures of either the vaginal swabs or the comparison test that excluded Mr. Hill as a contributor of DNA." (Gov. Br. at 48). *Holmes v. South Carolina*, 547 U.S. 319 (2006), *United States v. McAllister*, 64 M.J. 248 (C.A.A.F. 2007), and *Woolheater* dispel any such notion. But this is already addressed in our January 31, 2019 brief. (App. Br. at 144-47).

But one thing that deserves renewed emphasis is the government's untempered inconsistency, whereby it chides the defense for not rebutting its DNA claims—something the defense need not do—while simultaneously denying the defense means and access to do its own, independent DNA testing of other probative items—something the defense must do. (Gov. Br. at 48, 55-59). The wrongness of this effort reflects the weakness it tries to hide; MSG Hennis had a possible defense that WHJR or another committed these crimes, and the military judge denied him the means of pursuing it. No fair trial could obtain under these circumstances. In a case of such grave importance, with such final consequences, it strains all sense for the military judge to disempower the panel members and hobble the defense simply because he thought the case turned on "the semen found at the crime scene." (JA 2043-45). That foray into the members' fact-finding role was the very harm *Holmes* and *McAllister* condemned as reversible error.

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

Using former testimony at trial is the same as using a deposition. The distinction between the two types of record is a matter of name and provenance and nothing more. To the members hearing the evidence and deciding the case at court-martial, there is no functional difference between the two. Also to the accused unable to fully cross-examine his accuser in light of the trial at hand, unable to show the witness exhibits, and unable to expose the witness's demeanor to the court, there is no difference between former testimony and a deposition. Both forms of hearsay are "the equivalent of the testimony of a witness who was unavoidably absent from the trial," *United States v. Jakaitis*, 27 C.M.R. 115, 118 (C.M.A. 1958), and that is why Mil. R. Evid. 801(d)(1)(A), Mil. R. Evid. 804(b)(1)(A), and R.C.M. 703(e)(2)(D) all treat them in the same manner.

As much as the government wants a meaningful difference to exist between them, it never articulates one because, in both form and substance, testimony taken out of court and testimony taken in another court are still testimony taken out of the only court that matters—the one that trying the case. Transcripts of former testimony are indistinguishable from transcripts of former depositions, and Article

49(a), UCMJ bars both from capital courts-martial unless the defense introduces them.

The government asserts there is "no case law supporting Appellant's proposition that former trial testimony should be treated as equivalent to a deposition." (Gov. Br. at 61). The government must have ignored *Jakaitis*, *supra*, and *United States v. Connor*, 27 M.J. 378, 383 n.5 (C.M.A. 1989), which observed that the "conditions for admissibility [of prior testimony] in non-capital cases are the same conditions prescribed . . . for admission of depositions in non-capital cases." It must have also missed *United States v. Austin*, 35 M.J. 271, 276 n.5 (C.A.A.F. 1992), wherein this Court held that, although "a verbatim transcript of the alleged victim's testimony at an Article 32 Investigation" was not "technically a deposition," it "perceive[d] no substantial difference between the two in this case," and that any distinction was "one without meaning." Likewise, the government must have overlooked *United States v. Crockett*, 21 M.J. 423 (C.M.A. 1986), which treated former testimony and depositions interchangeably throughout its holding. The government seems to have missed the service court opinions following the same lead as well.[11]

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[11] *See*, *e.g.*, *United States v. Hamilton*, 36 M.J. 927, 933 (A.F.C.M.R. 1993) ("With regard to depositions and former testimony, the primary consideration is whether there was an opportunity for confrontation and adequate cross-examination."); *United States v. Burrow*, 35 C.M.R. 614, 619-22 (A.B.R. 1965) (analyzing the admission of former testimony and depositions similarly); *United States v.*

None of this is surprising, however, as the interchangeability of these two forms of evidence is self-evident. If there were any practical difference between them, any reason at all to think Congress wanted to exclude depositions from capital courts-martial while inviting the use of testimony from former trials, Article 32 proceedings, administrative hearings, and other testimony, the government would have surely presented it. But it did not. On the other hand, the reason for continuing to treat depositions and former testimony equivalently is as obvious as their equivalence, "because the factfinder is not able to look at the witness and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Crockett*, 21 M.J. at 428. In a capital trial, where passions run high and the stakes run higher, there is great wisdom in requiring the government to prove its case with live witnesses and not pieces of paper. It failed to do so here, and this Court should vacate the sentence of death.

Vanderpool, 15 C.M.R. 609, 613-14 (A.F.B.R. 1954) (analyzing depositions and former testimony as equivalents).

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.

The government dismisses the relevance of the Swecker/Wolf investigation into the North Carolina State Bureau of Investigation (SBI) laboratory because it did not include the testing relied on in this case. (Gov. Br. at 70). But that ignores how the government relied on the SBI's testing results to begin with; asserting that the SBI had good procedures, that its analysts always follow those procedures, and that they must have followed them in this case as well. (R. at 5444-58). The findings of the Swecker/Wolf report cast doubt over those premises, and that in turn casts doubt over the government's conclusion that this test was reliable. Having this information at trial would have helped the defense underscore the importance of the fact that two other laboratories testing this same genetic material could replicate the SBI's result—a fact that greatly undermines the reliability of the SBI's results, and with it, a key part of the government's case.

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

A calm, deliberative, and reasonable panel could have acquitted MSG Hennis for the second time. Even if finding him guilty, a calm, deliberative, and reasonable panel could have still voted to impose a life sentence rather than

death—indeed, it appears this panel actually did that before the military judge misstated the voting procedures they had to follow. *See* Assignment of Error XIII. The outcome of this court-martial could have been very different had the members considered the facts without the corrupting influence of trial counsel's inflammatory arguments. But this prosecution forsook the norms of prosecutorial conduct and sought to incite the members on the merits and then again on sentencing.

1. Trial counsel's sustained efforts to persuade the members through emotion and outrage, rather than reason and reflection, prejudiced MSG Hennis's defense.

The government does not challenge the impropriety of trial counsel's closing or rebuttal arguments in a way not already addressed in our January 31, 2019 brief. Instead, this section focuses on the government's assertions that the impropriety was harmless. It was harmful—it was repeated, it was unmitigated, and it was calculated to drag the members' deliberations away from dispassionate scrutiny and into the throes of emotion in this highly charged, hotly contested murder trial.

a. Trial counsel's improper remarks were frequent, integral to his arguments, and undeterred by any curative efforts.

The government seems to argue that inflammatory arguments can be remedied by simply diluting them with more talk. In its view, trial counsel's "objectionable statements" caused no harm because they "were isolated and not a

predominant part of Government counsel's argument, particularly considering the Government's rebuttal argument spanned 56 transcript pages." (Gov. Br. at 77) (quotations omitted). That is a highly charitable characterization, given how trial counsel exploited five brands of improper argument on rebuttal, such as disparaging the defense,[12] asking the members to "send a message" on behalf of the Army,[13] likening MSG Hennis to a terrorist,[14] insisting that the Army "believes in the DNA" and vouches for its reliability,[15] and making "Golden Rule" type

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[12] Trial counsel maligned the arguments of defense counsel as "evil," "vile, disgusting," "offensive," and "monstrous." (JA 1125, 1153). Trial counsel then accused the defense of throwing the victim "under the bus. She can't respond, so we threw her under the bus." (JA 1152-54). Furthermore, trial counsel repeatedly heaped obloquy upon the defense, chiding their "desperate search for reasonable doubt," and then personalizing his distain with comments like "I can tell you something right now. If we switch sides right now, I'm losing this case. I don't want to be over here [pointing to the defense table] because of the evidence in this case because we have, by far, the better argument." (JA 1158, 1159). Such practice mirrors the undisciplined, ad hominem approach this Court decried in *United States v. Voorhees*, No. 18-0372/AF, (C.A.A.F. Jun. 27, 2019).

[13] "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." (JA 1179).

[14] "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, 1171).

[15] "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).

arguments.[16] These were not "isolated" remarks, but rather layers of overlapping impropriety, all stirring up outrage and suppressing rational deliberation; "we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential." *Berger v. United States*, 295 U.S. 78, 89 (1935).

The excesses of trial counsel's rebuttal built upon those preceding it throughout the trial[17] and in closing,[18] and they were further exacerbated by the

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[16] "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).

[17] *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).

[18] During the government's closing argument, trial counsel sought to ridicule a defense argument as "a conspiracy theory . . . on par with those that believe that walking on the moon happened in a desert in Arizona." (JA 1123). Trial counsel also made sure to attack the accused by decrying him "for what he is—a killer." (JA 1119).

defense's inability to respond. *See United States v. Holme*s, 413 F.3d 770, 774-77 (8th Cir. 2005) ("The potential for prejudice is great during closing arguments, especially when the defense has no opportunity for rebuttal."). Objecting was the defense's only recourse at that point, and it was next to useless here. Contrary to the government's assertions, the military judge's standard instructions and curative efforts were insufficient. (Gov. Br. at 77, 80, 83, 85, 88) His on-the-spot responses to misconduct were infrequent and ineffectual; even when the military judge did admonish trial counsel, nothing changed—trial counsel blatantly repeated the same argument without breaking his stride. (JA 1143, 1179, 1208). If government counsel freely disregarded the military judge's instructions and admonitions, what stopped the members from doing the same? Very little. The military judge's interventions were too few and too feeble to cure this repeated misconduct. The government's faith in perfunctory instructions and half-hearted admonitions is hard to justify as a general matter, and particularly hard in this case. (Gov. Br. at 77). The end result was unmitigated misconduct in a capital court-martial.

b. This was not a "strong case," but an emotionally-charged trial susceptible to inflammatory remarks and fear-baiting tactics.

The government's final pitch for a finding of no prejudice depends on the supposed "strength of the evidence." (Gov. Br. at 78). It believes there was "overwhelming evidence demonstrating Appellant's guilt." (Gov. Br. at 80). But

the Supreme Court of North Carolina came to the exact *opposite* conclusion when it found that "[o]verwhelming evidence of his guilt was not presented." *State v. Hennis*, 372 S.E.2d 523, 528 (N.C. 1988). And that assessment proved prophetic when, at the second presentation of this case, a jury uncorrupted by inflammatory tactics acquitted MSG Hennis of all charges. That alone demonstrates this case has never been a "strong" one, and that alone is enough to reject the government's argument. Yes, the government introduced DNA testing in its third trial of Hennis, but as demonstrated below, that testing was inconsistent, incomplete, and insufficient—it was dubious on its own, and even more so when set against the full picture of forensic testing in this case. The net outcome in 2010 was still a case capable of acquittal.

And when this Court weighs the evidence rigorously, it will come to the same conclusion. As the following discussion shows, reasonable doubts clouded each of the seven premises of the prosecution's case, and that alone sapped the "strength of the evidence." But consider the unsettling clues, still unexplained by the government, that the real killer or killers have never been tried, and this case falls well outside the category of cases "too strong to reverse." Indeed, this was precisely the kind of case where the reasoned judgements we demand of panel members were the most needed, and yet the most vulnerable to incitement and distraction.

i. "Eyewitnesses placed Appellant at the Eastburn home around the time of the murders, including an eyewitness who identified Appellant leaving the Eastburn home after the murders with a black Members Only jacket and carrying a garbage bag." (Gov. Br. at 78).

The government only had one "eyewitness," and that was Patrick Cone, the unsteady center of its case. Inconsistency and uncertainty have always beleaguered his testimony, and his "own remarks cast considerable doubt" over it. *Hennis*, 372 S.E.2d at 528. Indeed, this is a witness who privately admitted that he "felt like he was sending an innocent man to prison." (R. at 6153).

Cone testified that he saw a man leaving the Eastburn residence at about 3:30 a.m. on Friday, May 10, 1985. (JA 707). At six foot tall and around 167 pounds, this man was similar in build and slightly shorter than Cone, and significantly smaller than Hennis, who stood around 6'5" and weighed over 200 pounds at that time. (JA 707).

Cone did identify Hennis in a photo line-up, but only after praying for inspiration and vacillating between two candidates. (JA 688). And this was just minutes after he had actually brushed past MSG Hennis at the Cumberland County Sheriff's Office, and just minutes after its detectives had committed to Hennis as their chief suspect. (JA 716, 774). Cone was never certain of his "identification," and he confessed his doubts over it repeatedly. (JA 688, 721-24). This doubtful testimony was the core of the government's case, and it does not inspire "strength."

Of course there is a ready explanation for Cone's uncertain observations: he saw somebody else in those early, misty hours of May 10, 1985. Enter John Raupach, a young man bearing an uncanny similarity to Hennis, who habitually walked up and down that very street, at that very time, wearing a dark jacket, dark beret, and a dark bag slung over his shoulder. (JA 845-49, 879, 968-69, 972). There is no doubting Raupach's appearance, attire, or midnight strolls, as they were well-known in the neighborhood.[19] (JA 975, R. at 5870-71, 5892-94). There is also no doubting that he fitted Cone's descriptions better than Hennis. Patrick Cone has always doubted himself because he saw somebody other than Hennis that night.

So much for the strength of Cone's testimony. But the government appears to consider Margaret Tillison an "eyewitness" as well because she claimed to have seen Hennis near the Eastburn residence some 12 to 15 hours before the murders must have happened. (JA 652). Now as a preliminary matter, Tillison did not even testify at this court-martial—she had died well before it. (JA 974). Instead, the government relied on her former testimony in this capital court-martial. That was a plain violation of Article 49(a), and that error was prejudicial; it should have been excluded, and it deserves no consideration here. *See* Assignment of Error

[19] They were also well-known to Cumberland County prosecutors, who withheld this information from the defense and only acknowledged it once confronted with it at Hennis's second trial. (JA 1574-1720).

VII. But even if this Court considers it, its value is naught. Tillison's claim to have seen Hennis parked near the Eastburn residence on the afternoon of May 9, 1985 only surfaced a year after that supposed event. (JA 652). That was well after Tillison had repeatedly seen images of MSG Hennis and details of the investigation sensationalized in the newspaper and on television. (JA 652). And as one would expect, the reliability of her observation faltered on cross examination: "it probably could be possible it was anybody" she admitted. (JA 654). This was hardly the stuff of a "strong" case.

Eyewitness testimony is notoriously prone to bias, suggestion, and false confidence.[20] Expert witness Dr. Solomon Fulero addressed this at trial, noting how "eyewitnesses are not as accurate and reliable as laypeople believe they are," that cross-racial identifications like that made by Patrick Cone are even "less accurate than same-race identifications," and that exposure to media and repeated questioning lead to the formation of spurious, post hoc memories. (R. at 6329,

[20] "The empirical evidence demonstrates that eyewitness misidentification is 'the single greatest cause of wrongful convictions in this country.'. . . Study after study demonstrates that eyewitness recollections are highly susceptible to distortion by post-event information or social cues; that jurors routinely overestimate the accuracy of eyewitness identifications; that jurors place the greatest weight on eyewitness confidence in assessing identifications even though confidence is a poor gauge of accuracy; and that suggestiveness can stem from sources beyond police orchestrated procedures." *Perry v. New Hampshire*, 565 U.S. 228, 263-64 (2012) (Sotomayor, J., dissenting) (citations omitted).

6338). The testimonies of Patrick Cone and Margaret Tillison exemplify these limits on human perception.

But if this Court credits their testimony, it should also credit the eyewitness testimony against it. Charlotte Kirby also said she saw a man walking from the Eastburn residence with a bag over his shoulder in the early hours of May 10, 1985. (JA 978-95). He was significantly shorter and slimmer than MSG Hennis, and more consistent with Cone's first reported observation. (JA 978-95). Kirby, on the other hand, knew that the man she saw was not Hennis, and she did not harbor the self-avowed doubts of Patrick Cone or Margret Tillison. (JA 978-95). If these witnesses are all taken together, the sum of "eyewitness" testimony breaks even at best, it is no strong point for the prosecution.

ii. "Appellant's car was the same make and model as the car identified near the Eastburn home at the time of the murders." (Gov. Br. at 78)

The sight of a white Chevette in the Eastburns' neighborhood means very little. They were not uncommon in Fayetteville at that time,[21] and white Chevettes were not a rare sight on Summer Hill Road either—just ask Patrick Cone. The "white Chevy Chevette two-door, '75 or '76 model" with hubcaps that he

[21] Within only an hour, a police officer looking for Chevettes on a single road found five of them. (R. at 4726-27). Given that he spent several minutes pulling over and speaking with these motorists, the fact of the matter is that he could find Chevettes as freely as he wanted—more proof that this was an exceptionally common car in Fayetteville, North Carolina at that time.

identified outside the Eastburns' home on May 10, 1985 was the *very same car* he had seen "across the street from the Eastburn's [sic] approximately five to seven times, dating back to at least October of 1984." (JA 704-06). That means the Chevette that Cone saw could not have been Hennis's, not only because Hennis's 1981 Chevette had no hubcaps, but also because his car would have never driven down Summer Hill Road six months before he adopted Kathryn Eastburn's dog. (R. at 5221, Def. Ex. MM). If credited, Cone's car talk casts more doubt than it can resolve.

And this was not the only Summer Hill Chevette. The Eastburns' next door neighbor owned a Chevette, for example. (R. at 3944). Even Margaret Tillison acknowledged that, when she supposedly saw her Chevette across from the Eastburn home, she thought it was her son's as "he owned a white one at that time." (JA 650). Take all of this into account, and Hennis's white Chevette reveals itself as nothing more than a red herring.

iii. "Eyewitnesses further placed Appellant near an automated teller machine at the same time and place the Eastburns' missing card was used after the murders." (Gov. Br. at 78).

The idea that someone saw MSG Hennis use the Eastburns' credit card at an automated teller machine (ATM) results from a contaminated memory, not fact. Someone did use the Eastburns' debit card at a Fayetteville bank on May 11, 1985 at 8:55 a.m., and there is no reason to doubt that. (Pros. Ex. 107). But there are

several reasons to doubt MSG Hennis could be that person. First, he was completing charge of quarters duty around that time, nearly nine miles away from the (ATM) in question. (R. at 5824; Pros. Ex. 114, 115). It would have taken him 15 to 17 minutes to travel from his posting to that ATM. (R. at 5088, 5090, 5093). But he did not leave his company barracks until 8:45 a.m. (R. at 5824). It is not impossible, but it is implausible, that Hennis sped across the city of Fayetteville to make such a transaction. Second, in order to operate the card and withdraw funds from the Eastburns' accounts, the user had to enter a "secret . . . four digit code." (R. at 4950). Whoever used the card knew the code, and that fact suggests this person was far closer to Katie Eastburn than Timothy Hennis—perhaps someone like her neighbor WHJR or babysitter JC, someone who actually knew her.

But Cumberland County still found someone to place Hennis at that ATM, and her name was Lucille Cook. She had withdrawn $50 from that same ATM at 8:59 a.m., May 11, 1985, four minutes or so after someone used the Eastburns' card. (R. at 4959). Cook did not think anything of that transaction. Even when the Eastburn murders captured local media attention, and details of Hennis, his background, and his arrest featured on local newspapers and television, Mrs. Cook didn't think anything of it. (R. at 4997-98). She was aware of the news, but didn't come forward with any memory of seeing Hennis at an ATM—because she had no such memories. (R. at 4999).

Several weeks later, Detective Jack Watts approached her and asked if she remembered seeing anything that day.[22] (R. at 4993). Lucille Cook said "no. I didn't remember anything." (R. at 4972). A defense investigator then contacted her and asked the same thing; again, Cook did not remember seeing anyone at the ATM. (R. at 4999). When asked later about all of her 90 ATM transactions from December 7th, 1984 to May 30th, 1986, she did not have "any recollection about anything that happened with any one of those ATM transactions." (R. at 5005). All of these were unremarkable, unmemorable events.

But then some "9 to 10 months" later, Lucille Cook's memory "changed." (R. at 4973 5001). By April of 1986, she could now recall "a very tall, young, white male with blond hair" driving a small light colored car at the ATM. (R. at 4990). When county prosecutors presented her with a photo line-up that included an image of Hennis, she picked him but wasn't "certain" whether her identification was based upon what she saw at the bank or the fact that she "had seen his photograph in the newspaper." (R. at 5003, 5108).

Memories do not sharpen with time, they only fade, blur, and yield to the current of extraneous influences. Lucille Cook's testimony shows how that

[22] Another individual who had made an ATM transaction right before the Eastburn card was used did not see Hennis there. But she did remember Detective Watts's questioning of her, who she described as "a little pushy," and trying to "put it in my head that I saw somebody when I did not." (R. at 6088).

happens. Within ten months, she went from remembering nothing about an ATM transaction—or any ATM transaction for that matter—to "remembering" the banal details of a single, uneventful transaction performed by a complete stranger with whom she never interacted. What an incredible revelation it must have been, aided only by repeated queries from investigators and the frequent news reports covering the very same details of Hennis she "recalled" on the stand. Coupled with the implausibility of MSG Hennis even performing this ATM transaction, there is too much doubt here to say with confidence that he used the Eastburns' bank card.

iv. "Eyewitnesses described how Appellant burned a fire in a barrel at his home from 0930 to 1700 shortly after the murders." (Gov. Br. at 78).

The government's theory requires Hennis to have raped and murdered in the early hours of May 10, 1985 and then transported a garbage bag full of incriminating evidence out of the Eastburn home, over his shoulder, down the street, into his car, and through his own home in order to eventually burn it more than a day later. (JA 1119). For that to work, however, Hennis would have to hope his wife and child did not come home early and discover a bag full of bloody evidence lying about. Moreover, even if this theory were plausible, someone like Hennis would have surely left some stray forensic signs somewhere along the trail. But a team of state and county investigators scoured the Eastburn home and yard, and they combed through Hennis's car and house and found nothing connecting

Hennis to the crime. (JA 823-31, JA 939-45). No blood stains. No hairs. No fibers. No bank cards or documents pilfered from the Eastburns. No murder weapon. No clean-up materials. No charred remains of any such items either. Nothing. Hennis may have burned something in his backyard on May 11, 1985, but he could not have torched an entire forensic trail.

v. "There was evidence that Appellant owned and took a black Members Only jacket to a dry cleaners shortly after the murders." (Gov. Br. at 78).

Just like "a lot of people" in the mid-eighties, MSG Hennis owned a "Members Only" jacket, a sartorial choice that remains emblematic of the era. (R. at 4940). One day he had it dry cleaned, and for the government, this was an effort to remove the signs of a savage murder spree involving 35 stab and slashing wounds and several pools of blood. (Gov. Br. at 78). But there was never any blood on that jacket. The chemicals with which the dry cleaners treated it could not remove blood. (R. at 5663). So if it had been stained with blood, the State's Luminol testing would have reacted with the residual hemoglobin and revealed its presence. (R. at 5652-54). But it did not, and the State found no traces of blood or any other matter of forensic interest on MSG Hennis's jacket, or anything else belonging to him.

vi. *"Furthermore, the presence of abundant and intact semen from Appellant in Katie Eastburn established intercourse at or around the time of the murders, yet there was no evidence of consensual sexual intercourse between Appellant and Katie Eastburn." (Gov. Br. at 78).*

The government has oversold the strength and weight of the DNA testing in this case. The government conducted five tests on material taken from within Kathyrn Eastburn's vagina, and only one of them purported to inculpate Hennis with certainty—only one out of five. Of the others, one was inconclusive, another only included Hennis within a much larger group of possible matches, and two others only tended to *exculpate* Hennis. Considered as a whole, the biological testing in this case shows more misses than hits, and more doubts than strength.

The Federal Bureau of Investigation conducted the first test in 1985, a serological study of the vaginal swabs that could neither exclude nor include Hennis. (R. at 4347-51). In 1989, the FBI also considered DNA testing for this material but found it too little and too poorly preserved, concluding that "it would be extremely unlikely to get a typeable result." (JA 1406-12). The FBI's results did not implicate Hennis.

Then the evidence sat under uncertain conditions for 17 years before the North Carolina State Bureau of Investigation (SBI) examined it in 2006. Advised that "this may become a military court case," the SBI laboratory assessed the vaginal swabs with a newer DNA testing method that looked at "short tandem

repeats," *i.e*. STRs, or "short sequences of DNA that are repeated over and over again." (JA 175; R. at 5444). The process of identifying these repeats required extracting DNA from the cells containing it, quantifying how much DNA was extracted, replicating select parts of this DNA millions of times over, and then sorting out all of this copied material into pieces of various sizes. (R. at 5328, 5445). The analyst would then evaluate these results against a known sample and offer conclusions as to their similarity. When a single profile is compared with another one, this process is straightforward. But mixed profiles, *i.e*. those containing DNA from more than one person, are problematic and more prone to interpretive errors. (R. at 5396-97).

The SBI concluded that sperm on the swab belonged to Hennis, but several problems loomed over its testing. First, it was tainted by confirmation bias and association with a well-known cold case. Second, it involved a mixed profile extracted from a small amount of genetic material, which invited greater deviation in results. (R. at 5486). Third, it was conducted by a trainee in a laboratory that was later found to have misidentified DNA samples and made other "disturbing" mistakes. *See* Assignment of Error VIII. These all cast some doubt on the result.

But the most obvious mark of doubt was that the test could not be replicated. The United States Army Criminal Investigation Laboratory (USACIL) tried and failed to confirm the SBI's findings. (R. at 5353). It conducted an autosomal STR

test, like that performed by the SBI, on the genetic material extracted from Kathryn Eastburn's vaginal smear. (R. at 5353). Her DNA profile showed up, but Hennis's did not. (R. at 5353, 5375).

Then USACIL conducted a Y-STR test that focused on short tandem repeats found within the Y chromosome only, *i.e*. only in male DNA. This was only the fourth or fifth case for which USACIL had used Y-STR testing, and it did not even follow the minimum recommendations for the test.[23] (R. at 5377). Nevertheless, USACIL's ultimate interpretation of this test was that a male profile shared by Hennis, his forefathers, and as many as 1 in 200 other men was present. (R. at 5387). This was not an exact figure, but "just an approximation." (R. at 5407). Moreover, the test showed "male DNA allele that is not associated with Master Sergeant Hennis that was found on the vaginal smear." (R. at 5385). This kind of result does not project strength at all; indeed, at least one expert would describe an "ultimate calculation of 1 in 223" as "very weak by—DNA profiling standards," and at least one military judge would deem the result inadmissible under Mil. R. Evid. 403. *See United States v. Henning*, 75 M.J. 187, 189 (C.A.A.F. 2016).

[23] The testing kit's manufacturer specified that the system should be operated with a sample containing at least "500 picograms." (JA 905). The sample actually used was only 120 picograms, well below the recommended minimum quantity. (JA 905).

Recognizing the limits of this test, USACIL sent its evidence to LabCorp, a private entity, for a fifth and final test. This test was a more sensitive autosomal STR test that was better suited for low amounts of DNA. (JA 903-05, 914). LabCorp examined the evidence and concluded that the resulting DNA profile "was consistent with Kathryn Eastburn and different from Timothy Hennis." (JA 918).

The end result of all of this testing is doubt. A test's validity depends on its repeatability, and here the government could not repeat the one test on which it depended. Is this a strong scientific result? No. If there is anything consistent in these five biological tests, it is their inconsistency, a fact of great inconvenience for the government. Inconsistent tests raise reasonable doubts.

And those doubts grow when the tests of other biological samples are considered. Kathryn Eastburn's vaginal vault was not the only place to seek probative DNA; indeed, there were other sources more clearly associated with the murders that, when tested, pointed to an unknown male and not MSG Hennis. The DNA extracted from Kathryn Eastburn's fingernails—fingernails she must have used to struggle against her assailant—contained male DNA that did not inculpate MSG Hennis. (JA 889-91). The DNA extracted from Erin Eastburn's fingernails likewise contained male DNA that did not inculpate MSG Hennis. (JA 889-91). The tip of a rubber glove found at that crime scene, of a type never used by

investigators, contained male DNA that did not inculpate MSG Hennis either. (R. at 5390). A blood-stained title removed from the crime scene once again contained the DNA of an unknown male that excluded MSG Hennis. (R. at 5372-73). And a bloody towel recovered from the Eastburn home, an item used after the murders and almost certainly by the murderer or murderers, contained the DNA of an unknown male that excluded MSG Hennis. (JA 889-91).

All five of these tests cast even greater doubt on the government's already doubtful case. And if the military judge had allowed the defense the access to this evidence with the expert assistance it needed, these items could have proven even more exculpatory. *See* Assignment of Error VI. The government has repeatedly pointed to its DNA test as irrefutable evidence of guilt. But once the talismanic power of that test wears off, and a full, methodical consideration of all the forensic testing in this case obtains, reasonable doubt is what remains.

Finally, the government's assertion that "there was no evidence of consensual sexual intercourse between Appellant and Katie Eastburn" is out of place. (Gov. Br. at 78). To begin with, unfaithful spouses rarely document their trysts for posterity, so the idea that such evidence would be laying around a quarter century later cannot be taken seriously. Furthermore, it is obtuse to rely on such an argument when the government opposed inquiries into Kathryn Eastburn's private

life and the military judge prevented the defense from pursuing such a defense at trial. (R. at 378-79; App. Ex. 101, 102).

vii. "No witness could provide Appellant a full alibi over the possible time frame of the murders." (Gov. Br. at 78).

The absence of an alibi is not a substitute for proof. Nevertheless, MSG Hennis had reason and plausibility on his side. The government's case required an ambitious timeline and a belief that MSG Hennis cleaned up the crime scene with extraordinary precision and efficiency. The government never firmly stated when it believed MSG Hennis arrived at the Eastburn home on May 9, 1985, but it seemed to settle on a time around 11:30 p.m. (JA 1101, 1161). Then it asserted he left the home at 3:30 a.m. on May 10, 1985. (JA 1102). Under this timeline, MSG Hennis only had four hours to perpetrate a rape and three murders, and then complete an incredible cleansing of anything that could incriminate him. In that timeframe, and amidst that kind of violence, he would also have to inflict 35 stab wounds without suffering so much as a scratch, cut, bite mark, bruise, or even an errant drop of blood. (JA 957). Then he would have to remove every fingerprint, footprint, hair, fiber, or other item that could trace back to him. (JA 921-24, 932, 939-41). Of course this was not impossible, but it was implausible.

Moreover, Hennis had to do all of that by 3:30 a.m. and then return to his home some 15 minutes away, secret the evidence he would supposedly burn a day

later, clean himself up, change into his physical fitness uniform, and drive another 15 minutes to Fort Bragg so as to be standing at attention and ready for a battalion run by 5:30 a.m. (JA 957, R. at 5734, 5747). Hennis would have to do all of this without betraying any suspicious signs to the company of soldiers around him just hours after. (JA 952, 956-57, 960). Again, this was not impossible, but it was implausible.

And then MSG Hennis would have to work a normal duty day on May 10 and perform an overnight charge of quarters shift as well, once again without evincing any sign of fear, hurry, or anxiety. (JA 960-61, R. at 5769, 5770-71, 5788-94). On Saturday, May 11, Hennis would have to race to the ATM after completing his charge of quarters duty, quickly withdrawal funds once there, and immediately burn all the murderous evidence in his own backyard before spending the rest of the day repairing his car's starter and moving furniture with his grandfather-in-law. (R. at 5839-40). Hennis would have to return to Fort Bragg again Sunday morning for yet another long charge of quarters shift. (R. at 5712). This too was not impossible, but it too was improbable.

viii. The government ignores a host of other considerations that cast doubt on this conviction.

Every step of the government's case was unsteady and shaded with reasonable doubts. That's why it could not sustain a conviction when tried fairly in

1989. That alone dispels the idea that this was a "strong" case. But go a step further, and consider the totality of the evidence available, and the weakness of this prosecution becomes clearer still.

A chilling and undisputed fact that the government has never confronted, whether at trial or on appeal, is that Kathryn Eastburn received a threatening phone call "7 to 8 weeks" before she ever advertised her dog for adoption, or ever met Timothy Hennis. (JA 589). It was a week after Gary Eastburn left when Kathryn told him a man had called her "between 4:00 and 5:00 in the morning." (JA 587). The man identified her by name and threatened: "Ms. Eastburn, I live around the corner and I'm coming to see you." (JA 588). The call was so frightening that Gary Eastburn "called and asked friends to keep an eye on" his wife. (JA 589). The call was also frightening enough for Kathryn Eastburn to alert her neighbor Jeanette Seefeldt.[24] (R. at 3943).

The import of this is clear: someone who knew Kathryn Eastburn had threatened her in her home well before Hennis ever came into the picture. That strongly supports MSG Hennis's defense. So how does the government respond? With silence. This was an obvious lead to pursue; Cumberland County investigators could have quickly culled through a pen register report and identified

[24] "It was a —weird phone call is what she said. She had gotten a weird phone call." Katie told Jeanette Seefedlt about this weeks before the 9th of May. (R. at 3943).

the number that called at this specific time, yet as far as the record shows, they never did. By 2010, that opportunity was long gone, and with it, a possible defense.

The government has never identified a motive either, but merely begged the question or obscured it with inflammatory references. (JA 1171)("We don't care why people fly planes into buildings."). The government's implication was simply that Hennis committed such a heinous act because he was a "killer," even though he had no record of any violence whatsoever, before or after these accusations.

What do these facts show? Kathryn Eastburn had been threatened before she ever met Hennis, and by someone who knew her name and lived "right around the corner." (JA 588). WHJR was her backyard neighbor, and he had just as much motive and means as Hennis to commit the crimes, and by virtue of his location, even greater opportunity. (JA 2017-21). Unlike Hennis, who appeared utterly ordinary on May 10, 1985, WHJR had scratches on his face and shifting explanations for them. (JA 957, 2017-21, 2138). Of the eyewitness accounts on which the government depends, WHJR fit them better than Hennis. (JA 2017-21). And for as much as the government has made about sightings of a white Chevette near the Eastburns' home on May 9, 1985, WHJR had access to a light colored van like that seen by two witnesses also parked outside the Eastburns' home that night. (JA 982, 2017-21). Lastly, when law enforcement approached WHJR, he was

uncooperative and unwilling to provide hair, fingerprint, and handwriting samples, yet Hennis volunteered everything asked of him. (JA 2017-21).

A fair look at these facts reveals that there was a credible third party defense that the military judge barred Appellant from presenting. There were reasonable doubts in this court-martial that might have prevailed, for a second time, if the government had not inflamed the members and drawn them away from calm, reasoned deliberation. The arguments of trial counsel were improper and harmful, and they should result in reversal of this case.

2. The impropriety and prejudice of trial counsel's sentencing arguments also merit relief.

As for the impropriety of trial counsel's sentencing arguments, there is clear error. First, the government acknowledges that trial counsel wrongly disparaged MSG Hennis's right to present mitigating evidence. (Gov. Br. at 88). Second, it offers no justification for trial counsel's calls to punish MSG Hennis more harshly because the Army waited two decades to pursue this court-martial, and indeed there is no justification. (Gov. Br. at 91). Third, the government defends trial counsel's "Golden Rule" arguments on sentencing by avoiding some of the actual comments challenged in our brief, *e.g*. JA 1176, and then relying on *United States v. Baer*, 53 M.J. 235 (C.A.A.F. 2000) for the rest. *Baer* does draw a distinction between comments on pain and suffering, on one hand, and attempts to make the

members feel like the victims on the other. In this case, however, trial counsel's repeated appeals to "[i]magine the mental anguish" of Kathryn Eastburn were just another way of "asking the members to put themselves in the victim's place." *Id*. at 238; (JA 1204). Like the "imagine" refrains uttered in *Baer*, these also "cross[ed] the line into impermissible argument" on their face, and unlike *Baer*, no context could redeem them. *Id*. at 238. Trial counsel had played the notes of "blind outrage and visceral anguish" several times throughout this trial, particularly during rebuttal, and his repetition of that tone on sentencing was certainly "aimed at inflaming the passions." *Id*. at 237.

The prejudicial effect of these ploys is also clear: a calmer panel could have given a life, rather than death sentence. Even with its most graphic descriptions of the victims, the government fails to explain how a death sentence for a father, husband, and career soldier with no record of violence was so foregone an outcome. (Gov. Br. at 94). Indeed, just consider the members' initial rejection of death, and nothing more needs to be said to show how a less provoked panel could have chosen life. *See* Assignment of Error XIII.

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

The government does not contest the mitigating value of MSG Hennis's prior inmate records, and it does not add anything new to the specious alternatives proposed and relied by the military judge. (Gov. Br. at 187-91). The government's real addition to this discussion is an attempt to graft on a "bad faith" requirement that simply does not exist.

To do this, the government invokes Fifth Amendment cases concerning due process in non-capital courts-martial. (Gov. Br. at 95-101). But this has never been a due process claim. Master Sergeant Hennis's cause for relief arises under the Eight Amendment and its interpretation in *Skipper v. South Carolina,* 476 U.S. 1 (1986). *Skipper* and its antecedents deal with capital punishment and ensuring an accused's right to show his humanity before a death sentence is contemplated. *See*, *e.g.*, *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) ("the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender . . . as a constitutionally indispensable part of the process of

inflicting the penalty of death."). This goes above matters of good or bad faith, and such a discussion is nowhere to be found in *Skipper*.

Now the government rightly observes that *Skipper* concerned an exclusion of evidence rather than its destruction. But the difference between the two concerns is immaterial to the question of life or death. The course of events obscuring the complete "character and record of the individual" does not matter to the members or the individual. *Woodson*, 428 U.S. at 304. The end result is still the same: the members rendered a decision without a full understanding because of governmental actions beyond the control of the accused. The faith due such a decision suffers either way.

So the question is really one of remedy. The specious alternatives offered by the government and military judge, such as having MSG Hennis testify himself or extracting 25 year old memories from hitherto unknown witnesses, were plainly inadequate. *See Skipper*, 476 U.S. at 8 (noting that the accused's own testimony was "the sort of evidence that a jury naturally would tend to discount as self-serving."). One reasonable alternative would have been for the government to concede and stipulate to MSG Hennis's peaceful behavior while incarcerated; it had no reason to doubt this, but apparently it just could not deign to do so. (JA 1990-92; R. at 1320-25). Short of that, however, the only way to ensure MSG Hennis's sentencing adhered to the Eight Amendment—and that the value of his

life was not cheapened by the State's administrative purges—was to strike the capital referral. The military judge should have done so.

Master Sergeant Hennis deserves relief as a constitutional matter. But if this Court measures his rights under R.C.M. 703(f)(2), it should arrive at the same destination: dismissal of the capital sentence. As a preliminary matter, no showing of bad faith is needed to prevail here, a fact made clear by the case on which the government leaned most heavily in its response, *United States v. Simmermacher*, 74 M.J. 196, 201 (C.A.A.F. 2015). The Rule only has three requirements for relief, and this case satisfies all of them. First, the destroyed records were "essential" to a fair sentencing contest in a death eligible proceeding—*Skipper* establishes that. 476 U.S. at 8. Second, there were no "adequate substitutes" for MSG Hennis's records—*Skipper* establishes that too. *Id*. Third, MSG Hennis was not at fault for the State's destruction of the State's records, and he could not have reasonably prevented this administrative action years before the government planned a third trial for his life.

The demands of R.C.M. 703(f)(2) are easily met here, and the military judge should have abated the capital nature of the proceedings as the rule demands. *See Simmermacher*, 74 M.J. at 202. But the military judge never addressed this, despite the defense raising this basis for relief before the court-martial. (JA 1988-

89, 2042). The failure to grant relief was an abuse of discretion, and another ground for dismissing the capital sentence in this case.

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.

The military judge's concern about "unfair" hypotheticals compelling prospective members to "commit" to positions "in a vacuum" was misplaced. (Gov. Br. at 107, citing JA 512). He should have focused instead on the fairness owed the accused in this capital case. The questions defense counsel wished to ask were needed to probe whether the members' views would "substantially impair" them from considering mitigating evidence in this case. *Wainwright v. Witt*, 469 U.S. 412, 424 (1985). There is nothing "unfair" in asking a possible member if, in a case concerning the murder of children, he or she would impose the death penalty upon someone for murdering children without fully considering the accused's "background." (JA 508). A member who could not consider that background—or who would encounter substantial difficulties doing so—was simply unfit to sit on a capital court-martial.

And LTC Boyd and MAJ Weidlich were so impaired. LTC Boyd felt that even death would not be enough punishment for a child killer.[25] MAJ Weidlich made it clear that no amount of mitigation would matter if the accused had killed children.[26] Such views prevented them from fairly considering mitigating evidence, and thus disqualified them serving in this case. Even under the most generous interpretations of their stated views, LTC Boyd and MAJ Weidlich were at least "close calls" and still squarely within the liberal grant mandate. *See*, *e.g.*, *United States v. Commisso*, 76 M.J. 315, 324 (C.A.A.F. 2017). The military judge may have given rote lip service to the mandate, but his failure to grant the challenges of these members shows he did not actually apply it. The government follows the military judge in saying "liberal grant mandate," and also follows him in failing to present a compelling reason why this case would clearly fall outside it.

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[25] Lieutenant Colonel Boyd agreed that "life in prison is not really punishment for the premeditated murder of children," and justified this on the grounds that "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 345, 438).

[26] Major Weidlich also agreed that "life in prison is not really punishment for the premeditated murder of children," and he further asserted that "it's really the facts of the case that are important to me . . . I don't think that the [accused's] background would sway me one way or another towards or against the death penalty." (JA 345, 520). Moreover, 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).

The same holds for LTC Watson. The government believes his "some good, some not so good" impression of defense attorneys was unbiased. (Gov. Br. at 119, 121). But set that alongside his impression of prosecuting attorneys, which was "good." (JA 378). No qualifications there, just a uniformly "good" impression of prosecutors. The difference between these two is what matters most; LTC Watson was predisposed to credit prosecuting attorneys more than defending attorneys, and a member of the public hearing that and considering his prior background as a police officer would question his ability to decide this case impartially. Under such facts, it's hard to see how the military judge could confidently say this "is not a close call," and it's hard to see how the liberal grant mandate should not have applied here. (JA 427).

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

This Court did not consider the constitutionality of a variable panel size in *United States v. Curtis*, 32 M.J. 252 (C.M.A. 1991). It only addressed whether R.C.M. 1004 "should require the court-martial to have at least 12 members at all times." *Id*. at 267. That is not the same issue challenged here, which focuses on the effect of panels that can vary between 12 and more members. *Curtis* dealt with sufficiency, but this assignment of error deals with uncertainty.

But the government is right that Sergeant Hasan Akbar did raise this issue before this Court, and this Court granted him no relief for it. *United States v. Akbar*, 74 M.J. 364, 413 (C.A.A.F. 2015). But Akbar only raised it as a headnote pleading in a two-sentence act of preservation. *See* Amended Final Brief on Behalf of Appellant at 242, United States v. Akbar, (USCA Dkt. No. 13-7001/AR), Feb. 28, 2014. The issue is better pleaded now and better briefed now, and should this Court get this far, it should consider this issue fully and with fresh eyes. If it does so, it will see that this is not "an attack on the military's death penalty system," but rather an attack on a pernicious, counterintuitive uncertainty. (Gov. Br. at 125). Its harm should be fixed, and indeed, Congress has already done so for future courts-martial. *See* Military Justice Act of 2016, 10 U.S.C. § 825a (2016). There is no reason to deny MSG Hennis the benefit of that same wisdom here.

XIII. THE MILITARY JUDGE ERRED WHEN HE FAILED TO CLARIFY THE PROPER PROCEDURE FOR VOTING ON A DEATH SENTENCE.

For everyone but LTC Boyd, the death penalty is the most severe punishment that can be imposed; a member who votes for the death penalty has already surpassed a vote for life imprisonment. Thus when the members vote on a sentence, if at least one of them votes for life rather than death, then the death penalty falls off the table and "the other votes would automatically revert to life to

get to the three-fourths concurrence" that R.C.M. 1006(b)(5) appears to require. (JA 1314). That is the only reasonable application of that rule to this case, and it is exactly what the government supported at trial. (JA 1314). But now on appeal, the government embraces the military judge's puzzling instruction that even the mandatory minimum sentence required 11 votes. (Gov. Br. at 127-28). This is an elusive logic indeed. What if the members were evenly and inalterably split between life and death: permanent stasis and a hung jury, even though there is a mandatory minimum sentence that everyone has sanctioned or surpassed? It's another moment of absurdity in this court-martial.

There were only two choices under this scheme: life or death. As the mandatory minimum, a life sentence was guaranteed. The panel's sole function at this point was to determine whether it would unanimously vote for death. If at least one member voted for life, then death could not be imposed. The conscience of one member could prevent death and secure life—that is the indisputable purpose of R.C.M. 1006(d)(3)(B)(4). But not so in this court-martial; if four or more members wanted the death penalty, then they would hold a life sentence hostage. That is a bizarre outcome indeed, and the government cannot justify it on any grounds other than a soda straw view of the rules. When the deck is stacked this heavily in favor of death, it cannot comply with the prohibition on cruel and unusual punishment, and its result must be set aside.

XIV. THE PANEL PRESIDENT'S FAILURE TO PROPERLY ANNOUNCE THE AGGRAVATING FACTORS MEANS THIS COURT CANNOT AFFIRM A DEATH SENTENCE.

This assignment of error does indeed concern a "technical violation of R.C.M. 1004(b)(8)," but this Court has always understood that provision in a technical manner. Simply put, the court-martial cannot adjust a sentence upwards, and the belated announcement of aggravating factors does constitute an upwards adjustment—there could be no death sentence without them. (Gov. Br. at 134). Without their announcement in open court, only a life sentence could obtain, and the sole purpose of announcing these findings after the court-martial's closure was to ensure the legality of a death sentence.

XV. THE COURT-MARTIAL OF MSG HENNIS VIOLATED ARTICLE 44(A), UCMJ.

If Article 44(a) merely repeated the protections of the Double Jeopardy Clause, as the government argues, there would be no need for it. (Gov. Br. at 36). But Congress did see a need for it, and its plainly worded purpose is protecting servicemembers from duplicative prosecutions. The Article should be understood in that light, rather than one of redundancy.

Prior to the Code, the Armed Forces and state authorities could not prosecute servicemembers for the same offenses, because their criminal codes did not

overlap. A soldier who slew his superior officer, for example, would face charges of murder in state court and then charges of mutiny at court-martial, as the Articles of War only provided for military offenses. *See*, *e.g.*, 6 Op. Atty Gen 413 (1854); *In re Stubbs*, 133 F. 1012 (W. D. Wash., 1905). The conduct was the same, but the offenses were different, and in this way each entity could vindicate its interests without redoubling the other's. This divide between state crimes and offenses cognizable at court-martial remained largely undisturbed until the post-War Code became law.[27] The government gives no case, no law, and no reason to understand our military history otherwise.

Now the government does reference prior versions of the Manual for Courts-Martial, but these offer no further guidance. (Gov. Br. at 36-38). That an act "committed in a State might constitute two *distinct* offenses, one against the United States and one against the State, for both of which the accused might be tried" is entirely consistent with a practice prohibiting double trials for the *same* offenses. *Manual for Courts-Martial* (1918 ed.), para. 149(d) (emphasis added); *see also Manual for Courts-Martial* (1949 ed.), para. 68. The Manuals merely recognized in abstraction what the cases of Captain Howe, Surgeon Steiner, and Private

[27] The 1863 Articles of War did permit courts-martial of certain common law offenses, but only when committed "in time of war." *United States v. French*, 27 C.M.R. 245, 251 (C.M.A. 1959). But there appears to be no record of any court-martial relying on this power to repeat state prosecutions for the same offenses.

Stubbs already illustrated in practice: the "two distinct offenses" would be different offenses, such as murder and mutiny,[28] manslaughter and maltreatment,[29] or murder and assault prejudicial to good order and discipline.[30] A single bout of conduct can certainly justify separate military and civilian trials for distinct military and civilian crimes, but not repeat trials for the same offense.

And the Manuals do not conflict with the insights of Colonel Winthrop either. This preeminent scholar must have understood the practice of his time when he observed that, in cases of concurrent subject matter jurisdiction, "an acquittal or conviction of one of such offences . . . in a civil court, will be a complete bar to a prosecution of the same in a military court, and vice versa." WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 265 (2nd ed. 1920). This balance of interests preceding the Code should still prevail.

While the Code extended courts-martial to common law crimes that had only been the subject of civilian codes before, there is no indication that Congress also wanted to extend courts-martial to such crimes when already tried in state court. Our history has shown that military discipline does not require the power to re-litigate civilian crimes already tried in civilian courts. If the government has some

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[28] 6 Op. Atty Gen 413 (1854).

[29] 6 Op Atty Gen 506 (1854).

[30] *In re Stubbs*, 133 F. 1012 (W. D. Wash., 1905).

reason to think that is not true, that our military resources should go to second-guessing civilian verdicts, that our servicemembers should suffer double prosecution more frequently than the citizens they protect, and that our tools of discipline should become extensions of state prosecutions, then the government should have presented those reasons by now.

XVI. APPELLATE DEFENSE COUNSEL HAVE FAILED TO INVESTIGATE HIGHLY EXCULPATORY EVIDENCE, AND HAVE THUS DEPRIVED MSG HENNIS OF HIS RIGHT TO EFFECTIVE ASSISTANCE.

There is evidence that someone other than Timothy Hennis—JC—was covered in the Eastburns' blood on May 10, 1985, and the government asserts there is no need to investigate this. (Gov. Br. 137-41). That is a remarkable position. There is no serious question that establishing this fact at trial would have helped show someone else committed these murders. There is no serious question either that appellate defense counsel have a duty to investigate such matters. *Strickland v. Washington*, 466 U.S. 668, 691 (1984) ("counsel has a duty to make reasonable investigations"). And there is no serious question that appellate defense counsel have repeatedly asked for the necessary resources to do so—which the government has always opposed and denied. *See United States v. Hennis*, 77 M.J. 7 (C.A.A.F. 2017).

The only serious question left, then, is why the government believes the ever-changing roster of appellate counsel detailed to this case could effectively investigate this information without the requested resources. (Gov. Br. at 140-41). These counsel have always represented dozens of other clients as well, and they have rarely spent more than a year or two detailed to this extraordinarily complex case. They are assigned to Fort Belvoir, Virginia, and lack any in-house investigative resources. How are they supposed to successfully probe claims that are now 34 years old and 300 miles away, and when the main leads, Walter Cline and AC, are both deceased? Such an investigation requires expertise and sustained, local, and long-term efforts that a rotating door of out-of-state appellate counsel cannot provide. If the Army pursued this court-marital for the sake of justice, then it should have no fear of the truth further investigation might reveal.

ASSIGNMENTS OF ERROR XVII TO XL.

The defense relies on its earlier pleadings for the remaining assignments of error.

CONCLUSION

Wherefore, appellee respectfully requests this Honorable Court dismiss the findings and sentence.

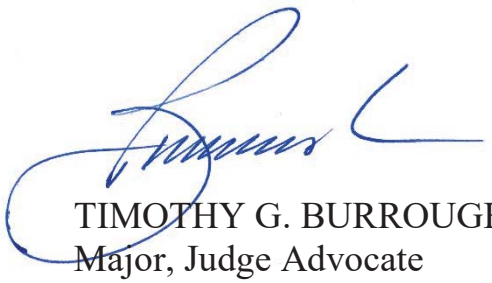
TIMOTHY G. BURROUGHS
Major, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0668
USCAAF Bar No. 36756

JONATHAN F. POTTER
Senior Capital Defense Counsel
USCAAF Bar No. 26450

CHRISTOPHER DANIEL CARRIER
Lieutenant Colonel, Judge Advocate
Chief, Capital & Complex Litigation
USCAAF Bar No. 32172

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 July 25, 2019.



TIMOTHY G. BURROUGHS
Major, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0668
USCAAF Bar No. 36756