**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ARMED FORCES**

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| **UNITED STATES**<br><br>*Appellee*<br><br>v.<br><br>**TIMOTHY B. HENNIS**,<br>Master Sergeant (E-8),<br>United States Army,<br><br>*Appellant* | BRIEF ON BEHALF OF APPELLEE<br><br>Crim. App. Dkt. No. 20100304<br><br>USCA Dkt. No. 17-0263/AR |

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


ALLISON L. ROWLEY
Captain, Judge Advocate
Appellate Attorney, Government Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0773
Allison.l.rowley.mil@mail.mil
U.S.C.A.A.F. Bar No. 36904

CATHARINE M. PARNELL
Major, Judge Advocate
Branch Chief, Government Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road, Room 2016
Fort Belvoir, VA 22060
(703) 693-0793
Catharine.m.parnell.mil@mail.mil
U.S.C.A.A.F. Bar No. 36827

ERIC K. STAFFORD
Lieutenant Colonel, Judge Advocate
Deputy Chief, Government Appellate Division
eric.k.stafford.mil@mail.mil
U.S.C.A.A.F. Bar No. 36897

STEVEN P. HAIGHT
Colonel, Judge Advocate
Chief, Government Appellate Division
Steven.p.haight.mil@mail.mil
U.S.C.A.A.F. Bar No 36151

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## STATEMENT OF STATUTORY JURISDICTION

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

## STATEMENT OF THE CASE

On May 9, 1985, Mrs. Kathryn ("Katie") Eastburn and two of her daughters, Kara and Erin Eastburn, were murdered in their home in Fayetteville, North Carolina, while her husband and their father, Air Force Captain Gary Eastburn attended training at Maxwell Air Force Base, Alabama. (JA 2). After the murders, the Eastburn's youngest child, Jana, remained alone in the house until the neighbors heard her crying on May 12, 1985, and alerted law enforcement. (JA 2). Mrs. Eastburn and her daughters died of multiple stab wounds to their necks. (JA 2). At autopsy, the medical examiner discovered intact spermatozoa in Mrs. Eastburn's vagina. (JA 2).

Appellant stood trial for the Eastburn murders in the State of North Carolina in 1986. (JA 2). A jury convicted him and sentenced him to death, however, the Supreme Court of North Carolina reversed his conviction in 1988. *State v. Hennis*, 323 N.C. 279, 372 S. E.2d 523 (1988); (JA 2). A jury acquitted Appellant at his

second state trial in 1989 and he returned to serve on active duty in the U.S. Army until his retirement in 2004. (JA 2); (App. Ex. 8, encl. 1).

After Appellant's acquittal, the State of North Carolina conducted advanced deoxyribonucleic acid (DNA) testing on the evidence in the Eastburn murders and determined that Appellant's DNA matched that of the spermatozoa found in Mrs. Eastburn's body at the time of her death. (JA 2-3, 17; R. at 5354-55). In 2006, the Army recalled Appellant to active duty to stand trial. (App. Ex. 8, encl. 2).

On April 8, 2010, a general court-martial with enlisted representation found Appellant guilty, contrary to his pleas, of three specifications of premeditated murder, in violation of Article 118, UCMJ, 10 U.S.C. § 918 (1956). (JA 2). The panel sentenced Appellant to death, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1. (JA 2). The convening authority approved Appellant's sentence on January 26, 2012. (Action).

The Army Court reviewed this case under Article 66, UCMJ, and affirmed Appellant's conviction and his death sentence. *United States v. Hennis*, 75 M.J. 796 (A. Ct. Crim. App. 2016); (JA 2).

## STATEMENT OF FACTS

In May 1985, Captain Gary Eastburn accepted an assignment with the U.S. Air Force that would require his family to relocate to the United Kingdom. (R. at 3907). In anticipation of their move, Captain Eastburn and his wife, Katie, decided

to place an advertisement in the local paper at Fort Bragg, North Carolina, to find a new home for their dog. (R. at 3920-21). Appellant responded to the advertisement and visited the Eastburn home on May 10, 1985, to meet the dog. (R. at 3921-22).

On May 12, 1985, the Eastburn's neighbors noted that they had not seen Katie Eastburn or any of her children for several days. (R. at 3935-36). They also noticed the Eastburn's newspapers piling up in the front yard and went next door to investigate. (R. at 3935-36). When the neighbors heard Jana Eastburn crying, they called the sheriff. (R. at 3937). The responding patrol officer discovered Jana Eastburn in her crib and the bodies of Katie Eastburn, Kara Eastburn, and Erin Eastburn elsewhere in the house. (R. at 3980; 3991-4003).

As described above, the State of North Carolina tried and convicted Appellant for the Eastburn murders in 1986. Following his acquittal at his second trial, Appellant returned to active duty in the U.S. Army and retired as a Master Sergeant (MSG) in 2004. (JA 2).

In 2005, the Cumberland County Sheriff's Office submitted the evidence from the Eastburn murders to the North Carolina State Bureau of Investigation (SBI) laboratory for additional DNA testing. (R. at 312, 321, 339). In 2006, the SBI lab returned test results that matched Appellant's DNA to the vaginal swabs taken at Mrs. Eastburn's autopsy. (R. at 321-22).

In 2006, the General Court-Martial Convening Authority (GCMCA) in this case requested that the Assistant Secretary of the Army for Manpower and Reserve Affairs (ASA M&RA) order Appellant to return to active duty for court-martial. (App. Ex. IX, encl. 1).

Appellant's court-martial took place in 2010. The evidence introduced at trial showed that Appellant stabbed each of the victims and slit their throats. (R. at 4793, 4877, 4880). The state of the crime scene suggested that Appellant sexually assaulted Katie Eastburn prior to her death; at autopsy, the medical examiner swabbed her vagina and found live spermatozoa. (R. at 4861). At trial, the medical examiner testified that, based on the condition and location of the spermatozoa he found inside Katie Eastburn, Appellant deposited the sperm shortly before her death. (R. at 4861). A Government witness placed Appellant at the Eastburn home at approximately 0330 hours on the night of the murders carrying a black trash bag and wearing a black Members Only jacket. (R. at 4531). Appellant's neighbors witnessed him setting a fire in a barrel on the day after the murders and Appellant's car matched the make and model of a car identified near the Eastburn home. Further, the Government established that Appellant used Katie Eastburn's ATM card—stolen at the time of her murder—on May 19, 1985. (R. at 4976). Appellant had no alibi for the offenses.

At trial, Appellant sought to impeach the DNA sample from Mrs. Eastburn's autopsy. He also attacked the prosecution's case-in-chief by calling attention to the lack of other forensic evidence—blood, hair, fingerprints—at the crime scene. (R. at 5586). At the close of the court-martial, the panel returned a guilty verdict and later sentenced Appellant to death.

Additional facts necessary to resolve the issues presented in this case are included below when addressing each assignment of error.

## I.
## WHETHER THE BREAK IN APPELLANT'S SERVICE FORECLOSED THE EXERCISE OF COURT-MARTIAL JURISDICTION.

### Facts

Appellant initially entered active duty on January 29, 1981, pursuant to a four-year enlistment agreement. (JA 1499). On February 1, 1984, Appellant extended his initial term of service for one year to January 28, 1986. (JA 1499; App. Ex. XVII, encl. 4). On May 16, 1985, Appellant was arrested by the Cumberland County Sheriff's Office for the Eastburn murders and placed into pretrial confinement from that day until December 15, 1985, when he was released on bail. (JA 1499; App. Ex. XVII, encl. 15). In January 1986, Appellant extended his enlistment again for seven months to August 27, 1986. (JA 1499).

On July 4, 1986, Appellant was convicted in North Carolina of three counts of premeditated murder and rape. (JA 1499; App. Ex. XVII, encl. 14). On July 8, 1986, Appellant was sentenced to death and transferred to the North Carolina Department of Corrections. (JA 1499; App. Ex. XVII, encl. 14). On October 6, 1988, the Supreme Court of North Carolina set aside Appellant's conviction and authorized a new trial. (JA 1499). On October 31, 1988, Appellant was transferred from the North Carolina Department of Corrections to the Cumberland County Jail to await a new trial. (App. Ex. XVII, encl. 14; App. Ex. XXVI). A jury acquitted Appellant at his retrial on April 19, 1989. (JA 1499).

Appellant immediately returned to active duty on April 21, 1989, and reported to Fort Knox, Kentucky, where he had been administratively assigned pending the disposition of his appeal after his first civilian trial. (App. Ex. XVII, encl. 16).[1] On May 22, 1989, Appellant's commanding general approved the classification of Appellant's absences due to confinement from May 16, 1985, to

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[1] After Appellant's first trial but prior to the reversal and acquittal, Appellant's command processed him for separation under Chapter 14 of Army Regulation (AR) 600-20. (JA 1499). On October 3, 1986, Appellant's discharge was approved, but the discharge was deferred until final action on his civilian appeal was complete. (JA 1499). Appellant's discharge, which was never executed, was voided by the GCMCA at Fort Knox because of the reversal, retrial, and acquittal. (JA 1499).

December 15, 1985, and from July 4, 1986, to April 19, 1989, as unavoidable. (JA 1500; AE XXVII.).

On June 1, 1989, Appellant submitted a signed application for reenlistment for four more years that reflected an Expiration of Term of Service (ETS) date of June 17, 1989. (JA 1500).[2] Appellant's request for reenlistment was approved, effective June 13, 1989. (JA 1500). Appellant received a discharge certificate, dated June 12, 1989, for the sole purpose of effectuating his reenlistment. (JA 1500). Appellant continued to serve on active duty until his retirement in 2004.[3] (JA 1500). The DD 214 Appellant received upon his retirement in 2004 indicated that he never had a break in service from his entry into the Army in 1981 until his retirement in 2004. (JA 1500).

The command preferred charges against Appellant on November 9, 2006, and referred those charges to a general court-martial on August 17, 2007. (JA 117-118). On January 22, 2008, Appellant filed a motion to dismiss on the basis that his June 12, 1989, discharge and his June 13, 1989, reenlistment constituted a break in service which deprived the court-martial of personal jurisdiction. (JA 1445-1450).

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[2] The Army Court found that the ETS date of June 17, 1989, was incorrect in light of the commanding general's May 22, 1989, decision and found that Appellant's correct ETS date was, at the latest, August 27, 1986. *Hennis*, 75 M.J. at 807.
[3] After his 1989 reenlistment, Appellant reenlisted in 1992, 1996, and 2001. (App. Ex. XVII; encls. 10, 11, 12, and 13).

The Government filed its response on January 22, 2008. (JA 1451-1465). On April 28, 2008, the military judge denied Appellant's motion to dismiss. (JA 1499-1501).

In his ruling, the military judge specifically found that Appellant's June 12, 1989, discharge was solely for the purpose of an immediate, voluntary reenlistment and was "not intended to terminate the accused's relationship with the Army" as the discharge certificate "was a necessary predicate for the accused to reenlist." (JA 1500). The military judge did not specifically conclude that a break in service occurred, but found that, assuming there was a break in service based on Appellant's June 12, 1989, discharge certificate, jurisdiction was revived under Article 3(a), UCMJ, 18 U.S.C. § 803, because Appellant's offenses were punishable by confinement for five or more years; Appellant could not be tried by any state, territory, or in Federal District Court; Appellant was subject to the UCMJ at the time of his court-martial under Article 2, UCMJ, 18 U.S.C. § 802; and murder offenses are not barred by the statute of limitations. (JA 1500-1501).

On May 15, 2008, Appellant filed a petition for extraordinary relief in the Army Court asserting, among other things, that his court-martial lacked jurisdiction because of his alleged break in service. (App. Ex. 79).[4] The Army

[4] The court reporter designated all Appellate Exhibits after App. Ex. LIX (49) in the original Record of Trial using Arabic numerals. This brief will refer to Appellate Exhibits consistent with the original Record.

Court denied the petition on June 25, 2008, and this Court denied the petition on September 26, 2008. (App. Ex. 91, 93).

Upon reviewing Appellant's case under Article 66, UCMJ, the Army Court found that Appellant's ETS date was August 27, 1986, because of the retroactive effect of the May 22, 1989, memorandum classifying both periods of Appellant's incarceration as unavoidable. *Hennis*, 75 M.J. at 808. Specifically, the Army Court noted:

> Following his acquittal and release from incarceration, appellant served continuously on active duty until 12 June 1989. We further find as fact that, the next day, appellant continued to maintain significant indicia of military status and reenlisted. Until 22 May 1989, appellant's post-acquittal military service was pursuant to his contractual enlistment, the fulfillment of which had been tolled during his civilian confinement. However, once his confinement-related absence was excused on 22 May 1989, appellant's ETS date reverted to 27 August 1986 (at the latest). Therefore, from 22 May until 12 June 1989, appellant served on active duty beyond the "period of obligated service" required by his enlistment.

*Id*. The Army Court, relying on *United States ex rel. Hirshberg v. Cooke*, 336 U.S. 210 (1949), and *United States v. Clardy*, 13 M.J. 308 (C.M.A. 1982), found that Appellant's military status terminated before his June 1989 reenlistment because, at that point, he had already served past his end of service obligation. *Id*. at 808. Although the Army Court concluded that there was a break in service, it found that jurisdiction was preserved under Article 3(a), UCMJ. *Id*. at 809-810.

**Standard of Review**

"When an accused contests personal jurisdiction on appeal, we review that question of law *de novo*, accepting the military judge's findings of historical facts unless they are clearly erroneous or unsupported in the record." *United States v. Melanson*, 53 M.J. 1, 2 (C.A.A.F. 2000) (citing *United States v. Owens*, 51 M.J. 204, 209 (C.A.A.F. 1999)).

**Law and Argument**

Assuming arguendo that there was a break in Appellant's service, this Court should find that there was jurisdiction over Appellant pursuant to Article 3(a), UCMJ, because Appellant's case meets all of the criteria for personal jurisdiction. "Congress enacted Article 3(a) to remedy the problem identified in *Hirshberg*, in which the Supreme Court interpreted the then-existing statutes and military practices as prohibiting a military trial for an offense committed during a prior term of service." *Willenbring v. Neurater*, 48 M.J. 152, 177 (C.A.A.F. 1998), *overruled in part by United States v. Mangahas*, 77 M.J. 220, 222 (C.A.A.F. 2018). "The enactment of Article 3(a), as part of the UCMJ, was designed to permit courts-martial for prior-service offenses when the case involved a major offense that could not be tried in a civilian court." *Willenbring*, 48 M.J. at 177. Under Article 3(a), UCMJ, jurisdiction is revived after a break in service if four provisions are met:

> 1. The referred offense must be punishable by more than five years of confinement;
>
> 2. The accused "cannot be tried in the courts of the United States or of a State, a Territory, or the District of Columbia;"
>
> 3. The accused is subject to the Code at the time of court-martial under Article 2, UCMJ; and
>
> 4. The offense is not barred by the statute of limitations.

Article 3(a), UCMJ.

Appellant's case meets all four criteria of Article 3(a), UCMJ. Murder is punishable by more than five years under the UCMJ. *See* MCM, Part IV, ¶43e. North Carolina cannot prosecute Appellant for the murders because of the Double Jeopardy Clause; Appellant was subject to the Code at the time of his court-martial;[5] and the offense of murder has no statute of limitations. Article 43(a), UCMJ, 10 U.S.C. §843(a). Furthermore, the remainder of the federal Government had no jurisdiction to prosecute Appellant.

Though Appellant argues that Article 3(a), UCMJ, does not apply to his case because he was previously prosecuted for the murders in North Carolina state court, this conflicts with the plain language of Article 3(a), UCMJ. (Appellant's Br. 66-67). Contrary to Appellant's argument, the focus of the Article 3(a), UCMJ,

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[5] As addressed in Assignment of Error III, Appellant was subject to the UCMJ by virtue of his status as a retiree.

is not whether an accused *could have been* prosecuted in another court in the past. Rather, "cannot be tried" signifies the analysis focuses on a court's *present* ability to try a case. As the Army Court noted:

> Had Congress intended for Article 3(a), UCMJ, to be applied with a view toward a state or federal court's past ability to try a case, we are confident it would have used the "could not have been tried" phrase—or an equivalent variant—for which appellant advocates. Instead, the statute is worded in a manner which requires us to evaluate whether such courts "cannot."

*Hennis*, 75 M.J. at 809.

The Army Court's recognition of the plain meaning of Article 3(a), UCMJ, is consistent with this Court's precedent in *Willenbring v. Neurauter*. In *Willenbring*, this Court found because a federal district court prosecution for an appellant's offenses committed on Fort Belvoir was barred by the statute of limitations at the time of his court-martial, the case was one that "cannot be tried in a civilian court" under Article 3(a), UCMJ. *Id*. at 176-177. In making that determination, this Court noted:

> [E]ven though Congress specifically used the word "jurisdiction" at several points in the drafting of other aspects of Articles 2 and 3, it did not use that word in the Article 3 criteria limiting court-martial jurisdiction over prior-service offenses, which it could have done by restricting military trials to cases outside the "jurisdiction" of civilian courts. Instead, the statute referred to cases that "cannot" be tried.

*Id*. at 177. Therefore, Article 3(a), UCMJ, is not limited to permit courts-martial jurisdiction only where a state or federal court has always lacked its own jurisdiction to adjudicate the case. Rather, Article 3(a), UCMJ, focuses on the ability of a federal or state court to try a case at the time of a court-martial, regardless of the prior ability of those entities to adjudicate the same case.

In this case, North Carolina was unable to try Appellant at the time of his court-martial because of double jeopardy, just as the *Willenbring* appellant could not be tried by a federal district court at the time of his court-martial because of the running of the statute of limitations. Accordingly, considering *Willenbring* and the plain language of Article 3(a), UCMJ, this Court should find that even if there was a break in Appellant's service, Article 3(a), UCMJ, revived jurisdiction. Appellant's convictions should be affirmed.

## II.
## WHETHER APPELLANT'S CRIMES WERE SUFFICIENTLY "SERVICE CONNECTED" TO SUBJECT HIM TO COURT-MARTIAL JURISDICTION?

### Facts

On December 21, 2007, the defense filed a motion to dismiss alleging that the offenses lacked connection to military service. (App. Ex. XIV). The Government filed a response on January 22, 2008. (App. Ex. XV). On April 28, 2008, the military judge denied the defense motion to dismiss. (App. Ex. 71). The

military judge found that, pursuant to *United States v. Solorio*, 483 U.S. 435 (1987), jurisdiction attaches solely based on the status of a service member and not whether there was service connection between the military and the offenses. (App. Ex. 71, p.1). The military judge found that even if the pre-service connection test still applied, the test would be satisfied because: "each murder victim was the dependent of an Air Force officer; the murders occurred at a location very close to Fort Bragg; only the military has jurisdiction over the accused for the alleged offenses; and the command has the responsibility and authority to maintain good order and discipline." (App. Ex. 71, p.1-2).

## Standard of Review

This Court reviews issues of jurisdiction de novo. *Melanson*, 53 M.J. at 2 (citing *Owens*, 51 M.J. at 209).

## Law and Argument

A. *United States v. Solorio* abolished the service connection test.

This Court should reject Appellant's assertion that his court-martial lacked jurisdiction because *Solorio* unequivocally repudiated the service connection test. Even if the service connection test still applies to capital cases, the circumstances of Appellant's offenses warrant a finding of jurisdiction. In *O'Callahan v. Parker*, 395 U.S. 258 (1969), the Supreme Court held that for the military to have jurisdiction over an offense, the offense "must be service connected." *Id*. at 272.

The Court then considered twelve factors relevant to determining whether an offense was service connected. *Id*. at 273-274.[6] In *Relford v. Commandant, U.S. Disciplinary Barracks*, the Court delineated an additional nine factors for courts to consider when analyzing service connectedness. 401 U.S. 355, 356-358 (1971).[7] The Court noted that the factors did not define the limits of the analysis and that courts must address each case on an *ad hoc* basis. *Id*. at 365-366, 369.

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[6] The Court in *O'Callahan* considered whether: (1) the servicemember was properly off-post; (2) the crime was committed off-post; (3) its commission at a place not under military control; (4) the offense occurred within the territorial limits of the United States rather than "an unoccupied zone of a foreign country"; (5) the crime was committed during peacetime; (6) the crime was related to the offender's military duties; (7) there is a civilian court to hear the case; (8) the victim was performing any duties related to the military; (9) military authority was flouted; (10) there is any threat to the military installation; (11) the offense involved military property; (12) the offense is traditionally prosecuted by civilians. *Relford,* 401 U.S. at 365; *O'Callahan*, 395 U.S. at 273-274.

[7] The additional factors considered by the Court in *Relford* were: (1) the essential need for the armed forces to secure military enclaves, (2) the military commander's duty to maintain law and order, (3) the adverse impact to morale, discipline, reputation, and integrity because the victim is military or military property is involved, (4) the notion that Congress' power to prosecute service-members exceeds the geographical boundaries of military enclaves, (5) the reality that civilian courts may not be capable or interested in hearing some military cases, (6) the idea that "geographical and military relationships" go a long way toward showing service connectedness, (7) the historic basis for extending military jurisdiction for offenses involving the victimization of "one associated with the post," to include "*an offense against a civilian committed 'near' a military post*," (8) the importance of not interpreting *O'Callahan* to call for the restriction of courts-martial to purely military offenses, and (9) the inability to draw lines between on or off duty and military or nonmilitary areas of a post. *Relford,* 401 U.S. at 367-69 (emphasis added).

In 1987, in *Solorio*, the Court explicitly overturned *O'Callahan* and the service connection requirement for court-martial jurisdiction. *Solorio*, 483 U.S. at 486. The Court categorized *O'Callahan* as a break from the "unbroken line of decisions from 1866 to 1960" that based jurisdiction solely upon an accused being a member of the "land and naval Forces" and an improper departure from the plain meaning of Art. I, § 8, cl. 14. *Id*. at 439-441 (quotations and citations omitted). The Court noted that there was a "dearth of historical support for the *O'Callahan* holding" and that *O'Callahan* was based on an erroneous interpretation of history concerning jurisdiction during the American Revolution – the same erroneous interpretation that Appellant submits to this Court. *Id*. at 443-447. The Court also noted that the factors promulgated by *O'Callahan* and *Relford* were unworkable and led to irreconcilable appellate decisions. *Id*. at 448-50.

B. Appellant's military status at the time of the offense conferred jurisdiction upon the court-martial.

In *United States v. Avila*, 27 M.J. 62 (C.M.A. 1988), the Court of Military Appeals (CMA) held that the "military status" test for jurisdiction re-established in *Solorio* applied to offenses occurring prior to its decision on June 25, 1987. *Id*. at 64. Accordingly, pursuant to *Solorio* and *Avila*, court-martial jurisdiction over Appellant existed because he was an active duty service member at the time of his offenses in 1985.

Appellant attempts to use Justice Stevens' concurrence in *Loving v. United States*, 517 U.S. 748, 774-775 (1996), to allege that the service connection test remains the test for capital cases. However, *Solorio* clearly and unequivocally stated: "We therefore hold that the requirements of the Constitution are not violated where, as here, a court-martial is convened to try a serviceman who was a member of the Armed Services at the time of the offense charged." *Solorio*, 483 U.S. at 450. Although *Solorio* involved a non-capital offense, the Court's sweeping language concerning the military status test drew no distinction between capital and non-capital cases. The majority in *Loving* cited *Solorio* throughout its opinion and summarized its holding: "Congress may extend court-martial jurisdiction to *any* criminal offense committed by a service member during his period of service." *Loving*, 517 U.S. at 769 (emphasis added). The *Loving* Court made no distinction between jurisdiction in capital and non-capital cases. Likewise, the CMA in *Avila* made no distinction between *Solorio*'s applicability to capital and non-capital cases. Accordingly, Appellant's attempted distinction should not change this Court's analysis of jurisdiction after *Solorio*.

Furthermore, in *United States v. Gray*, 51 M.J. 1 (C.A.A.F. 1999), this Court previously declined to make a distinction between subject matter jurisdiction in capital and noncapital cases. In *Gray*, an appellant also argued that the service connection test determined subject matter jurisdiction in capital courts-martial

based upon Justice Stevens' concurrence in *Solorio*. *Id.* at 11. The Court could have held that the service connection test still controlled capital cases, but it did not. Instead, this Court noted the question raised by Justice Stevens in his concurrence and found that even if subject matter jurisdiction is based on the service connection test, the facts of the *Gray* appellant's offenses satisfied that test. *Id*. Because the Stevens concurrence does not control and nothing limits the holding in *Solorio* to non-capital cases, this Court should not interpret its analysis in *Gray* to suggest that the service connection test remains the test for subject matter jurisdiction in capital cases.

Accordingly, because an "accused's military status at the time of the offense under the UCMJ is the *sole criterion* for establishing subject matter jurisdiction in a court-martial, capital or otherwise[,]" and Appellant's status as an active duty service member at the time of his offenses satisfied this jurisdictional requirement, this Court should reject this assignment of error. *Hennis*, 75 M.J. at 811 (emphasis added). However, even if court-martial jurisdiction depended on a service connection between the offenses and the military, this case would satisfy that test.

C. Appellant's crimes were sufficiently "service connected" to establish jurisdiction.

First, the victims in this case, Katie, Erin, and Kara Eastburn, were the dependents of an Air Force captain stationed at Pope Air Force Base. The

relationship of the victims to the military is a weighty consideration in the service connection analysis. Prior to the Supreme Court's *Solorio* decision, the CMA noted that "sex offenses against young children [committed off-post] have a continuing effect on the victims and their families and ultimately on the morale of any military unit or organization to which the family member is assigned." *Solorio*, 21 M.J. 251, 256 (C.M.A. 1986) (finding that this "continuing effect" of the offenses established service connection); *see also Relford,* 401 U.S. at 366-67 (describing the relationships of the victims, a service-member's sister and a service-member's wife, as "significant aspects" of the service connection analysis). Logically, this also applies to relatives of murder victims.

Second, Appellant's offenses occurred less than one mile from Fort Bragg's Yadkin Road gate. (App. Ex. 71, p. 1-2; R. at 3904). As the Court in *Relford* noted, the historical exercise of court-martial jurisdiction for a "crime against the person of one associated with the post" "include[d] an offense against a civilian committed 'near' a military post." 401 U.S. at 368; *see also United States v. Abell*, 23 M.J. 99, 103 (C.M.A. 1986) (describing the proximity of the crime scene to Fort Rucker as a "significant fact suggesting service connection"); *United States v. Mitchell*, 2 M.J. 1020, 1023 (A. Ct. Crim. App. Oct. 29, 1976) (finding a murder committed on or near Fort Bragg was service-connected while noting that "jurisdiction is not automatically lost once a fixed boundary is crossed; that some

offenses from the very location of their occurrence just outside the reservation can be as service-connected as those occurring inside the boundary."), *pet. for rev. den'd*, 3 M.J. 105 (C.M.A. 1977).

Additionally, this case meets the service connection test because only the military had jurisdiction over Appellant's crimes. Appellant suggests that the military's initial deference to state authorities is a factor in favor of finding a lack of service connection, but that proposition has been rejected by military courts. *See Abell*, 23 M.J. at 104 (ruling that "[i]nitial deference to civilian authorities cannot reasonably be equated to a determination by the military that the offenses are not service-connected"). The military has a substantial interest in maintaining good order and discipline in light of the newly-discovered DNA evidence linking Appellant to the offenses and seeking justice for the victims, a military family. As this Court's concurring opinion noted in *United States v. Abell*,

> [M]odern strategic command policy for the maintenance of a strong national defense recognizes that the welfare of the military member's family is of vital importance in maintaining an armed force of good morale and discipline. Protection of a servicemember's family against crimes by another member is of vital importance, perhaps equal to or greater than that of protecting a military member from crime.

*Abell*, 23 M.J. at 104 (Cox, J., concurring).

In conclusion, this Court should find that Appellant's status as an active duty service member at the time of his offenses established jurisdiction in this case because *Solorio* abrogated the *O'Callahan* service connection test for all offenses. Even if this Court finds that the service connection test applies to capital cases, the facts of this case demonstrate a service connection sufficient to establish court-martial jurisdiction. Accordingly, this Court should reject Appellant's assertion that the court-martial lacked jurisdiction.

## III.
## WHETHER THE COURT-MARTIAL HAD PERSONAL JURISDICTION OVER APPELLANT?

### Facts

Appellant retired from the U.S. Army in the rank of First Sergeant (1SG) on July 31, 2004. (JA 1353).[8] Appellant's retirement orders placed him on "the retired list" under 10 U.S.C. § 3914. (JA 1353). After the North Carolina SBI identified Appellant's DNA in the vaginal swab taken at Katie Eastburn's autopsy, the convening authority requested that the ASA MR&A recall Appellant to active duty to facilitate his court-martial. (JA 1362). The ASA MR&A granted the convening authority's request. (JA 1354, 1363).

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[8] Appellant's orders authorized him to retire at the rank of 1SG, however, when the Army recalled him to active duty, it ordered him to duty in the rank of MSG. Both 1SG and MSG qualify for the pay grade E-8.

At trial, Appellant filed a motion to dismiss and argued that the Army did not have jurisdiction over him because he became a reservist upon his retirement. (JA 1355). Appellant also argued that the Army failed to follow its regulations when it recalled him to active duty and referred his case to trial. (JA 1355). The military judge denied Appellant's motion to dismiss and found that, as a retiree, Appellant remained subject to the UCMJ and subject to recall for court-martial. (JA 1498). The military judge also found that the Government established that it followed the appropriate regulatory procedures to recall Appellant and therefore did not lose or compromise its jurisdiction over his crimes. (JA 1498).

**Standard of Review**

This Court reviews questions of jurisdiction de novo. *United States v. Ali*, 71 M.J. 256, 261 (C.A.A.F. 2012). The courts of the Armed Forces may exercise jurisdiction over all those subject to the UCMJ. Article 17, UCMJ, 18 U.S.C. § 817. The analysis of personal jurisdiction focuses on the status of the appellant, "i.e., whether the person is subject to the UCMJ at the time of the offense." *Ali*, 71 M.J. at 261-62 (citing *Solorio*, 483 U.S. at 439-40). The military's jurisdiction over the person will continue so long as the person maintains military status. *United States v. Harmon*, 63 M.J. 98, 101 (C.A.A.F. 2006); *see also* Rule for Courts-Martial [hereinafter R.C.M.] 202, discussion. When an Appellant places jurisdiction at issue, the Government must prove jurisdiction by a preponderance

of the evidence. *Hennis*, 75 M.J. at 803-04 (citing *United States v. Morita*, 74 M.J. 116, 121 (C.A.A.F. 2015)).

**Law and Argument**

A. The military properly exercised its personal jurisdiction over Appellant as a retired soldier.

This Court should affirm Appellant's convictions because the Army properly exercised personal jurisdiction over Appellant as an active duty retiree. Both the UCMJ and military case law establish that military courts-martial may try and sentence retired members of the armed forces. Article 2(a)(4), UCMJ; *see also United States v. Dinger*, 77 M.J. 447, 453 (C.A.A.F. 2018) ("'Retired members of a regular component of the armed forces who are entitled to pay' are subject to the UCMJ, and, therefore, trial by court-martial."); *Pearson v. Bloss*, 28 M.J. 376, 379-80 (C.M.A. 1989) ("[R]etired enlisted members of the [Army] are 'actually members of or part of the armed forces' for purposes of court-martial jurisdiction."). While AR 27-10, Legal Services: Military Justice (16 November 2005), para. 5-2.b.(3), permits a commander to order a retired soldier to active duty for purposes of a court-martial, this has no effect on the personal jurisdiction conferred by the soldier's retired status. *United States v. Hooper*, 26 C.M.R. 417, 420-21 (C.M.A. 1958) (rejecting the premise that the military must order a retired member to active duty to effectuate their court-martial). Appellant's retirement

orders, effective July 31, 2004, authorize his retirement from active duty service at the grade of First Sergeant (1SG). (JA 1353). Appellant's status as a retired member "entitled to pay" therefore subjected him to court-martial jurisdiction regardless of whether the Army recalled him to active duty.

Appellant alleges that by virtue of his assignment to the "Reserve Component," the Army could not recall him for purposes of court-martial. This assumes that assignment to the "Reserve Component" divests Appellant of his status as a retiree and makes him a "reservist." It does not. Appellant's retirement orders authorize his retirement under 10 U.S.C.S. § 3914, the statute which allows the retirement of enlisted members who have at least twenty, but less than thirty, years of service.[9] Retirement under Section 3914 transfers an enlisted member to the Retired Reserve, a list of retired members of the uniformed services entitled to retired or retainer pay. *See* 10 U.S.C. §§ 9001, 12774, 12307.[10] "Members in the Retired Reserve are in a retired status." 10 U.S.C. § 10141. When Appellant retired from active duty in 2004, his orders placed him on "the retired list" under 10

[9] On February 1, 2019, an enactment of Congress redesignated this section as 10 U.S.C. § 7314. *See* John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 1636, Section 808(b)(12) (2018).
[10] The Government notes that, prior to 1995, 10 U.S.C. § 3914 provided that "A regular enlisted member then becomes a member of the Army Reserve." National Defense Authorization Act for Fiscal Year 1995, Pub. L. 103-337, 108 Stat. 2753 (1994).

U.S.C. § 3914. (JA 1353). As Appellant maintained a "retired" status rather than a "reserve" status after his release from active duty, Appellant's argument that the Army could not recall him from the "reserves" has no merit. Because Appellant retired from active duty, the Army never lost personal jurisdiction over him and therefore had authority to return him to active duty for court-martial.

In his brief, Appellant argues that, "[t]he Army foreclosed any claim of personal jurisdiction based on [his] retired status when, over his objection, it treated him as a soldier on active duty." (Appellant's Br. 72). Appellant fundamentally misconstrues the relationship between personal jurisdiction and his recall to active duty for purposes of prosecution. The Army never lost personal jurisdiction over Appellant because his crimes occurred while he served on active duty, and when the Army prosecuted him for those crimes, he held a "retired" status. Both active and retired military status may justify the exercise of court-martial jurisdiction. *See Dinger*, 77 M.J. at 453; *Harmon*, 63 M.J. at 101 (citing *Solorio*, 483 U.S. at 439). As the Army did not lose jurisdiction over Appellant when he retired from active duty, it cannot follow that the Army lost jurisdiction when it brought Appellant from one authorized military status to another without creating a break in service. While the Army did not *need* to recall Appellant to active duty in order to court-martial him, it certainly did not lose personal

jurisdiction over him when it did because he was always subject to Article 2, UCMJ.

B. The Army properly recalled Appellant to active duty for purposes of his court-martial.

Despite Appellant's contention to the contrary, the Army properly and lawfully recalled him to active duty pursuant to 10 U.S.C. § 688. Section 688 provides that the service secretaries may recall retirees "to such duties as the Secretary considers necessary in the interests of national defense." 10 U.S.C. § 688(a), (b)(1), (c). Department of Defense Directive 1352.1, Management and Mobilization of Regular and Reserve Retired Military Members [hereinafter DOD Dir. 1352.1] (July 16, 2005), similarly authorizes the recall of retirees to perform "duties that the Secretary concerned considers necessary in the interests of national defense." DOD Dir. 1352.1, para. 4.3.5. Pursuant to AR 27-10, the Secretary of the Army allows the recall of retirees for courts-martial only under "extraordinary circumstances" and only after to approval by the Office of the Judge Advocate General. AR 27-10, para. 5-2.b.(3). As the Army Court noted below, nothing in DOD Dir. 1352.1 defines duties "necessary in the interests of national defense." *Hennis*, 75 M.J. at 806.

In this case, the convening authority requested that the ASA M&RA recall Appellant to facilitate court-martial action on June 29, 2006. (JA 1362). The

convening authority's request specified the "extraordinary circumstances" justifying the request, including the discovery of new evidence and the fact that the U.S. Army remained the only jurisdiction that could prosecute Appellant for his crimes. (JA 1362). Pursuant to 10 U.S.C. § 688, the ASA M&RA granted the convening authority's request and the Secretary of the Army ordered Appellant to active duty for "UCMJ processing." (JA 1354, 1363). Appellant does not attempt to explain how the regulatory authority of the Secretary of the Army to recall retirees for court-martial does not fall within the statutory authority to recall soldiers for purposes "necessary in the interests of the national defense." Because the appropriate authorities ordered Appellant to active duty pursuant to DOD and Army regulations, Appellant cannot show that the Army improperly recalled him to active duty. Further, absent any authority under 10 U.S.C. § 688 to the contrary, Appellant cannot claim that the Army's decision to recall him for courts-martial purposes did not qualify as "in the interests of the national defense." Given that the record reflects the Army's compliance with regulatory procedure and Appellant's status as a retired member of the armed forces subject to Article 2, UCMJ, this Court should find that a preponderance of the evidence supports the Army's exercise of jurisdiction over Appellant's case.

## IV.
## WHETHER APPELLANT'S COURT-MARTIAL VIOLATED THE DOUBLE JEOPARDY CLAUSE OF THE CONSTITUTION?

### Facts

After Appellant's acquittal, the state authorities considered the Eastburn murders "open/unsolved" because they never identified the male DNA profile found at Katie Eastburn's autopsy. (JA 170). In 2005, after attending a training on new techniques available for testing DNA evidence, Captain Larry Trotter of the Cumberland County Sheriff's Office submitted Katie Eastburn's vaginal swabs for additional testing. (JA 170). Captain Trotter did not know whether Appellant remained on active duty or whether he had retired from the Army. (JA 172). In 2006, the state laboratory returned results indicating that Appellant's DNA matched the swabs taken from Katie Eastburn. (JA 180).

Later in 2006, Captain Trotter met with the Fort Bragg Office of the Staff Judge Advocate (OSJA) to discuss whether the Army would prosecute the Eastburn murders based on the DNA evidence. (JA 180-85). No one in the Cumberland County Sheriff's Office pressured the Staff Judge Advocate, Colonel (COL)[11] Renn Gade, to take the case. (JA 194; App. Ex. XIX, XXII).

[11] Now retired.

On December 21, 2007, Appellant moved to dismiss his court-martial for double jeopardy. (JA 1417). In the motion, Appellant argued that his prosecution and later acquittal by the State of North Carolina prohibited the Army from prosecuting him for the Eastburn murders. (JA 1419). The military judge denied the motion to dismiss on December 21, 2009. (App. Ex. 236). The military judge ruled that because the United States and the State of North Carolina were separate sovereigns, Appellant's prosecution by the United States did not offend the Double Jeopardy Clause of the Fifth Amendment. (App. Ex. 236)

## Standard of Review

This Court reviews questions of double jeopardy de novo. *United States v. Campbell*, 71 M.J. 19, 27 (C.A.A.F. 2012). A military judge's findings of fact are reviewed for clear error. *United States v. Easton*, 71 M.J. 168, 171 (C.A.A.F. 2012).

## Law and Argument

### A. Appellant's court-martial did not violate the Double Jeopardy Clause because the U.S. Army and the State of North Carolina are separate sovereigns.

Appellant's court-martial did not violate the Double Jeopardy Clause because the law does not prohibit the United States from pursuing criminal charges after an acquittal by a state court. Neither constitutional nor statutory restrictions bar prosecution where charges are pursued by separate sovereigns. *See* U.S.

CONST. amend. V.; Article 44, UCMJ, 10 U.S.C. § 844; *United States v. Delarosa*, 67 M.J. 318, 321 (C.A.A.F. 2009) (citing *Heath v. Alabama*, 474 U.S. 82, 89 (1985)). The separate sovereigns doctrine provides that a single act may give rise to two distinct offenses where a single criminal act violates the laws of two sovereigns; in such a case, the offender has committed not one but two offenses—one under the law of each sovereign. *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1870 (2016) (citing *Heath*, 474 U.S. at 88). Historically, both the Supreme Court and the highest military courts have recognized the validity of the separate sovereigns doctrine; the clear precedent of the courts establishes that a military member may be prosecuted at a court-martial for conduct already prosecuted by a state or foreign Government. *See United States v. Wheeler*, 435 U.S. 313, 320 n. 14 (1978); *Abbate v. United States*, 359 U.S. 187, 193-94 (1959); *United States v. Lanza*, 260 U.S. 377, 382 (1922); *United States v. Schneider*, 38 M.J. 387, 390-92 (C.M.A. 1993); *United States v. Stokes*, 12 M.J. 229 (C.M.A. 1982). There is no question that the United States and the State of North Carolina represent two separate sovereigns. *Abbate*, 359 U.S. at 195. Therefore, Appellant's court-martial for the Eastburn murders after his acquittal in North Carolina did not violate the Double Jeopardy Clause of the Fifth Amendment.

B. Appellant's court-martial was not a "sham."

This Court should affirm the findings and sentence in this case because Appellant's court-martial was not a "sham." In *Bartkus v. Illinois*, 359 U.S. 121 (1959), the Supreme Court held that a second prosecution by a separate sovereign could violate the Double Jeopardy Clause if the later prosecution was a "sham," or cover, for a repeat of the same prosecution by the first sovereign. 359 U.S. at 123-24. In this case, Appellant's court-martial would potentially violate the Double Jeopardy Clause if the U.S. Army "was merely a tool of the [State of North Carolina] authorities." *Id.* This so-called "sham" exception to the separate sovereigns doctrine creates a high hurdle for Appellant: it is not enough to show that the two prosecutions covered similar offenses nor that the two authorities cooperated with one another on the second prosecution.[12] In the Fifth Circuit, for

[12] *See United States v. Apicelli*, 839 F.3d 75, 85 n. 10 (1st Cir. 2016) ("Mere similarity is not sufficient [to overcome the dual sovereign presumption] – a defendant must make a prima facie case that 'one sovereign was a pawn of the other, with the result that [the] notion of two supposedly independent prosecutions is merely a sham.'") (citations omitted); *United States v. Vanhoesen*, 366 Fed. Appx. 264, 267 (2d Cir. 2010) ("Cooperation between federal and state authorities, however, does not of itself establish an exception to the dual sovereignty doctrine."); *United States v. Roland*, 545 Fed. Appx. 108, 115-16 (3d Cir. 2013) (finding no exception to the dual sovereignty doctrine where the federal Government pursued charges based on a cooperative program between the U.S. Attorney's office and the state district attorney's office because "cooperation between federal and state authorities was 'sanctioned by the Supreme Court,' and

example, an appellant must demonstrate “a high level of control: one sovereign must (1) have the ability to control the prosecution of the other and (2) it must exert this control to ‘essentially manipulate [] another sovereign into prosecuting.’” *United States v. Moore*, 370 Fed. Appx. 559, 561 (5th Cir. 2010). The Ninth Circuit held that:

> In short: Cooperation is constitutional; collusion is not. Impermissible collusion may be found when the prosecutors of one sovereign ‘so thoroughly dominate[]or manipulate[]’ the prosecutorial machinery of the other sovereign ‘that the latter retains little or no volition in its own proceedings.

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that federal prosecution was based on ‘facts implicating valid federal interests.’”) (citations omitted); *United States v. Montgomery*, 262 F.3d 233 (4th Cir. 2001) (a sham prosecution occurs when the second sovereign is “dominated, controlled, or manipulated” by the first); *Moorer v. United States*, 2018 U.S. App. LEXIS 11153 at *6 (6th Cir. 2018) (“The key to whether a prosecution is a sham ‘is whether the separate sovereigns have made independent decisions to prosecute.’”) (citations omitted); *United States v. Ballinger*, 465 Fed. Appx. 563, 565 (7th Cir. 2012) (“This exception, if it exists at all, is a narrow one [] and here no evidence suggests that the federal Government was acting as a ‘tool’ of the State.) (citations omitted); *Chavez v. Weber*, 497 F.3d 796, 804 (8th Cir. 2007) (“[Cooperation] between state and federal law enforcement officers ‘does not in itself affect the identity of the prosecuting sovereign.’”) (citations omitted); *United States v. Barrett*, 496 F.3d 1079 (10th Cir. 2007) (“[The] *Bartkus* Court’s failure to identify a particular instance of a sham prosecution may mean that the exception does not exist … Indeed, the close interaction between the federal and state authorities in *Bartkus* … suggests that the sham exception exists, if at all, only in the rarest of circumstances.”) (citations omitted); *United States v. Shahrazah Mir Gholikhan*, 370 Fed. Appx. 987, 990 (11th Cir. 2010) (“To fit within the exception, the defendant must show that one sovereign was so dominated, controlled, or manipulated by the actions of the other that it did not act of its own volition.”) (citations omitted).

*United States v. Lucas*, 841 F.3d 796, 803 (9th Cir. 2016) (citations omitted). To date, none of the Circuit Courts of Appeals have applied this exception to any case.

Appellant cannot prevail on this assignment of error because, to the extent that this Court chooses to recognize the "sham" prosecution exception, the facts do not support Appellant's contention that the State of North Carolina controlled, dominated, or otherwise manipulated the Army's decision to pursue a court-martial for the Eastburn murders. At the motions hearing, Captain Larry Trotter of the Cumberland County Sheriff's Office testified that when he sent the vaginal swabs from Appellant's case for additional DNA testing, he did not know that Appellant was serving with the U.S. Army. (R. at 317-18). He later believed it was possible that the Army could prosecute Appellant, but he did not contact either the Fort Bragg OSJA or Fort Bragg CID. (R. at 321-22). Captain Trotter testified that the Cumberland County Sheriff's Office only supplied the DNA evidence to Fort Bragg in May or June of 2006. (R. at 327-28).

The Government submitted sworn statements from the former XVIII Airborne Corps Staff Judge Advocate, COL Gade, and the Chief of Capital Litigation, Lieutenant Colonel (LTC) John Ohlweiler, in support of its response to Appellant's double jeopardy motion. (App. Ex. XIX, XXII). Colonel Gade stated after reviewing the evidence provided by the Cumberland County Sheriff's Department, he "determined that there was a factual and jurisdictional basis to

recall [Appellant] to active duty to face court-martial charges." (App. Ex. XIX). Prior to effectuating the recall, COL Gade discussed the Army's options with the GCMCA, Lieutenant General (LTG) John Vines, and the Chief of Criminal Law at the Office of the Judge Advocate General. (App. Ex. XIX). As the convening authority, LTG Vines made the decision to recall Appellant to active duty for purposes of court-martial on the advice of his Staff Judge Advocate; the record does not reflect that he engaged with the North Carolina authorities before recalling Appellant and exercising the Army's jurisdiction over the Eastburn murders.

Similarly, LTC Ohlweiler's statement indicates that prior to referral, Appellant and his counsel had the opportunity to present their case to the convening authority and recommend against the court-martial. (App. Ex. XXII). Prior to referral, Appellant specifically objected to the trial on the basis of the prior acquittal in North Carolina and argued that the trial should not proceed on the basis of Appellant's service record. (App. Ex. XXII).

In his ruling on the motion to dismiss for double jeopardy, the military judge found that Appellant could not supply a scintilla of evidence to support the sham exception to the separate sovereigns doctrine. (App. Ex. 236). This finding of fact is not clearly erroneous, nor does Appellant supply new facts that contradict the military judge's ruling.

In his brief, Appellant argues the Army "decided to become [Cumberland County's] cat's paw" and that "it was not going to back off" of prosecuting Appellant "at the prodding and behest of Cumberland County officials." (Appellant's Br. 110). Appellant also asserts that because the Army prosecution utilized the same evidence and the same investigators as the state prosecution, his court-martial qualifies as a "sham prosecution." (Appellant's Br. 110). However, so long as cooperation between prosecuting entities does not qualify for the *Bartkus* exception and Appellant cannot demonstrate that the convening authority did not make his own independent decision to prosecute, repeating such allegations does not give them merit. *See Lucas*, *supra*. Accordingly, this Court should find that Appellant's court-martial does not meet the requirements of the so-called "sham exception" to *Bartkus*.

C. *United States v. Stokes* is sound precedent applying the dual sovereignty doctrine to Article 44, UCMJ.

In Issue XV, Appellant asserts that his court-martial violated Article 44(a), UCMJ. (Appellant's Br. 228). He also asserts that this Court erred when it applied the dual sovereignty doctrine to Article 44(a), UCMJ, in *United States v. Stokes*. (Appellant's Br. 230).

Appellant's challenge to his court-martial should fail because the military derives its authority from the same source as the federal Government and nothing

in the Supreme Court's Double Jeopardy jurisprudence requires that this Court reverse its holding in *Stokes*. Specifically, Appellant argues that this Court should revisit *Stokes* because he concludes that the opinion misinterprets Article 44(a), UCMJ, and inappropriately grafts the dual sovereignty doctrine onto military justice. (Appellant's Br. 235).

In *Stokes*, this Court followed the controlling Supreme Court precedent—*Wheeler*, *Abbate*, and *Bartkus*—to determine that Article 44(a), UCMJ, "was not intended to abolish the dual-sovereignties rule that had been applied in interpreting the constitutional guarantee against successive trials for the same offense." *Stokes*, 12 M.J. at 231. This analysis is sound: an examination of the historical Manuals for Courts-Martial reveals that, contrary to Appellant's argument, military justice has long contemplated a bar to repeat prosecutions by entities *deriving their authority from the federal Government*.[13] In the 1918 Manual, for example, paragraph 149(d), provides:

> The same acts constituting a crime against the United States can not, after the acquittal or conviction of the accused in a court of competent jurisdiction, be made the basis of a second trial of the accused for that crime in the

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[13] A bar to court-martial in the form of a plea *autrefois acquit* or *autrefois convict* appears in P. HENRY RAY, INSTRUCTIONS FOR COURTS-MARTIAL 7 (1890) without explanation. The first substantive explanation of the relationship between military and state courts appears in A MANUAL FOR COURTS-MARTIAL, COURTS OF INQUIRY, AND OF OTHER PROCEDURES UNDER MILITARY LAW (1918) [hereinafter 1918 Manual].

> same or in another court, civil or military, of the *same Government*.

1918 Manual, paragraph 149(d) (emphasis added). The Manual goes on to delineate the rule as applicable to federal territories versus states:

> Although the same act when 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*, that rule does not apply to acts committed in the Philippine Islands. The Government of a State *does not derive its powers from the United States*, while that of the Philippine Islands does owe its existence wholly to the United States.

*Id.* (emphasis added). This language appears in successive manuals, to include the 1921 Manual,[14] the 1928 Manual,[15] the 1936 Manual,[16] the 1943 Manual,[17] and the 1949 Manual.[18] In the 1951 Manual, the language changes. It not only contemplates Article 44(a), UCMJ, but explicitly forecloses Appellant's argument:

> The same acts constituting a crime against the United States cannot, after acquittal or conviction of the accused in a civil or military court deriving its authority from the United States, be made the basis of a second trial of the accused for that crime in the same or in another such court without his consent. The civil courts in the Territories and possessions of the United States, as well as the district and other courts of the United States, derive their authority from the United States. The same acts when committed in

[14] Manual for Courts-Martial (1921 ed.), paragraph 149.
[15] Manual for Courts-Martial (1928 ed.), paragraph 68.
[16] Manual for Courts-Martial (1936 ed.), paragraph 68.
[17] Manual for Courts-Martial (1943 ed.), paragraph 68.
[18] Manual for Courts-Martial (1949 ed.), paragraph 68.

> a State may constitute two distinct offenses, one against the United States and the other against the State. In such a case trial by a State court does not bar trial by court-martial.

Manual for Courts-Martial (1951 ed.), paragraph 68d. This language remained in successive Manuals for Courts-Martial, to include the 1969 Manual in effect at the time of this Court's decision in *Stokes*. Manual for Courts-Martial (1969 ed.), paragraph 215b.

Accordingly, when this Court decided *Stokes*, it founded its opinion on a long line of Supreme Court precedent and controlling military law. Appellant makes no attempt to reconcile his argument regarding Article 44(a), UCMJ, with the contrary text of prior versions of the Manual for Court-Martial. His argument with respect to the interpretation of Article 44(a), UCMJ, should not persuade this Court to reverse its holding in *Stokes* nor its application of the dual sovereignty doctrine in the military justice system.

## V.
## WHETHER THE DELAY IN APPELLANT'S CASE DENIED HIM DUE PROCESS OF LAW?

### Standard of Review

This Court reviews a military judge's decision denying a motion to dismiss for abuse of discretion. *United States v. Reed*, 41 M.J. 449, 453 (C.A.A.F. 1995) (Sullivan, J., dissenting); *see also United States v. Mangahas*, 77 M.J. 220, 221

(C.A.A.F. 2018) (reviewing a military judge's ruling on a motion to dismiss on Fifth Amendment due process grounds for abuse of discretion). This Court reviews questions of law, such as whether a preferral violated the Fifth Amendment, de novo. *Mangahas*, 77 M.J. at 222.

## Law and Argument

### A. The military judge did not abuse his discretion when he denied Appellant's motion to dismiss for egregious pretrial delay.

Appellant cannot prevail upon this assignment of error because the military judge did not abuse his discretion when he denied Appellant's motion to dismiss. An abuse of discretion occurs when the military judge applies the wrong law or makes clearly erroneous findings of fact. Neither error occurred in this case. First, the military judge applied the correct law under *United States v. Reed*, 41 M.J. at 451-52, *United States v. Lovasco*, 431 U.S. 783 (1977), and *United States v. Marion*, 404 U.S. 307 (1971). The military judge correctly noted that, in order to show a denial of due process claim predicated on pre-preferral delay, an accused must demonstrate: (1) "egregious or intentional tactical delay on the part of the Government; and (2) that he suffered actual prejudice as a result of the delay." *Reed*, 41 M.J. at 451-52 (citing *Lovasco*, 431 U.S. at 795 n. 17). (App. Ex. 237). The military judge also noted that Appellant's court-martial began within the applicable statute of limitations under Article 43, UCMJ. (App. Ex. 237). Turning

to the facts, the military judge observed that Appellant filed his initial motion to dismiss on December 21, 2007, and proffered that he would supply facts to support that motion by the 2008 hearing date. (App. Ex. 237). Despite the delay between the initial motion and the judge's ruling in 2009, Appellant did not "[make] a proffer as to how death or memory impairment of certain witnesses actually [prejudiced him]." (App. Ex. 237). When combined with the evidence of the Army's good faith—such as Appellant's reenlistment and retirement—the military judge found Appellant's failure to produce facts demonstrating prejudice fatal to his due process claim. (App. Ex. 237). Thus, the military judge did not err when he denied Appellant's motion to dismiss because Appellant never attempted to demonstrate actual prejudice.

B. Appellant cannot meet his burden to demonstrate either intentional delay or actual prejudice.

This Court should affirm the findings and sentence in Appellant's case because he does not demonstrate either egregious, intentional delay on the part of the Government or that he suffered actual prejudice as a result of the pre-preferral delay. To prevail on this error, Appellant must first overcome the presumption that the Government did not violate the Due Process Clause because Appellant's prosecution fell within the applicable statute of limitations. *Marion*, 404 U.S. at 322 n. 14 (noting that the applicable statute of limitations represents a "legislative

judgment about balancing the equities in situations involving the tardy assertion of otherwise valid rights."). The absence of a statute of limitations applicable to Article 118a, UCMJ, reflects the desire of the legislature to provide for the prosecution of premeditated murder "at any time without limitation;" while this does not preclude Appellant from arguing a due process violation, it highlights the high burden he must overcome on appeal to show an infringement of his rights. *See* Article 43(a), UCMJ.

Despite alleging this error early in his court-martial, Appellant never presented evidence in support of his argument that the Government intentionally delayed his trial to gain tactical advantage. (App. Ex. 237). Similarly, he never proffered as to how the death or memory impairment of certain witnesses actually prejudiced his case in light of the verbatim transcripts available from earlier trials. (App. Ex. 237). Appellant also fails to meet this burden on appeal.

Appellant cannot show that the Army intentionally delayed its court-martial to gain a tactical advantage. In Appellant's brief, he argues that the Army stalled his administrative separation pending his trial in the State of North Carolina and then treated the allegations as "fully and definitively resolved." (Appellant's Br. 123). The Army allowed Appellant to re-enlist, restored his service record, and eventually allowed him to retire. (App. Ex. 237). As the military judge noted at trial, these facts suggest that the Army treated Appellant with good faith and

actually undermine Appellant's argument that the Government stalled to gain an advantage. (App. Ex. 237). While Appellant argues that the Army "could have" tested the DNA evidence in Appellant's case a decade earlier, Appellant cites nothing which suggests that the federal Government had an obligation to test evidence in the hands of a State, nor that the federal Government intentionally waited to prefer charges in order to gain an advantage over Appellant. (Appellant's Br. 126). In the absence of such facts, Appellant cannot prevail on the first prong of the *Reed* test for egregious delay.

Neither can Appellant satisfy the second prong of the *Reed* test and demonstrate actual prejudice to his case. Appellant argues that he suffered prejudice because he had to rely on testimony from prior trials for his defense. However, he provides no authority aside from the general preference for live testimony to support his position. (Appellant's Br. 122). No precedent supports the claim that an appellant may show actual prejudice caused by "lost" witnesses where he has prior testimony available for his defense.[19] In the absence of such

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[19] Reviewing decisions by the federal Circuit Courts of Appeals, the Government avers that the loss or unavailability of witnesses rarely results in a finding of actual prejudice and that the availability of prior testimony moots such an argument. In the Fourth Circuit, for example, an appellant may only show prejudice when they "demonstrate, with specificity, the expected content of the witness' testimony" and "that the information the witness would have provided was not available from other sources." *United States v. Kalbflesh*, 621 Fed. Appx. 157, 159 (4th Cir. 2015); *see also United States v. Spears*, 159 F.3d 1081, 1085 (7th Cir. 1998)

precedent, this Court should not find that Appellant suffered actual prejudice in this case. The failure to find one prong of the *Reed* test precludes this Court from concluding that Appellant suffered a violation of his due process rights. *Reed*, 41 M.J. at 452. Accordingly, because Appellant has not shown either intentional tactical delay by the Government or actual prejudice, this Court should not find that the court-martial violated the Due Process Clause of the Fifth Amendment.

## VI.
## WHETHER THE MILITARY JUDGE IMPERMISSIBLY LIMITED APPELLANT'S OPPORTUNITY TO PRESENT A COMPLETE DEFENSE?

Article 46, UCMJ, 18 U.S.C. § 846, provides all parties to a court-martial with "equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." Furthermore, the Constitution "guarantees criminal defendants a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (citations omitted). However, neither Article 46, UCMJ, nor *Holmes* guarantees an accused the right to call any witness or entitle him to any expert assistance for any reason. As the

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(holding that to show a violation of due process, "a defendant must do more than show that a particular witness is unavailable and that the witness' testimony would have held the defense…"). In the instant case, Appellant had access to another source of evidence in the form of prior testimony. *See Woodfox v. Cain*, 609 F.3d 774, 804 (5th Cir. 2010) (finding no due process violation where prior testimony of unavailable witnesses introduced at a later trial).

Supreme Court noted in *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973), the trial judge is the gatekeeper holding both parties to the same standards of admissibility, and an accused "must comply with established rules designed to assure both fairness and reliability." *Id*. at 302. *See also United States v. Woolheater*, 40 M.J. 170, 173 (C.M.A. 1994) (noting that the Constitutional right to present defense evidence "is not absolute and may yield to policy considerations such as the interest in the orderly conduct at trials."). An accused still bears the burden of demonstrating that his requests for witnesses and expert assistance comport with the applicable Rules for Courts-Martial and Military Rules of Evidence. In this case, Appellant failed to meet this threshold burden of demonstrating the relevance and necessity of the testimony of Mary Krings, Gary Staley, and William Hill, Jr., and the expert assistance of Dr. Edward Blake.[20] Accordingly, this Court should find that the military judge did not abuse his discretion by denying Appellant's request for such witnesses and expert assistance.

[20] Appellant refers to Dr. Blake as "Dr. William Blake." (Appellant's Br. At 148). However, Dr. Blake's correct name is Dr. Edward Blake.

A. The military judge did not abuse his discretion when he denied the production of Appellant's witnesses.

**Facts**

On January 13, 2010, the defense moved the trial court to compel production of Mary Krings, Gary Staley, and William Hill, Jr. (JA 1994-2021). The defense proffered that Mr. Hill would testify that he lived near the victim's residence, had scratches on his face around the time of the murders from a black male trying to steal his bicycle, and refused to give forensic samples in 1989. (JA 1996). The defense proffered that Ms. Krings would testify that she dated Mr. Hill in 1985 and that at around the time of the murders, Mr. Hill had scratches on his face, gave inconsistent stories about the scratches, and asked for a job transfer to Raleigh. (JA 1995). The defense also proffered that Mr. Staley lived near the victim's home with Mr. Hill and was the owner of a light-colored work van that resembled one seen outside of the Eastburn home on the night of the murders. (JA 1997).

The Government responded on January 19, 2010. (JA 2022-2037). The military judge heard argument on the defense motion on January 20, 2010. (JA 250-257). During the discussion for production of Mr. Hill and the corroborating witnesses, the military judge asked about the DNA found in the vaginal swabs which excluded Mr. Hill as a contributor. (JA at 250). Appellant refused to address the issue of DNA, arguing that it was not the only piece of evidence in this case,

and it was not dispositive. (R. at 251). The military judge repeatedly asked appellant to explain the evidence that supported Mr. Hill as a suspect, including the presence of scratches on Mr. Hill's face "around the time of the murders." (JA 251-254). Appellant conceded that he did not have a better timeline of what "around the time of the murders" consisted of; it could have been weeks or months from the date of the murders. (JA at 251-252).

The military judge denied the production of Ms. Krings, Mr. Staley, and Mr. Hill on January 26, 2010. (JA 2043-2045). As the basis for his ruling, the military judge found:

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

(JA 2043-2045).

**Standard of Review**

A military judge's ruling on the production of a witness is reviewed for abuse of discretion. *United States v. Rockwood*, 52 M.J. 98, 104 (C.A.A.F. 1999). A military judge's ruling denying a request for a witness should only be reversed if, "on the whole," denial of the witness was improper. *United States v. Ruth*, 46

M.J. 1, 3 (C.A.A.F. 1997). This Court "will not set aside a judicial denial of a witness request 'unless [it has] a definite and firm conviction that the [trial court] committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.'" *United States v. McElhaney*, 54 M.J. 120, 126 (C.A.A.F. 2000) (quoting *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993)) (internal citations omitted).

**<u>Law and Argument</u>**

The production or denial of witnesses is governed by R.C.M. 703(b)(1). Rule for Courts-Martial 703(b)(1) provides for the "production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be *relevant and necessary*." (emphasis added). At trial, Appellant bore the burden of demonstrating the relevance and necessity of the witnesses requested for production. R.C.M. 703(c)(2). In this case, the military judge correctly found that Appellant failed to meet that burden.

The basis of Appellant's assertion that Ms. Krings, Mr. Staley, and Mr. Hill were relevant and necessary witnesses is based upon his allegation that Mr. Hill should have been considered a potential suspect. (JA 251). However, Mr. Hill submitted a DNA sample in 2009 and was excluded as a possible contributor of the

seminal fluid found in Katie Eastburn. (JA 250, 2035).[21] Appellant offered no specific evidence tying Mr. Hill to the crimes and did not challenge the testing procedures of either the vaginal swabs or the comparison test that excluded Mr. Hill as a contributor of DNA. Appellant failed to tie the presence of scratches on Mr. Hill to the specific date of the murders. As for Mr. Staley's van, Appellant speculated that Mr. Hill would have had access to a van which *might* resemble a van seen near Eastburn home on the night of the murders. Appellant did not proffer a more specific description of either van, nor did he proffer the likelihood of Mr. Hill's access to the van. Because Appellant failed to provide information beyond mere speculation that Mr. Hill was culpable in the murders, the military judge properly found, "[t]he defense proffered no evidence to support [the] theory" that Mr. Hill is a suspect.[22] (JA 2043-2045). If an appellant fails to show relevance, then it naturally follows that such evidence is unnecessary.

Appellant's attempt to categorize the military judge's ruling as the very error addressed by the Supreme Court in *Holmes v. South Carolina* is misplaced. In

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[21] Appellant's theory was that a different individual raped and murdered the victims and that Appellant had consensual sex with Katie Eastburn at some point prior to her murder. (JA at 2031).

[22] It is also for this reason that, should this Court find that the military judge erred in the denial of these witnesses, any such error was harmless beyond a reasonable doubt. With nothing but speculative questions and ambiguous facts, there was no probative evidence to support the theory of Mr. Hill's culpability. Accordingly, Appellant suffered no prejudice by this denial of production.

*Holmes*, the Court vacated an appellant's conviction for rape and murder because he was denied the opportunity to present evidence of a third party's guilt. *Holmes*, 547 at 331. *Holmes* overturned an opinion of the South Carolina Supreme Court holding that "where there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence." *Id*. at 324 (citing *State v. Holmes*, 361 S.C. 333, 342-43 (2004)). The Court held that this exclusion violated the appellant's right to have a meaningful opportunity to present a complete defense because the strength of a prosecutor's case has no logical relationship to the relevance or admissibility of a defendant's evidence. *Id*. at 330-331.

In contrast to *Holmes*, the military judge in this case did not rely solely on the DNA analysis which excluded Mr. Hill as the source of semen. The military judge also relied on the absence of any evidence specifically linking Mr. Hill to the Eastburn home. (JA 2043-2045). During oral argument on the motion, the military judge repeatedly "pressed defense counsel for any information that could fairly be described as surpassing speculation and constituting probative evidence to support a theory that Mr. Hill, worthy of suspicion as a culpable third party in the defense's estimation, was responsible for the murders." *Hennis*, 75 M.J. at 824-825. Because the defense offered nothing more than speculation to support their request for Ms.

Krings, Mr. Staley, and Mr. Hill, the military judge acted within his discretion when he denied their production.

Furthermore, while *Holmes* stands for the proposition that the admissibility of defense evidence does not depend on the strength of Government evidence, *Holmes* does not absolve the defense of their burden to demonstrate that the production of a witness is both relevant and necessary under R.C.M. 703. Here, because the military judge reasonably concluded that the defense did not meet its burden in demonstrating that the testimony of Mary Krings, Gary Staley, and William Hill, Jr. was relevant and necessary, his ruling was not an abuse of discretion.

B. The military judge did not abuse his discretion by denying Appellant's request for expert assistance.

**Facts**

The convening authority first approved funding for Dr. Edward Blake as a defense DNA expert consultant on April 3, 2007. (App. Ex. 155, p. 3). Despite the appropriation of funding, Dr. Blake did not bill the Government for any services provided. (App. Ex. 155, p. 3). The convening authority approved additional funding for Dr. Blake in December 2008. (App. Ex. 155, encl. 2). On March 17, 2009, the Government canceled Dr. Blake's contract because it believed the defense was not utilizing Dr. Blake's service. (App. Ex. 155, p. 3). As of that date,

the defense failed to provide the Government with a list of the items they intended to test or what items should be released for testing and had not yet performed any DNA testing. (App. Ex. 155, p. 3).

On March 25, 2009, the defense again requested that the convening authority provide funding for Dr. Blake's work as a DNA expert consultant. (App. Ex. 155, Encl. 8). The request identified 39 out of the 154 items seized from the crime scene for testing. (App. Ex. 155, Encl. 8). On April 2, 2009, the convening authority approved the request but limited funding to the testing of four items requested by the defense, including the vaginal smears, vaginal swabs, and fingernail clippings taken from Katie Eastburn. (App. Ex. 155, Encl. 9).

On April 27, 2009, the defense submitted a motion to compel additional funding for Dr. Blake to conduct additional testing and for access to more evidence. (App. Ex. 154). Although the motion itself did not specify which items the defense desired Dr. Blake to test, the enclosures to the motion suggested the Appellant sought testing for the remaining 35 of the original 39 items. (App. Ex. 154). On May 11, 2009, the military judge granted the defense motion in part. (App. Ex. 162). The Court ordered that Dr. Blake be appointed as an expert consultant and that the Government send vaginal smears, vaginal swabs, fingernail and hand fibers, 64 latent lifts, and eight photocopies of the Mr. X letters, the original Mr. X letters and envelopes to Dr. Blake's laboratory. (App. Ex. 162). The

military judge denied the remaining items listed by enclosure to the defense motion, reasoning that those items already exculpated Appellant because biological testing of some of those items did not link him to the crime scene and the Government failed to test the rest of the items. (App. Ex. 162). The military judge noted, "If the defense is able to show how further inspection and possible testing of the evidence … is material to the preparation of its case, the court is willing to reconsider its ruling [as to the evidence denied for defense testing]." (App. Ex. 162).

On September 9, 2009, Appellant filed a motion for additional funding for Dr. Blake because he had been unable to complete the testing and consultation services previously ordered by the military judge. (App. Ex. 198). The military judge granted the motion for additional funding on September 10, 2009. (App. Ex. 206).

On September 25, 2009, the defense filed a motion to compel an additional $20,000 in funding for Dr. Blake to conduct testing on the evidentiary items not previously approved for testing. (JA 1915-1935). In support of its motion, the defense included affidavits from Mr. Renner, the defense crime scene analyst and reconstructionist, and Dr. Blake, which generally proffered that additional DNA testing *might* yield evidence of a third-party actor. (JA 1921-1935).

The military judge heard argument on the defense motion on October 1, 2009. (R. at 1067-1169). During the Article 39(a) session, defense counsel indicated that the motion constituted a request to reconsider the May 11, 2009, ruling and that Appellant sought access to additional items as listed in the enclosures to the May 2009 motion. (R. at 1067-1069). The Government indicated that footprints, hair, fibers, blood, and fingerprints excluded Appellant from the crime scene and that its DNA analysis of Katie Eastburn's vaginal swabs was "[t]he only forensic link" linking Appellant to the crime scene. (R. at 1086-1089). Defense counsel asserted that he was seeking to put forth "affirmative evidence to show that someone else was present at the crime scene and therefore, is the potential perpetrator" and that he wished to develop a potential DNA profile of someone else who may have committed or assisted in the crimes. (R. at 1089).

The military judge denied Appellant's motion on October 13, 2009, after finding that the defense did not meet its burden to demonstrate that additional testing was necessary. (JA 1975-1976). The military judge summarized the defense's request as an "effort to develop a potential DNA profile of the person or persons who were the contributors of biological matter on the evidence in an effort to identify the actual perpetrator(s)." (JA 1975). The military judge found that, "[i]t is unclear how a specific person could be identified without comparing the results to a known DNA sample. There is no proffer that the test results would indicate

when the evidence which the defense requests to be analyzed had been left in the house rented by [the Eastburn] family." (JA 1975). The military judge noted that Appellant "has had the opportunity to examine and conduct independent DNA testing on the physical linchpin, evidence the Government intends to offer at trial." (JA 1975). The military judge also noted that the Government tested some of the requested items and that those tests excluded Appellant as the contributor of biological material on those items, which made these items exculpatory evidence. (JA 1975-1976). The military judge further noted that some of the requested items were not tested by the Government and were thereby exculpatory without any further testing because "trial counsel are precluded from arguing those non-tested items incriminate the accused in any way." (JA 1976). In sum, there is "no authority for the position that the accused is entitled to Government funded expert assistance to analyze items which are already established as exculpatory." (JA 1976). Accordingly, the military judge denied the defense motion because the defense did not show how additional testing of the exculpatory items would be material to the preparation of the defense. (JA 1975-1976).

**Standard of Review**

This Court reviews a military judge's ruling denying expert assistance for an abuse of discretion. *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2008). A military judge abuses his discretion when: (1) the findings of fact upon which he

predicates his ruling are not supported by the evidence of record; (2) incorrect legal principles were used; or (3) his application of the correct legal principles to the facts is clearly unreasonable. *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous.'" *McElhaney*, 54 M.J. at 130 (quoting *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997).

**Law and Argument**

The military judge did not abuse his discretion in denying the defense request to examine and test items of evidence beyond those described in his May 11, 2009, order because he correctly found that the requested testing was not necessary. An accused is entitled to expert assistance provided by the Government if he can demonstrate that the assistance is "necessary for an adequate defense." *United States v. Garries*, 22 M.J. 288, 291 (C.M.A. 1986). To demonstrate necessity, an accused "must demonstrate something more than a mere possibility of assistance from a requested expert . . . ." *United States v. Gunkle*, 55 M.J. 26, 31 (C.A.A.F. 2001). The accused must establish a reasonable probability that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial. *Id*. at 31-32 (citing *United States v. Robinson*, 39 M.J. 88, 89 (C.M.A. 1994)).

Contrary to Appellant's assertion, the military judge correctly interpreted and applied this Court's precedent in *United States v. McAllister*, 55 M.J. 270 (C.A.A.F. 2001) (*McAllister I*), and *United States v. McAllister*, 64 M.J. 248 (C.A.A.F. 2007) (*McAllister II*). In *McAllister I*, a capital case, this Court found that a military judge erred in denying the defense a competent expert to test DNA found underneath the victim's fingernails. *McAllister I*, 64 M.J. at 275-276. In finding that the military judge erred, this Court noted:

> The DNA evidence was the linchpin of the prosecution case. It excluded all possible suspects except appellant. Appellant was on trial for murder, facing a life sentence, and needed the tools to competently test the prosecution's DNA evidence. On its face, the Government's DNA evidence appeared incomplete, because it was not subjected to the tests for two additional genetic systems that were developed after the Government's evidence was first tested. The two additional tests were evidence of the rapid pace of development in the area of PCR testing.

*Id*. at 276. Accordingly, this Court found that the military judge erred by arbitrarily denying the defense request to substitute expert assistants. *Id*. In *McAllister II*, this Court noted that the "effect of the military judge's ruling denying McAllister expert assistance was to deny him the right to present a defense—a defense to "'the linchpin of the prosecution case.'" *McAllister II*, 64 M.J. at 252 (quoting *McAllister I*, 55 M.J. at 276).

*McAllister I* and *II* stand for the proposition that the defense can test evidence that is the "linchpin" of the Government's case. Neither *McAllister I*, nor *McAllister II*, nor "equal access" under Article 46, UCMJ, provide a basis to fund the exploration of any and all theories contemplated by the defense. For example, in *United States v. Lloyd*, 69 M.J. 95 (C.A.A.F. 2010), this Court found that a military judge did not abuse her discretion when she denied a defense motion for blood spatter expert assistance. *Id*. at 99-101. In *Lloyd*, the charges against the appellant arose from appellant stabbing three individuals during a bar fight. *Id*. at 96-97. The appellant argued that expert assistance was "necessary to explor[e] all possibilities as to how the blood came to be on the shirt that [one victim] was wearing at the time of the altercation." *Id*. at 100 (internal quotations omitted). The Court distinguished the case from *McAllister I* and rejected the appellant's assertion that testing to "explor[e] all possibilities" rendered expert assistance necessary because it only demonstrated the "mere *possibility*" and not a "reasonable *probability*" that the expert would be of assistance. *Id*. at 100-101. (quoting *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005)).

In this case, the military judge correctly noted that Appellant "has the right to necessary expert assistance. He does not have the right to unrestricted expert assistance." (App. Ex. 216, p. 1). As the Army Court noted, "Appellant only offered the general hypothesis that additional forensic testing could *potentially*

disclose a DNA profile, an investigative lead which could again *potentially* lead to identifying another person who was *perhaps* in the [Eastburn] family home at some unknown point in time." *Hennis*, 75 M.J. at 820. Therefore, like the Appellant in *Lloyd*, Appellant's basis for the additional testing amounted to no more than a "mere possibility" that it would be of assistance. Moreover, in contrast to *McAllister I* and *II*, the requested testing was not to be performed on the Government's "linchpin" evidence because the items requested to be tested were those which the Government was not seeking to introduce into evidence at trial.

As this Court stated in *Gray*, "appellant has confused his right to *necessary* [] assistance with an unrestricted right to search for any evidence which might be relevant in his case." *Gray*, 51 M.J. at 31 (emphasis in original). This is precisely what Appellant seeks to argue. Because the military judge applied the correct law and was reasonable in his determination that the defense did not meet its burden in demonstrating that the requested testing was not necessary, this Court should find that he did not abuse his discretion in denying funding for Dr. Blake to conduct additional testing.

Should this Court find that the denial of additional funding was an abuse of discretion, any error was harmless. The defense's theory that Dr. Blake would be able to name a third party through a series of DNA profiles that could not be compared to any known sample is entirely speculative. Further, the items

Appellant requested for additional testing were exculpatory: either those items did not link Appellant to the crime or the Government never tested them in the first place. All of the tested items excluded Appellant as a contributor except for his seminal fluid found inside Katie Eastburn, and the military judge permitted the defense the ability to re-test such evidence. Accordingly, this assignment of error is without merit.

## VII.
## WHETHER THE GOVERNMENT VIOLATED ARTICLE 49(D), UCMJ, WHEN IT INTRODUCED FORMER TESTIMONY AGAINST APPELLANT AT TRIAL?

### Standard of Review

As the defense did not object to the admission of former testimony on Article 49(d), UCMJ, grounds, the burden is on Appellant to establish plain error. *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014). To find plain error, Appellant must show that there is error, that the error was plain or obvious, and that the error materially prejudiced his substantial rights. *See United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998).

## Law and Argument

The former trial testimony submitted in Appellant's court-martial was properly admitted under Mil. R. Evid. 804.[23] Article 49(d), UCMJ, 10 U.S.C. §849 did not prohibit the admission of the former trial testimony because that provision only concerns depositions. It is self-evident from the plain language of the Rules for Courts-Martial and Article 49, UCMJ, that former trial testimony is not testimony obtained from a deposition. Accordingly, Appellant's argument is without merit.

Military Rule of Evidence 804(b)(1) provides for a hearsay exception for former testimony if a declarant is unavailable as a witness. The Rule refers to former testimony as, "Testimony given as a witness at another hearing of the same or different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceedings…." Mil. R. Evid. 804(b)(1). Unlike previous versions of Mil. R. Evid. 804, the version of Mil. R. Evid. 804 in effect at the time of Appellant's court-martial "does not distinguish between capital and non-capital cases." MCM, Appendix 22, page A22-56. The Rules for Courts-

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[23] There were seven Government witnesses who were unavailable under Mil. R. Evid. 804(a)(4). Six of the witnesses were deceased and one witness had dementia. (R. at 384-85, 1172; App. Ex. 103, 169, 317, 318). The defense only objected to certain portions of the witnesses' former testimony, not their unavailability or the general admissibility of their testimony. (R. at 384-85, 402, 607-08, 617, 1172; App. Ex. 104, 130, 318, 169, 318).

Martial define a deposition as "the *out-of-court* testimony of a witness under oath in response to questions by the parties, which is reduced to writing or recorded on a videotape or audiotape or similar material." R.C.M. 702 discussion (emphasis added). Accordingly, while a deposition is a type of former testimony, not all former testimony is a deposition.

The application of Military Rule of Evidence 804(b)(1) is subject to Articles 49 and 50, UCMJ. Article 49, UCMJ, entitled "Depositions[,]" governs the taking and use of depositions in a court-martial. While the UCMJ does not define "deposition," Article 49, UCMJ, makes no reference to "former testimony" or former trial testimony. A plain reading of Article 49 limits its applicability only to depositions and not other forms of prior testimony. If Congress intended Article 49, UCMJ, to encompass all former testimony like Mil. R. Evid. 804, it would have explicitly stated so.

There is no case law supporting Appellant's proposition that former trial testimony should be treated as equivalent to a deposition. Contrary to Appellant's assertion that "prior testimony is [always] treated like a deposition[,]" and should therefore be barred from use in a capital case, the use of former trial testimony of unavailable witnesses has long been an accepted practice in common law jurisprudence. *Mattox v. United States*, 156 U.S. 237, 240-241 (1895). In *Mattox,* a capital case, two Government witnesses from the appellant's former trial died prior

to retrial. *Id*. at 240. A transcribed copy of their testimony was admitted and read into evidence. *Id*. At the former trial, "[b]oth these witnesses were present and were fully examined and cross-examined…." *Id*. In cases dealing with the former testimony of deceased witnesses, the Court stated:

> [W]e know of none of the States in which such testimony is now held to be inadmissible. . . . [T]he authority in favor of admissibility of such testimony, where the defendant was present either at the examination of the deceased witness before a committing magistrate, or upon a former trial of the same case, is overwhelming.

*Id*. at 241. The *Mattox* Court also distinguished former testimony from depositions or *ex parte* affidavits:

> The primary object of the constitutional question was to prevent depositions or *ex* parte affidavits being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

*Id*. at 242-243. The Court further noted that the right of confrontation "must occasionally give way to considerations of public policy and the necessities of the case." *Id*. at 243. Admitting former trial testimony of unavailable witnesses is such a necessity: "To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed

the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent." *Id*.

In conclusion, the plain language of the rules and the longstanding precedent in capital case law confirm that former testimony given at trial is not the functional equivalent of a deposition. By relying on Article 49, UCMJ, which exclusively deals with depositions, Appellant fails to allege plain or obvious error regarding the admission of former testimony. Accordingly, this Court should find this assignment of error to be without merit.

## VIII.
## WHETHER THE MILITARY JUDGE ERRED WHEN HE DENIED THE DEFENSE MOTION FOR A NEW TRIAL?

### Facts

On October 15, 2010, Appellant moved for a mistrial or for a new trial after the publication of a report by the North Carolina Attorney General identifying issues with the state laboratory that tested evidence in Appellant's case. (JA 2073). The report—known as the "Swecker/Wolf" report—highlighted problems with the written reports completed by several analysts at SBI, including Ms. Brenda Bissette Dew, a witness for the prosecution. (JA 2082). In his motion, Appellant alleged that the Government violated its discovery obligations by not providing the

report and further alleged that he would have changed his trial strategy had he known that the report implicated Ms. Dew. (JA 2078).

The military judge denied the motion for a mistrial and motion for a new trial on January 27, 2011. (JA 2123). The military judge found that the report did not address Appellant's guilt or innocence and that, because the report primarily discussed the lab's written report procedures, it had low probative value. (JA 2124).

## **Standard of Review**

This Court reviews a military judge's ruling on a petition for a new trial for abuse of discretion. *United States v. Johnson*, 61 M.J. 195, 199 (C.A.A.F. 2005) (citing *United States v. Humpherys*, 57 M.J. 83, 96 (C.A.A.F. 2002)). A military judge abuses his discretion if "the findings of fact upon which he predicates his ruling are not supported by evidence of record; if incorrect legal principles were used by him in deciding [the] motion; or if his application of the correct legal principles to the facts of a particular case is clearly unreasonable." *Id*. (citing *Williams*, 37 M.J. at 356).

## **Law and Argument**

This Court should not grant relief on this assignment of error because the military judge did not abuse his discretion when he denied the defense motion for a mistrial or a new trial. A military judge should declare a mistrial under R.C.M. 915

"only when necessary 'to prevent a miscarriage of justice.'" *United States v. Harris*, 51 M.J. 191, 196 (C.A.A.F. 1999) (citing *United States v. Garces*, 32 M.J. 345, 349 (C.M.A. 1991)). This Court does not reverse a military judge's ruling on a motion for a mistrial "absent clear evidence of abuse of discretion." *Id.* (citing *United States v. Rushatz*, 31 M.J. 450, 456 (C.M.A. 1990)). Similarly, a military judge should only grant a petition for a new trial "if a manifest injustice would result absent a new trial … based on proffered newly discovered evidence." *United States v. Brooks*, 49 M.J. 64, 68 (C.A.A.F. 1998) (citing *United States v. Williams*, 37 M.J. 352, 356 (C.A.A.F. 1998)). In this case, the discretion to grant a petition for a new trial rested squarely with the military judge. *Id.* (citing *United States v. Bacon*, 12 M.J. 489, 492 (C.M.A. 1982) ("[T]he determination of sufficient grounds for granting a petition for new trial in the military rests 'within the [sound] discretion of the authority considering [that petition].") (citations omitted)).

The military judge denied Appellant's motion for a mistrial because, after making findings of fact and considering R.C.M. 915, he determined that the newly-discovered evidence regarding Ms. Dew did not create circumstances that "cast substantial doubt on the fairness of the proceedings." (JA 2123). After considering this Court's precedent in *Bacon*, the military judge also denied Appellant's motion for a new trial because he determined that the Swecker/Wolf report and its potential impeachment value "would not have produced a substantially more

favorable result for the accused in light of all the other pertinent evidence presented at trial." (JA 2124).

On appeal, Appellant neither identifies clear errors in the military judge's factual findings nor does he allege that the military judge applied incorrect law to his case; rather, Appellant appears to argue that the military judge unreasonably concluded that the report "would not have produced a substantially more favorable result for the accused in light of all the other pertinent evidence presented at trial." (Appellant's Br. 167; JA 2124). Appellant argues that the report "would have led to a different trial strategy"—one based on undermining the credibility of Ms. Dew and "the entire crime laboratory." (Appellant's Br. 167). Appellant cannot carry his burden on this issue because the military judge based his factual findings in the evidence presented at trial and because he made sound legal conclusions regarding the weight of Ms. Dew's testimony in light of the Swecker/Wolf report.[24]

Despite Appellant's expansive framing of the evidence, the record supports the military judge's factual findings regarding the Swecker/Wolf report and his legal conclusion about the value of the report vis-à-vis Ms. Dew's testimony. In his

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[24] As noted below, Mr. Swecker and Mr. Wolf released their report in August 2010, nearly five months after the verdict in Appellant's case. (JA 2122). Despite Appellant's argument regarding the Government's discovery violations, the military judge properly considered the report as "newly-discovered evidence" within the meaning of R.C.M. 1210(f) and Article 73, UCMJ.

ruling, the military judge noted that the Swecker/Wolf report did not show that the SBI Crime Laboratory "concealed" or "deliberately suppressed evidence." (JA 2108, 2122). Further, the report indicated that the lab's errors were visible from the lab notes, which Appellant had access to as a part of pre-trial discovery. (JA 2108, 2122). While the Swecker/Wolf report reviewed Ms. Dew's work, it did not specifically cover her work related to Appellant's case. (JA 2122). Overall, the report determined that the deficiencies it identified resulted from "the absence of written policy" guidance regarding written reports and gaps in employees' legal training. (JA 2107-08). The report focused on "circumstances that would produce reports which were technically and scientifically correct as to the results of the tests actually reported on, but which were nevertheless incomplete, unclear, and in some cases not truthful." (JA 2107). To the extent that the report identified errors Ms. Dew committed in unrelated cases, none of those errors affected evidence "addressing the guilt or innocence of [Appellant.]" (JA 2123).

The military judge also made findings of fact that Ms. Dew provided exculpatory testimony in Appellant's case. (JA 2123). Ms. Dew testified that she participated in the investigation of Appellant's case at the crime scene and as a lab analyst. (JA 596). Ms. Dew found no evidence of blood stains in either her examination of Appellant's house or his car. (JA 630). During cross-examination, Appellant's attorney questioned Ms. Dew regarding additional testing she

performed on the knives and shoes in Appellant's residence. (JA 638). Ms. Dew testified that although she tested Appellant's clothing with phenolphthalein—a compound that will react with blood—she found no evidence of blood anywhere in Appellant's home. (JA 640). In his closing argument, Appellant's attorney remarked that Ms. Dew "could have been a witness for the defense."[25] (R. at 6564).

Appellant does not allege that the military judge applied the wrong law in his case. Indeed, the military judge correctly cited and applied the three-part test articulated in *United States v. Bacon* when he ruled against Appellant's motion for a new trial. (JA 2124). In his ruling, the military judge assumed that Appellant satisfied the first two prongs of the test by identifying "newly-discovered evidence" that "could not have been discovered by [Appellant] at the time of trial by the exercise of due diligence." *Bacon*, 12 M.J. at 491. (JA 2124). Having satisfied the first two prongs of *Bacon*, the military judge turned to the final prong of the test: whether the evidence—considered in light of the other evidence

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[25] "With respect to the Hennis vehicle and the Hennis residence, again she could have been a defense witness. She acknowledged that she had all the time she needed to run every chemical analysis that she wanted to run to determine whether or not there was blood inside the interior of the vehicle that was transferred or found on clothes, found on shoes, found on knives." (R. at 6566).

produced at trial would "probably produce a substantially more favorable result for the accused." *Id.* (JA 2124).

Applying this legal standard, the military judge correctly considered the evidence Ms. Dew presented at trial in light of the potential impeachment value of the Swecker/Wolf report. (JA 2124). The military judge considered the "exculpatory" nature of Ms. Dew's testimony as well as the fact that other experts provided forensic evidence relevant to Appellant's guilt. (JA 2124). The military judge noted that Appellant had his own experts and an opportunity to cross-examine Ms. Dew regarding her conclusions. (JA 2124). Even assuming the successful impeachment of Ms. Dew's testimony, the military judge found that its exclusion "would not have probably produced a substantially more favorable result" for Appellant. (JA 2124). Thus, the military judge competently and correctly applied the standard established in *Bacon* to find that Appellant was not entitled to a new trial. Because the military judge made appropriate factual findings and applied the correct legal standard, Appellant cannot show that he abused his discretion by denying the defense motion for a new trial.

In his brief, Appellant states that the military judge erred when he reasoned that the defense "opted against an impeachment strategy" for Ms. Dew. (Appellant's Br. 167). Appellant then argues that the impeachment evidence available in the Swecker/Wolf report would have led to a different trial strategy

because it would have led Appellant to question the competence and reliability of Ms. Dew and the SBI crime laboratory. (Appellant's Br. 167). The record of trial contradicts Appellant's assertions both because Appellant had substantial evidence available with which to impeach Ms. Dew and because the Swecker/Wolf report primarily focused on the lab's reporting, not the lab's results. First, the military judge based his analysis of Appellant's trial strategy on the cross-examination of Ms. Dew—which focused on the thoroughness of her analysis and the absence of blood evidence—and the contents of Appellate Exhibit 119. (JA 2124). Appellate Exhibit 119 reveals that, on at least one occasion, Ms. Dew switched blood samples of a victim and an accused in an unrelated case. (App. Ex. 119). As a result, another serologist had to re-run all of her tests. (App. Ex. 119). To the extent that Appellant argues that the Swecker/Wolf report questions Ms. Dew's credibility and the reliability of her results, Appellant had ample evidence available at trial to impeach her testimony on those grounds.

Further, while Appellant argues that the report undermines the chain of custody for evidence admitted against him at trial, this assertion misstates the findings of the Swecker/Wolf report and its impeachment value. First, as the military judge stated in his ruling, the Swecker/Wolf report did not review any of the testing conducted in Appellant's case. (JA 2122). This substantially limits its relevance to Appellant's court-martial. (JA 2122). Second, to the extent that the

Swecker/Wolf report identified errors in the SBI crime lab's reporting practices, the report also indicated that those errors would be visible to anyone who had access to the analysts' notes and files. (JA 2122). Appellant had access to all of the relevant files from the SBI crime lab prior to trial and he also had access to defense experts with whom to examine them. (JA 2122-23). Third, contrary to Appellant's assertions, the Swecker/Wolf report did not identify generalized issues with the chain of custody procedures at the SBI crime lab. (JA 2102-03). [26] Thus, Appellant overstates the value of the report for impeaching the credibility of "the entire crime laboratory." (Appellant's Br. 167). Given that the report focused on circumstances where the lab produced "incomplete" reports of "technically and scientifically correct results," it does not serve as an indictment of all of the lab's results in every case. (JA 2107).

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[26] The Swecker/Wolf report identified one case, *State of North Carolina v. George Earl Goode*, where the evidence examined by the SBI crime laboratory suffered from inadequate storage and poorly-documented chain of custody issues. (JA 2103). Nothing in the record from Appellant's case suggests that the evidence suffered from similar deficiencies, nor does the Swecker/Wolf report suggest that the lab suffered from those issues as a general rule. In fact, the report noted that the SBI crime lab "[met] all FBI DNA Advisory Board (DAB) Quality Assurance Standards for Forensic DNA Testing Laboratories" and that "[n]o issues were identified in these reviews that would call into question the proficiency of analysts, quality control protocols, or the adequacy of the SBI's DNA testing procedures." (JA 2104).

Therefore, considering the value of the Swecker/Wolf report in light of the other evidence produced at trial, the military judge did not err when he found that the report would not produce a substantially more favorable result for Appellant. Because the military judge made appropriate findings of fact, applied the correct law, and came to a reasonable conclusion, this Court should not find that the military judge abused his discretion when he denied Appellant's motion for a new trial.

## IX.
## WHETHER IMPROPER ARGUMENT BY TRIAL COUNSEL DENIED APPELLANT A FAIR TRIAL?

### Standard of Review

This Court reviews allegations of prosecutorial misconduct and improper argument de novo. *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017). When an appellant enters a proper objection at trial, courts review alleged prosecutorial misconduct for prejudicial error. *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) (citing Article 59, UCMJ, 10 U.S.C. § 859 (2000)). When there has been no objection at trial, this Court reviews allegations of prosecutorial misconduct and improper argument for plain error. *United States v. Andrews*, 77 M.J. 393, 399 (C.A.A.F. 2018). "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused." *Fletcher*, 62 M.J. at 179 (citations omitted).

Appellant bears the burden of proof under plain error review. *Sewell*, 76 M.J. at 18.

**Law and Argument**

Improper argument is a form of prosecutorial misconduct. *Sewell*, 76 M.J. at 18. During argument, trial counsel "may strike hard blows, [but] he is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935). "Trial prosecutorial misconduct is behavior by the prosecuting attorney that 'oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.'" *Fletcher*, 62 M.J. at 178 (quoting *Berger*, 295 U.S. at 84). Trial counsel have a "duty to refrain from improper methods calculated to produce a wrongful conviction." *Berger*, 295 U.S. at 88. "However, as a threshold matter, the argument by a trial counsel must be viewed within the context of the entire court-martial. The focus of [an appellate court's] inquiry should not be on words in isolation, but on the argument as 'viewed in context.'" *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000) (quoting *United States v. Young*, 470 U.S. 1, 16 (1985)). Commentary on the presentation of evidence, defense arguments, and interpretation of the evidence are fair and appropriate in any criminal case. *See Baer*, 53 M.J. at 237.

Regardless of whether an appellant preserved the issue of prosecutorial misconduct, "reversal is warranted only 'when the trial counsel's comments taken as a whole were so damaging that we cannot be confident that the members

convicted the appellant on the basis of the evidence alone.'" *Sewell*, 76 M.J. at 18 (quoting *United States v. Hornback*, 73 M.J. 155, 160 (C.A.A.F. 2014)). To analyze improper argument during the pre-sentencing phase of trial, this Court must determine whether or not it can be "confident that Appellant was sentenced on the basis of the evidence alone." *United States v. Halpin*, 71 M.J. 477, 480 (C.A.A.F. 2013). "In assessing prejudice, we look at the cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial." *Fletcher*, 62 M.J. at 184 (citing *United States v. Meek*, 44 M.J. 1 (C.A.A.F. 1996)). Under *United States v. Fletcher*, this Court weighs three factors to determine whether trial counsel's improper arguments were prejudicial: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." *Id*. "[T]he third factor [alone] may so clearly favor the Government that the appellant cannot demonstrate prejudice." *Sewell*, 76 M.J. at 18.

I. Alleged improper argument during findings phase

**A. Trial counsel's argument addressing the defense trial strategy**

The defense counsel opened his findings argument with a theme of "evil," stating that, "there are evil men who do evil things in the world" but that Appellant was not such a man. (R. at 6555). Later in his argument, the defense counsel reiterated his theme of "evil," suggesting that the Eastburn family encountered evil

in their home on the night of the murders, but that Appellant was not the evildoer or the “personification of evil.” (R. at 6612; 6619). Addressing the presence of Appellant’s semen in Katie Eastburn, the defense inferred, for the first time during trial, that Katie Eastburn had consensual sex with Appellant, that she committed adultery, and that the evidence did not take the panel “beyond adultery to murder.” (R. at 6617-6619).

In response, the trial counsel began his rebuttal findings argument by directly referencing the defense’s reference to “evil” and characterizing the defense’s argument as “discount[ing]” the photos the panel saw of the slain Eastburn family. (JA 1124). The trial counsel then stated:

> Now, you saw evil and you heard an evil argument this morning. It’s not enough that Katie Eastburn was murdered. The defense wants you to believe she cheated on you, Gary. She committed adultery. That’s what the defense wants you to believe. That is a vile, disgusting, offensive argument. The defense said you don’t know Katie Eastburn. There’s a reason for that, because he killed her 25 years ago . . . . And when the defense doesn’t get what they want through the DNA evidence, they’ve got to go for broke. They’ve got to do the Hail Mary. “Man, I tell you what, this DNA evidence -- holy cow, this puts our guy at the scene. Oh, got to go consent now.” And there is absolutely no evidence whatsoever before you that that man had consensual sex with Katie Eastburn. That is a vile, disgusting argument; and it is designed to try to plant doubt. It is designed to get you off the ball, to get you off the game. It gets you so shook up about the “should have, could have, would have” world that criminals live in to prey on some sort of doubt that’s not reasonable but

> anything is possible so that you can get away from the main facts of this case.

(JA 1125-1126). Further addressing the defense counsel's argument that Katie Eastburn consented to sex with Appellant, the trial counsel stated:

> The ultimate messenger in this case who provides you the ultimate message in this case is Katie, and it is no one else because it is from her body that came the prime evidence in this case. And if you don't like that evidence, well, throw her under the bus. She can't respond, so we threw her under the bus.

(JA 1152). The trial counsel asked the panel not to "consider th[e] monstrous" argument that the presence of Appellant's semen in Katie Eastburn could have been present in her for two or three days as the result of consensual sex. (JA 1153, 1173). The defense counsel did not object to trial counsel's use of the words "evil," "vile, disgusting," "offensive," "monstrous," and throwing the victim "under the bus."

In light of the defense counsel's failure to object, this Court tests for plain error. There is an "exceedingly fine line which distinguishes permissible advocacy from improper excess." *Fletcher*, 62 M.J. at 183 (citation and internal quotation marks omitted). During argument, prosecutors are prohibited from interjecting personal opinions, matters not in evidence, and other irrelevant matters, or mischaracterizing the defense's argument. *Id*. at 179-180, 182. In *Fletcher*, this Court found that trial counsel's comments describing the defense theory of the case

as "nonsense," "fiction," "unbelievable," "ridiculous" and "phony," and "that thing they tried to perpetrate on you" was error. *Id*. at 182. However, "[u]nder the 'invited response' or 'invited reply' doctrine, the prosecution is not prohibited from offering a comment that provides a fair response to claims made by the defense." *United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005) (citing *United States v. Gilley*, 56 M.J. 113, 120-21 (C.A.A.F. 2001)). In this case, even if the Court agrees with the Army Court and finds that the trial counsel's word choices were not a fair response to the defense argument and crossed the line into impermissible argument such that it was plain and obvious error, Appellant is not entitled to relief because he cannot establish material prejudice. *Hennis*, 75 M.J. at 842-844.

First, "the objectionable statements were isolated and not a predominant part of Government counsel's argument[,]" particularly considering the Government's rebuttal argument spanned 56 transcript pages. *Hennis*, 75 M.J. at 843. Second, although the military judge did not sua sponte issue a limiting instruction, the military judge did give an instruction prior to findings argument that arguments by counsel are not evidence and that the members "must base [their] determination of the issues in this case on the evidence as [they] heard it and the law" as he instructed. (R. at 6507). This instruction absolved any risk that the panel members based their verdict on anything but the facts in evidence and the law because

absent evidence to the contrary, panel members are presumed to have followed the military judge's instructions. *Sewell*, 76 M.J. at 19.

Finally, the strength of the Government's evidence "reduced the likelihood that the [panel's] decision was influenced by argument." *Darden v. Wainwright*, 477 U.S. 168, 182 (1986). 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. Appellant's car was the same make and model as the car identified near the Eastburn home at the time of the murders. Eyewitnesses further placed Appellant near an automated teller machine at the same time and place the Eastburns' missing card was used after the murders. Eyewitnesses described how Appellant burned a fire in a barrel at his home from 0930 to 1700 shortly after the murders. There was evidence that Appellant owned and took a black Members Only jacket to a dry cleaners shortly after the murders. 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. No witness could provide Appellant a full alibi over the possible time frame of the murders. Accordingly, this Court should conclude that the evidence against Appellant was so strong that it can be "confident that the members

convicted him on the basis of the evidence alone." *Fletcher*, 62 M.J. at 184.

**B. Trial counsel's statement that the panel members are the "conscience of the Army."**

During the defense findings argument, the defense counsel addressed the panel members and their role as factfinder, stating: "you are selected to be on this court because of your experience, your rank, your maturity, your judgment . . . . [A]s I look at all of you . . . collectively you represent, number one, the conscience of the Army; but number two, you represent the experiences of the Army." (R. at 6558). In response, during rebuttal findings argument, the trial counsel stated, "Mr. Spinner talked about the conscience of the Army. You are the conscience of the Army . . . . Verdicts in courts-martial around the world send a message, and they reflect how our Army, our military values things. What is acceptable behavior and what is unacceptable behavior." (JA 1179). The defense counsel objected to this argument on the basis of apparent unlawful command influence. The military judge sustained the objection, instructed the trial counsel to refer to the evidence and not to refer to "Army Values," and instructed the panel to disregard trial counsel's argument. (JA 1179).

As the Army Court found, the trial counsel's "conscience of the Army" remark was not plain or obvious error because "it appears trial counsel was merely restating the defense's innocuous characterization of the panel." *Hennis*, 75 M.J. at

844. Even if the "conscience of the Army" and "send a message" remarks were improper, Appellant was not materially prejudiced in light of the military judge's instruction that the panel disregard the entirety of the trial counsel's argument containing those remarks, the brevity of those statements in context to length of the rebuttal argument and the overwhelming evidence demonstrating Appellant's guilt.

**C. Trial counsel's reference to the September 11, 2001 terror attacks and shootings on military installations.**

During the defense findings argument, the defense counsel alleged that the Government failed to explain what motive Appellant had to commit the murders:

> Now, motive does not have to be proven by the Government. I agree. No dispute there. The Government does not have to prove motive, but wouldn't it help to know the motive to make sure that you've got the right guy? . . . If you can articulate a motive, that helps solve the crime. That helps understand the evidence. It's like the glue that holds the case together." . . . The Government has offered no motive in this case. They have inferred or suggested a possible motive, but they haven't argued that directly.

(R. at 6608-6010). In response to the defense counsel raising Appellant's apparent lack of motive, the trial counsel stated in rebuttal findings argument:

> We don't have to prove motive, but motive does help. But it doesn't matter. It is the evidence in this case. And he asked you why -- why would someone do that? Why would they do that? How could they? Why would someone fly a plane into a building? Why would someone take a weapon in a military installation and start firing it? You know what, folks, it doesn't matter a darn bit. It

> doesn't matter why he did it because, if they did it, they should be found guilty.

(JA 1124). The defense counsel did not object to this argument.

In light of the defense counsel's failure to object, this Court reviews for plain error. In *Fletcher*, this Court found that a trial counsel's references to "Jesse Jackson, Jerry Falwell, Jim Bakker, Dennis Quaid, Matthew Perry and Robert Downey Jr."[27] were error because she was not "drawing legitimate inferences based on the evidence nor was she referring to matters within the common

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[27] The following are the specific remarks in *Fletcher* this Court found to be improper:

> Do people even with true faith make criminal mistakes? Do they or they or criminal actions [sic], do they use drugs? Yeah. Do they commit adultery on their wives? Ask Jessie Jackson about his two year old daughter. Ask Jerry Falwell about the hooker that he got caught with having intercourse with in a car in Palm Springs. Jim Bakker cheating on his taxes. I challenge you in findings to come up with the rest. I made a huge list but I don't have time to go over them. Is the fact that he's done good work mean that he can't use cocaine, nah uh. Dennis Quaid, prolific actor, needed inpatient treatment. Friends, Matthew Perry, fabulous performer, shows up every week. Had to go to inpatient treatment for drugs. How about this one, Robert Downey, Jr., wins an Emmy for the performances that he had during the time with which he was actually being arrested, charged and showing up positive for having used cocaine.

*Id*. at 190.

knowledge of the members. She was instead inviting the members to accept new and inflammatory information as factual based solely on her authority as the trial counsel." *Id*. at 184. Similarly, in *United States v. Erickson*, 65 M.J. 221 (C.A.A.F. 2007), the trial counsel, during presentencing argument, compared the *Erickson* appellant to "the embodiments of evil, Adolph Hitler, Saddam Hussein, Osama bin Laden." *Id*. at 223-224. This Court found the comparison to be plain and obvious error but did not rise to the level of severe misconduct. *Id*. While the arguments in *Erickson* and *Fletcher* were improper, this Court has noted that it is not inappropriate for counsel to "comment on contemporary history or matters of common knowledge within the community." *United States v. Kropf*, 39 M.J. 107, 108 (C.M.A. 1994) (citing *United States v. Long*, 17 U.S.C.M.A. 323, (1967)). Furthermore, "references to public figures and news stories may be allowed . . . . " *Fletcher*, 62 M.J. at 184.

In this case, the trial counsel's rhetorical reference to the September 11, 2001, attacks and shootings on military installations did not rise to the level of error because it was a fair response, using references "to contemporary history or matters of common knowledge within the community," to the defense counsel's argument that the Government did not demonstrate Appellant's motive. *Kropf*, 39 M.J. at 108. Trial counsel did not encourage the panel to compare those events to this case; in fact, the trial counsel stated that those events and motive "[didn't]

matter a darn bit," (JA 1124). Even if this Court agrees with the Army Court that the trial counsel's reference to the September 11, 2001, attacks and shootings on military installations was plain and obvious error, Appellant was not materially prejudiced in light of the "isolated" nature of these remarks, the military judge's instruction regarding the limited purpose of arguments by counsel, and the strength of the Government's case demonstrating Appellant's guilt. *Hennis*, 75 M.J. at 844.

**D. Trial counsel's argument concerning the reliability of the DNA evidence.**

During findings argument, the defense counsel attacked a perceived break in the chain of custody and the validity of the Government's DNA evidence establishing Appellant as the contributor of semen found in Katie Eastburn, asserting, "Why are you having to send it off to LabCorp, Government? Aren't you confident in your own evidence?" (R. at 6590). In response, during rebuttal findings argument, the trial counsel argued, "What is more credible? What is more believable? DNA in this case, that number right there [pointing to Appellate Exhibit 510] -- that number -- everyone of you know Army regulations require you to give a DNA sample. Why is that? Because the Army believes in DNA." (JA 1144). The defense counsel objected without specifying a basis, and the military judge sustained the objection. (JA 1144-1145). The trial counsel, continuing to respond to the defense' attack on the reliability of the DNA evidence, stated:

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

(JA 1144). The defense did not object to this argument but did object to trial counsel's suggestion that defense counsel had no issue with the chain of custody of the evidence because he did not object. (JA 1145). The military judge sustained this objection. (JA 1145).

Given the defense counsel's attack on the validity and credibility of the Government's DNA evidence, trial counsel's argument concerning the reliability of DNA testing and evidence was proper rebuttal. In doing so, the trial counsel referenced the Government's common use and reliance upon DNA evidence, such as identifying fallen soldiers. This is not improper vouching,[28] but merely permissible reference to facts that are public knowledge in the military and

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[28] "[I]mproper vouching occurs when the trial counsel "places the prestige of the Government behind a witness through personal assurances of the witness's veracity." *Fletcher*, 62 M.J. at 180 (quoting *United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir. 1993)).

community that allowed the trial counsel to explain to the panel the reliability of DNA in a way the panel would understand. *See Fletcher*, 62 M.J. at 183.

Even if this Court concludes that the trial counsel's remarks regarding the DNA evidence in his rebuttal argument were error, Appellant cannot establish that he was materially prejudiced in light of the transient nature of these remarks, the length of rebuttal argument, and the entire transcript, lack of any indication that the trial counsel intended to inflame the passions of the members rather than responding to the defense counsel's argument, and overwhelming strength of the Government's case. Furthermore, any prejudicial effect of the trial counsel's comment "the Army believes in DNA" and reference to the defense counsel's failure to object to the chain of custody evidence was remedied by the military judge sustaining the defense's objection to those statements and the military judge's standard instruction concerning the limited purpose of arguments by counsel.

**E. Trial counsel's argument did not violate the Golden Rule.**

The trial counsel began his opening statement evoking the moment Captain Eastburn found out that his wife and two of his young children were murdered:

> Mr. President, Members of the Panel, the phone is ringing. It's 1985. It's Mother's Day, and the phone is ringing. It's ringing on the hallways of the Squadron Officer's School at Maxwell Air Force Base in Alabama. The phone is ringing on that hallway, and there is a young captain there.

> His name is Gary Eastburn. And Gary Eastburn hears that phone, and he answers that call. And on the end of that phone is not his beautiful wife Katie; it's not his 5-year-old baby girl, Kara; it's not his 3-year-old baby girl Erin; it's not his 1-year-old baby girl, Jana. Members of the Panel, it's a homicide detective calling to say, "Captain Eastburn, you need to come home. There's been a death in your family." There had actually been three deaths in Captain Eastburn's family.

(JA 574-575). The trial counsel then described the rape and murder of Katie Eastburn and the murder of her daughters, commenting that Captain Eastburn was not there to protect them. (JA 578-579). During findings argument, the trial counsel referenced the phone call discussed at the beginning of his opening statement:

> Now, on opening, we told you the phone was ringing, justice was calling. It's been twenty-some years. It is time for you to answer that call for justice. It is time to show him for what he is, a brutal killer who slaughtered a mother and two babies. It is time to find him … guilty of [T]he [C]harge and its [s]pecifications.

(JA 1123). During rebuttal findings argument, in response to the defense counsel's assertion that the fact that Appellant had no cuts or scratches when he went to physical training was a sign of his innocence, trial counsel argued that there were no physical signs of an altercation on Appellant because Katie's fear, along with the fact that she had been bound, led her not to resist his attack:

> We can't tell you how it all happened, but imagine Katie and what's going on in her mind. The defense made, in

> their case-in-chief, this idea that he had no cuts and scratches, that he went to PT and had no cuts and scratches…. How hard is it for Katie Eastburn to struggle when she's been bound? And 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." That explains to you why there are no cuts and bruises on the accused on that evening.

(JA 1176-1177). The defense counsel did not object to any of the above remarks.

It is error for a trial counsel to ask a panel member to place himself in the position of the victim or near relative of the victim; this is the "Golden Rule." *United States v. Shamberger*, 1 M.J. 377, 379 (C.M.A. 1976). This Court should find that the trial counsel's remarks were not plain or obvious error because the trial counsel did not violate the Golden Rule. The trial counsel did not seek to have the members of panel place themselves into the shoes of the victims or their family during his opening statement; the story of the phone call was told from the perspective of Captain Eastburn. Furthermore, the trial counsel's remarks during rebuttal were intended to draw a rational inference that Appellant had no physical signs of an altercation because Katie did not resist because she was bound and fearful for the fate of her children. Even if this Court found trial counsel's comments to be erroneous, this Court can be confident that the comments did not sway the panel's findings in light of the overwhelming evidence supporting a

conviction, the military judge's standard instruction concerning the limited purpose of counsel argument, and the sparsity of these remarks in light of the length of trial counsel's opening statement and findings argument.[29]

II. Alleged improper argument during pre-sentencing phase

**A. Trial counsel's commentary on Appellant's mitigation evidence.**

During pre-sentencing, the defense admitted multiple photographs of Appellant and his family members. (Def. Ex. RR; R. at 6897). The trial counsel referenced these photographs in his pre-sentencing argument by stating, "Consider the aggravation in this case up against the mitigation and the extenuation. Consider what you heard yesterday. And I ask you this, how dare they ask you to look at pictures of Sergeant Hennis opening presents with his kids in front of a Christmas tree?" (JA 1207). The defense counsel objected, and the military judge instructed the panel that, "the defense is allowed to present matters in extenuation and mitigation. You must give them due consideration." (JA 1207). The trial counsel then continued his sentencing argument:

> How dare they ask you – they're allowed and you can consider it and should give it its appropriate weight. How dare they ask you to look at pictures of Sergeant Hennis sitting on the couch reading a book to his kids? Talking about hunting and scouts, there's probably a whole photo album -- multiple photo albums full of family pictures at

[29] The trial counsel's opening statement spanned 18 transcript pages, and the findings argument spanned 29 transcript pages.

> the Hennis' residence; activities, family activities, birthdays, celebrations, graduations. Those photo albums at Gary Eastburn's house are empty. Mr. Eastburn never got a chance to see his daughter's gymnastics. He never got a chance to teach his girls soccer, softball, or to get them into Girl Scouts. Katie never got any more chances to make those Halloween costumes, go to graduations as the girls got older, prom night, first dates, teach them how to drive, moving them into their college dorms. All the little things -- those are the big things. But it's the little things that are priceless moments that parents live for and that mean so much as you grow older when your kids grow.

(JA 1207-1208).

The trial counsel's comment "how dare they" in reference to the photographs was error derogating Appellant's Sixth and Eighth Amendment Rights to present evidence in extenuation and mitigation, but it did not prejudice Appellant even under the more exacting constitutional standard requiring that the error be harmless beyond a reasonable doubt. *Hennis*, 75 M.J. at 845; *United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007).[30] First, the military judge's instruction to the panel after the defense objection was a proper curative instruction that cleared any inference that the panel should completely disregard Appellant's evidence in extenuation and mitigation. Additionally, prior to sentencing deliberations, the military judge reiterated the instructions that the panel "must

[30] The Government conceded before the Army Court, and the Army Court found, that the comment "how dare they" was error. *Hennis*, 75 M.J. at 845.

give due consideration to all matters in extenuation and mitigation." (R. at 7181). These instructions emphasized to the panel that it was their duty to consider Appellant's evidence in extenuation and mitigation, which was within his right to present.

Second, the trial counsel's conduct was not severe because his argument appeared to be nothing more than an inartful attempt to argue to the panel that the "human cost" of Appellant's crimes outweighed Appellant's evidence presented in extenuation and mitigation. *United States v. Akbar*, 74 M.J. 364, 394 (C.A.A.F. 2015) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). The trial counsel referenced the military judge's instruction that the members must weigh the evidence in aggravation against the evidence in extenuation and mitigation at least three times in proximity to the erroneous argument. (R. at 7160-7163). The erroneous argument was brief and constituted less than thirteen lines of the 19-page Government sentencing argument.

Furthermore, Appellant incorrectly asserts that "Trial counsel never addressed whether death was the appropriate sentence based on the evidence presented." (Appellant's Br. 182). The Government's closing argument was otherwise proper and focused on how the panel should weigh the evidence in extenuation, mitigation, and aggravation. Appellant raped and stabbed Katie Eastburn fifteen times, including through her heart, liver, and lungs, and her throat

was slashed to the point of near decapitation. Five year-old Kara Eastburn and three year-old Erin Eastburn were both stabbed ten times and their throats were slashed to the point of near decapitation. The strength of Government's aggravation evidence demonstrating the brutality of Appellant's offenses against Katie Eastburn and two of her young children, along with the impact of loss suffered by Gary and Jana Eastburn, far outweighed Appellant's evidence in extenuation and mitigation. Accordingly, this Court should find that the trial counsel's comment "how dare they" was harmless beyond a reasonable doubt.

**B. Trial counsel's reference to the passage of time between Appellant's crimes and trial.**

This Court should find that the trial counsel's reference to "25 years" in his argument was not plain or obvious error because Assignment of Error V lacks merit. Even if this Court finds that it was plain and obvious error, Appellant was not materially prejudiced in light of the substantial evidence in aggravation presented by the Government that supported the panel's sentencing decision.

**C. Trial counsel's reference to victim impact evidence.**

During pre-sentencing argument, the trial counsel addressed the pain and suffering of the victims and stated:

> Imagine the mental anguish of Mrs. Eastburn . . . . At a certain point, Mrs. Eastburn had to realize that she was in trouble. Imagine the mental anguish of this woman, 120 or so pounds, and this 6-foot-4 man in her house now with

> her three small daughters there and her husband definitely not coming home, away at school. Imagine the mental anguish as that situation develops. And she was eventually bound and she was eventually raped. Imagine the fear ----

(JA 1203-1204). The defense objected on the basis of improper argument, and the military judge instructed the trial counsel that he "may not place the members in the shoes of the victims." (JA 1204). After acknowledging the military judge, the trial counsel continued his argument by stating, "The fear that [Mrs. KE] must have felt for her children, knowing that they were just a room away is extreme mental anguish." (JA 1204).

In his argument addressing Kara Eastburn's pain and suffering, the trial counsel stated:

> And little Kara in her bed down the hall under her blanket -- age 5, at the age where your parents tell you monsters aren't real. And when you're 5 and you lay in bed and you close your eyes and hide under the blanket thinking I can't see them so they can't see me. Imagine the screams. There can be no doubt that there was pain and suffering by all three of these victims, emotional and physical.

(JA 1205). When the trial counsel later explained to the panel that he would not have an opportunity for rebuttal, he stated:

> So I won't get a chance to rebut what the defense counsel might say in their argument, but I expect that you will hear the word "mercy" at some point. I wonder if Katie begged for mercy in her living room and in her bedroom. I wonder if Katie begged for mercy for her children. I wonder if her children begged for mercy before they were slaughtered.

> Remember that when the defense talks about -- if they talk about -- mercy.

(JA 1213).

This Court should agree with the Army Court that the trial counsel's argument was not plain or obvious error because it did not violate the Golden Rule. *Hennis*, 75 M.J. at 846. In *United States v. Shamberger*, the Court of Military Appeals (CMA) held that it was error for a trial counsel to ask the panel during presentencing argument to place themselves in the shoes of a husband forced to watch his wife being raped repeatedly and used phrases like "put yourself next to your car," "picture your wife having her clothes ripped off her and then being raped." 1 M.J. at 379. Similarly, in *United States v. Wood*, 18 U.S.C.M.A. 291 (1969), the CMA found that a trial counsel impermissibly asked the panel to sentence the accused from the perspective of their own sons being the victims of indecent liberties by the accused. However, in *United States v. Baer*, this Court noted:

> [W]e also recognize that an argument asking the members to imagine the victim's fear, pain, terror, and anguish is permissible, since it is simply asking the members to consider victim impact evidence. Logically speaking, asking the members to consider the fear and pain of the victim is conceptually different from asking them to put themselves in the victim's place.

53 M.J. at 238 (citations omitted). In *United States v. Edmonds*, 36 M.J. 791 (A.C.M.R. 1993), the Army Court of Military Review found that it was not error for trial counsel to argue during pre-sentencing to the panel to "imagine the fear" the victim felt as a crime was being perpetrated against him. *Id*. at 792. The Army Court distinguished the trial counsel's argument from *Shamberger* and *Wood* because the trial counsel asked the court to consider the fear of the victim of the crime, which was akin to asking the court to consider victim impact evidence, which is permissible argument. *Id*. at 793.

Here, the trial counsel's argument informed the panel of the victims' physical and mental suffering. As in *Edmonds*, this argument referred to appropriate, permissible victim impact evidence. *See Baer*, 53 M.J. at 23. Accordingly, this Court should find that trial counsel's comments were not plain or obvious error. Even if it was error, this Court can be confident that the panel was not swayed by these remarks because of the compelling evidence in aggravation presented by the Government.

**X.**

**WHETHER THE DESTRUCTION OF APPELLANT'S INMATE RECORDS PRECLUDED HIM FROM PRESENTING HIS CASE IN MITIGATION?**

## **Standard of Review**

Appellant presents an issue of first impression before this Court. In *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988), the Supreme Court held that in order to show a violation of the Due Process Clause based on the loss or destruction of evidence, an appellant must demonstrate bad faith on the part of the Government. In *United States v. Simmermacher*, 74 M.J. 196, 199 (C.A.A.F. 2015), this Court analyzed the relationship between constitutional due process standards and R.C.M. 703(f)(2), which governs lost and destroyed evidence in the court-martial system. This Court stated that while the analysis in *Youngblood* still applied to the constitutional due process inquiry for lost or destroyed evidence, the President intended for R.C.M. 703(f)(2) to provide additional protection for servicemembers. *Id.* In that case, this Court reviewed the military judge's ruling under R.C.M. 703(f)(2) for an abuse of discretion. *Id.*

In his brief, Appellant asserts that the military judge erred when he denied the defense motion to set aside the capital referral of his case based on an alleged violation of R.C.M. 703(f)(2). (JA 1987). Specifically, Appellant argues that the military judge should have set aside the capital referral because the loss of Appellant's inmate records from his prior incarceration in North Carolina prevented him from presenting mitigating evidence required by *Skipper v. South Carolina*, 476 U.S. 1 (1986). (Appellant's Br. 188) (JA 1987). In so doing,

Appellant asserts that the loss of relevant mitigation evidence in his capital case entitles him to extraordinary relief under R.C.M. 703(f)(2). This constitutes an issue of first impression before this Court; in the absence of controlling precedent, the Government will apply an abuse of discretion standard to the military judge's ruling.

## Law and Argument

### A. In the absence of bad faith, the loss of Appellant's inmate records does not constitute a due process violation.

The military judge did not abuse his discretion when he denied the defense motion to set aside the capital referral because the Government did not act in bad faith. Putting aside the question of whether the military judge *could* grant Appellant's requested relief, Appellant could not establish a due process violation for lost or destroyed evidence without establishing bad faith by the Government. *Simmermacher*, 74 M.J. at 199; *United States v. Hollis*, 57 M.J. 74 (C.A.A.F. 2002). In this case, Appellant disclaimed any argument of bad faith on the part of the Government. (R. at 1319). Based on the record before him, the military judge found no evidence of bad faith. (JA 2042). Accordingly, the military judge ruled that the destruction of Appellant's inmate records did not violate Appellant's right to a fair trial. (JA 2042). Because Appellant did not allege bad faith, the military

judge correctly ruled that the loss of Appellant's inmate records did not constitute a due process violation.

B. *Skipper v. South Carolina* does not change the framework for analyzing an appellant's entitlement to lost or destroyed evidence in a capital case.

In his brief, Appellant essentially seeks to blend the analysis of lost or destroyed evidence with the right of a capital defendant to present evidence in mitigation as a matter of constitutional due process. Appellant asserts that precluding a panel from considering evidence of a capital defendant's character—including their prior behavior in prison—constitutes a violation of the Eighth Amendment. (Appellant's Br. 189). Citing *Skipper*, Appellant equates the loss or destruction of his inmate records with an affirmative exclusion of those records from his sentencing case. (Appellant's Br. 189). This argument fails for two reasons: first, *Skipper* does not create an affirmative right for capital defendants; second, *Skipper* does not carve out a special category of evidence under R.C.M. 703(f)(2).

In *Skipper*, the Supreme Court reversed a capital conviction because the trial judge excluded evidence of the petitioner's adjustment to life in prison as "irrelevant" to his capital sentencing case. 476 U.S. at 3. In that case, the prosecutor based his sentencing argument in favor of the death penalty on the likelihood that the petitioner "would pose disciplinary problems if sentenced to

prison and would likely rape other prisoners." *Id.* The *Skipper* petitioner attempted to introduce evidence from his family members to show his adjustment to life in prison to rebut the argument that he would pose a danger to other inmates. *Id.* Applying *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982), the Supreme Court reversed the petitioner's death sentence and held that the exclusion of evidence pertaining to his behavior in prison deprived him of mitigating evidence that "might serve 'as a basis for a sentence less than death.'" *Id.* at 4-5.

*Skipper* certainly stands for the proposition that the affirmative exclusion of an appellant's mitigation evidence at trial violates the Eighth Amendment. *Id.* at 5-6 (citing *Eddings*, 455 U.S. at 110 ("[We] conclude that the Eighth and Fourteenth Amendments require that the sentencer … not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record.") (internal citations omitted)). Appellant's argument, however, expands *Skipper* to create an affirmative due process right for capital defendants—a conclusion that the *Skipper* opinion neither demands nor supports. A military judge would err under *Skipper* if he ruled against the admission of mitigation evidence regarding Appellant's behavior as an inmate; nothing in the *Skipper* opinion suggests that a capital case cannot proceed without this evidence if an Appellant does not offer it.

Appellant's argument under *Skipper* also fails because *Skipper* does not suggest that this Court should treat lost or destroyed mitigation evidence

differently than other evidence beyond compulsory process under R.C.M. 703(f)(2). To decide this assignment of error in Appellant's favor, this Court would have to hold that: (1) *Skipper* evidence is not merely relevant, but necessary, to the litigation of capital cases; (2) there is no adequate substitute for *Skipper* evidence; and (3) the absence of *Skipper* evidence in a death penalty case negates a capital referral or requires some other extraordinary remedy. This would create a special category of "lost or destroyed" mitigation evidence not governed by R.C.M. 703(f)(2) *and* would require the Court to hold that the inability to produce lost or destroyed mitigation evidence in a capital case constitutes a due process violation even without bad faith on the part of the Government. Thus, Appellant's argument must fail because it asks this Court to contradict binding precedent in *Youngblood* regarding bad faith and due process and this Court's own analysis in *Simmermacher* regarding the relationship between R.C.M. 703(f)(2) and due process.

C. The military judge did not abuse his discretion when he declined to set aside Appellant's capital referral on the basis of lost or destroyed *Skipper* evidence.

The military judge did not abuse his discretion because he made appropriate findings of fact and applied the correct law to Appellant's case. Based on the submissions of the parties and the stipulations of expected testimony, the military judge found that the State of North Carolina incarcerated Appellant in several

different facilities between 1985-1989. (JA 2042) (App. Ex.'s 226, 260-262). Pursuant to policy, the State of North Carolina destroys inmate records ten years after the inmate leaves state custody. (JA 2042) (App. Ex. 226). By 2009—twenty years after Appellant's release—most of his inmate records had been destroyed. (JA 2042) (App. Ex.'s 226, 260-262). The record supports these factual findings.

The military judge also did not abuse his discretion in this case because he applied the correct law to Appellant's motion. The military judge considered *Skipper* and found that Appellant's inmate records could be relevant and admissible mitigation evidence under R.C.M. 1001(c). (JA 2042). He then correctly noted that nothing in either *Skipper* or R.C.M. 1001(c) granted him the authority to set aside a capital referral based on the loss or destruction of that evidence. (JA 2042). The military judge then examined the broader due process question posed by Appellant's motion and found that the State's destruction of Appellant's records in the ordinary course of business did not amount to bad faith; absent bad faith, the failure to produce those records would not violate due process. (JA 2042). Turning to the question of R.C.M. 703(f)(2), the military judge determined that Appellant had adequate substitutes for the missing records, including his own testimony. (JA 2042).

Despite Appellant's argument to the contrary, the military judge did not err when he determined that Appellant could rely upon an adequate substitute for the

missing evidence. A military judge has wide discretion to determine whether an adequate substitute for lost or destroyed evidence exists. *Simmermacher*, 74 M.J. at 202. In this case, the Government produced stipulations of expected testimony from the records custodians at three confinement facilities, Appellant's education records from confinement, and over two hundred pages of related confinement records. (App. Ex.'s 260-262, 264). Those confinement records included logs of visits from Appellant's wife, children, and other family members—precisely the kinds of witnesses whose testimony the Supreme Court considered in *Skipper*. 476 U.S. at 2. The records also contained the names of visiting officers and prison officials whose testimony Appellant could have sought to produce on his behalf. (App. Ex. 264). Accordingly, the military judge did not misapply R.C.M. 703(f)(2) when he determined that Appellant could present an adequate substitute for his prison records. (JA 2042). Because the military judge applied the correct law to Appellant's case, he did not abuse his discretion when he declined to set aside the capital referral.

## XI.
## WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY RESTRICTING DEFENSE VOIR DIRE AND DENYING DEFENSE CHALLENGES FOR CAUSE?

### Facts

For clarity, the facts necessary to resolve Appellant's assignments of error with respect to voir dire are contained within each argument section below.

### Standard of Review

Appellant raises two separate voir dire issues in his brief. First, he alleges that the military judge "unreasonably restricted defense counsel's efforts to uncover panel member's views on capital punishment." (Appellant's Br. 195). Second, he alleges that the military judge erred when he failed to grant three defense challenges for cause. (Appellant's Br. 198-99). This Court reviews a military judge's limitations on voir dire for a clear abuse of discretion and will only reverse if Appellant demonstrates prejudice. *United States v. Loving*, 41 M.J. 213, 257 (C.A.A.F. 1994), *aff'd*, 517 U.S. 748 (1996) (citing *United States v. Smith*, 27 M.J. 25, 28 (C.M.A. 1988)). This Court reviews a military judge's ruling on implied bias "pursuant to a standard that is 'less deferential than abuse of discretion, but more deferential than de novo.'" *United States v. Dockery*, 76 M.J. 91, 96 (C.A.A.F. 2017) (quoting *United States v. Peters*, 74 M.J. 31, 33 (C.A.A.F. 2015)).

## Law and Argument

A. The military judge did not unreasonably restrict Appellant's voir dire of the panel**.**

*1. The military judge did not restrict Appellant's ability to exercise intelligent challenges for cause.*

The military judge did not abuse his discretion when he restricted Appellant's voir dire because the military judge did not interfere with Appellant's ability to exercise intelligent challenges for cause. Voir dire enables the parties to exercise intelligent challenges for cause and protects the constitutional guarantee of a fair and impartial panel. *United States v. Bodoh*, 78 M.J. 231, 237 (C.A.A.F. 2019). Despite its purpose, voir dire does "not permit the examination to range through fields as wide as the imagination of counsel." *Smith*, 27 M.J. at 28. Accordingly, R.C.M. 912(d) grants the military judge wide discretion in managing voir dire. R.C.M. 912(d), Discussion ("The nature and scope of the examination of members is within the discretion of the military judge."); *see also United States v. White*, 36 M.J. 284, 287 (C.M.A. 1993). As Appellant notes in his brief, the voir dire in this case lasted for ten days over the course of three weeks. (Appellant's Br. 195). The record demonstrates that the military judge gave Appellant's counsel ample opportunities to explore the views of the panel members and that Appellant freely—and frequently—exercised his rights to pose challenges for cause. Appellant identified and successfully articulated challenges for cause ranging from

prior knowledge of the case to implied bias to the members' views on the death penalty. (R. at 2020, 2051, 2145, 2307, 3242, 3705). Despite Appellant's argument to the contrary, the record clearly reflects that the military judge's management of the voir dire in this case did not prevent Appellant from intelligently exercising his right to challenge the members. Because the military judge did not prevent Appellant from fully and freely exercising his right to challenge the members, he did not abuse his discretion in limiting voir dire.

*2. The military judge applied the correct law during voir dire.*

The military judge did not abuse his discretion because he applied the correct law to the voir dire of the members. A military judge abuses his discretion in voir dire if they apply an erroneous view of the law. *Dockery*, 76 M.J. at 97 (citing *United States v. Quintanilla*, 63 M.J. 29, 35 (C.A.A.F. 2006)). As a tool, voir dire protects an appellant's constitutional rights by allowing them to identify unqualified jurors; in a death penalty case, this may include members who would automatically impose death. *Morgan v. Illinois*, 504 U.S. 719, 729 (1992); *see also United States v. Bellflower*, 50 M.J. 306, 309 (C.A.A.F. 1999); *United States v. Jefferson*, 44 M.J. 312, 318 (C.A.A.F. 1996) ("[Voir dire] is used by counsel as a means of developing a rapport with members, indoctrinating them to the facts and the law, and determining how to exercise peremptory challenges and challenges for cause."). In *Wainwright v. Witt*, 469 U.S. 412 (1985), the Supreme Court held that

a prospective juror may be excluded because of his views on capital punishment if "his views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." 469 U.S. at 424; *see also Quintanilla*, 63 M.J. at 36.

Appellant asserts that the military judge "failed to refer to or apply the requirements of *Morgan* and *Wainwright*."[31] (Appellant's Br. 197). Further, Appellant identifies several panel members—CSM Lincoln, CSM Kirkover, and SGM Delgado—whose voir dire the military judge allegedly restricted by preventing Appellant from inquiring into whether they would vote to impose a death sentence. (Appellant's Br. 196-97).

A complete reading of the record, however, indicates that the military judge fairly and adequately allowed Appellant to explore the death penalty views of the members and that he considered the correct law in issuing his rulings. *Morgan* stands for the proposition that "[a] juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances" and that an appellant "may challenge for cause any

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[31] The Government notes, as a factual matter, that the military judge specifically referenced *Morgan* in his ruling regarding Appellant's use of death penalty hypotheticals. (R. at 3009). Further, much of the voir dire in this case centered on whether the defense approach to the members—allegedly applying *Morgan*—required them to commit to a position unfairly without hearing all of the evidence. (R. at 2206).

prospective juror who maintains such views." 504 U.S. at 729. *Wainwright* held that the appropriate question to pose during voir dire is whether a panel member's views would substantially impair their performance by undermining their oath. 469 U.S. at 424-25.

The military judge allowed both the Government and Appellant wide latitude during voir dire to examine the panel members' backgrounds, experiences, and views—including their moral views on the death penalty.[32] However, throughout the voir dire process, Appellant and the military judge disagreed on the appropriate parameters for individual voir dire when posing death penalty hypotheticals. Early in the voir dire process, Appellant asked for a hearing in which he indicated his displeasure with the military judge's "interruptions" of his voir dire. (R. at 1917). In response, the military judge stated:

> I'm not going to allow either side to ask questions of any member which, in a vacuum, makes it unfair to the member. You asked that member a question about what sentence that member would impose based on some pretty serious factual predicate for findings and then indicating that—what sentence would he impose … I'm not going to allow either side to ask questions to members to put them in unfair situations. So when I see counsel doing that, I have the right and I believe obligation under R.C.M. 912 to interpose myself so questions are not unfairly put to members.

[32] *See*, for example, the discussion with LTC Watson regarding his Baptist faith and the morality of the death penalty. (R. at 1990).

(R. at 1919). This issue arose again when Appellant's counsel attempted to build a death penalty hypothetical using only the aggravating factors indicated at referral. (R. at 2200). The military judge indicated that he would allow Appellant to explore the panel member's view of what he might consider to determine an appropriate sentence but declined to allow Appellant to pose questions based only on the aggravating factors in the case:

> But if we get to sentencing in this case, whether it's capital or non-capital at sentencing, if we get there, we all know that the members are going to hear a lot more than just the circumstances surrounding the commission of whatever offense the accused may have been convicted of, if we get to sentencing, before they make a decision on sentencing. We know that's going to happen. So you may ask him what matters he will consider, but I am not going to permit members to be put in a situation where they are asked to commit to a position based solely on the nature of these aggravating factors, in essence being asked to make a decision in that vacuum without hearing all of the evidence ---- that's unfair.

(R. at 2205).

In a later round of voir dire, the military judge thoroughly addressed the parameters of permissible questions. (R. at 3007-13). In that oral ruling, the military judge both explicitly incorporated *Morgan* and articulated the *Wainwright* standard. (R. at 3007-08).[33] The military judge then discussed his discretion to

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[33] "It is clear the court must inquire or allow inquiry into whether potential members would automatically vote to impose the death penalty if the accused were

control voir dire and gave Appellant concrete examples of questions that he would allow Appellant to ask in order to assess the members' views of the death penalty. (R. at 3009-11). The military judge stated that he found Appellant's prior hypotheticals "misleading" and ruled:

> It is improper to use a hypothetical to try and pin a perspective [sic] member down to whether they think a particular case is worthy of either the death penalty or life imprisonment and essentially asking the member to opine whether he or she believes the death penalty would be a proper punishment in the case before them.
>
> Now, Defense, to life-qualify, the panel certainly may ask questions about the members' attitudes and views generally about the death penalty and ask follow-up questions about automatically imposing the death penalty in this case and whether they would fairly consider life and also follow-up with any answers in their pretrial questionnaires.

(R. at 3012). The military judge went on to explain that he disallowed the prior hypotheticals because "[the] question [was] really seeking to determine whether that member—what that member thinks about the death penalty in relation to this

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convicted; *Morgan v. Illinois*, 504 U.S. 719. A panel member who would vote for the death penalty in every case, fails in good faith to consider extenuating and mitigation circumstances as required by R.C.M. 1004 and the court's instructions … [an accused] must be able to identify those members whose views on capital punishment would prevent or substantially impair the performance of duties as a court member." (R. at 3008).

case, rather than inquire about the member's core values about the death penalty." (R. at 3013).

In sum, the record in this case shows that the military judge applied the law as required by *Morgan* and *Wainwright* while appropriately exercising his discretion under R.C.M. 912 to manage voir dire. Because the military judge conducted voir dire in Appellant's case using the correct law, he did not abuse his discretion and this Court should affirm Appellant's conviction.[34]

<u>B. The military judge did not abuse his discretion when he denied three of Appellant's challenges for cause.</u>

The military judge did not err when he denied Appellant's challenges to LTC Boyd, MAJ Weidlich, and LTC Watson as panel members because he applied the correct law regarding implied bias and considered the liberal grant mandate. A military judge's ruling on a challenge for cause is given great deference. *Dockery*, 76 M.J. at 96 (citing *United States v. Rolle*, 53 M.J. 187, 191 (C.A.A.F. 2000)). Military judges abuse their discretion when they make clearly erroneous findings of fact or apply an erroneous view of the law. *Id*. In this case, the military judge correctly considered the actual bias test, the implied bias test, and the liberal grant

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[34] In his brief, Appellant specifically challenged the voir dire of CSM Lincoln, CSM Kirkover, and SGM Delgado. The Government notes that Appellant attempted to voir dire all three members using variants of the hypothetical the military judge rejected in his ruling. (R. at 2428, 3741-42, 3746).

mandate when he denied Appellant's challenges to LTC Boyd, MAJ Weidlich, and LTC Watson. (R. at 2053, 2307-08, 2309-10). Because the military judge correctly considered and applied the law when ruling on Appellant's challenges to these members, this Court should find that he did not abuse his discretion when he allowed the members to sit on Appellant's panel.

*1. LTC Boyd*

Appellant alleges that LTC Boyd's "predisposition to impose a death sentence in any case involving the killing of children prevented him from fairly considering mitigation evidence." (Appellant's Br. 202). The Government interprets this as a challenge to LTC Boyd for implied bias based on an inelastic attitude towards sentencing. During individual voir dire, Appellant engaged in a conversation with LTC Boyd regarding his views on the death penalty in cases involving the premeditated murder of children:

> Q: So, with regard to that, the fact that it was—an innocent child has been murdered and it was done by premeditated murder, that just simply overrides anything else with regards to the appropriateness of punishment for children—appropriateness of the punishment of death?
>
> A: I would be willing to listen to any other type of feedback. I have my personal belief, but that doesn't mean that I would necessarily strongly stand on it from the standpoint of not listening to anything else, but I would be willing to take other types of information in the event that I am selected and there are other panelists that have other opinions that differ from mine.

(R. at 2132). LTC Boyd then indicated that, as he thought about it during voir dire, he might consider that death "frees [the accused] from having to think about [the crime] for the rest of their lives." (R. at 2132-33). The military judge followed up on this statement:

> Q: []. With those two statements, sir, if you believe that life is not appropriate, does that mean that you automatically have to vote for the death penalty if you were to sit on a panel where two little girls were the victims of premeditated murder?
>
> A: Sir, let me clarify. My initial—the emotional portion within me as a father, I initially said life wouldn't be appropriate. Now, as I sat here and I was thinking about it, I had also indicated that to take someone's life as a result of premeditation in the murder would free them from having to be reminded of it for the rest of their lives. So, simply what I am saying, sir, is that I would be open-minded. I know what my views are, but I would be open-minded to listen to other panelists.

(R. at 2140). During the follow-up questioning by the military judge, LTC Boyd indicated that he could listen to the opinions of other panel members and make a conclusion about an appropriate sentence after listening to all of the evidence. (R. at 2142). Appellant moved to exclude LTC Boyd based on his "deeply held personal belief" that life imprisonment would not be appropriate punishment for the premeditated murder of children. (R. at 2159-60).

The military judge considered Appellant's challenge to LTC Boyd and found that despite his initial reactions, "Lieutenant Colonel Boyd made it clear, in an extremely credible manner, that he is willing to listen to all of the evidence and will consider the full range of punishments." (R. at 2308). The military judge further found that LTC Boyd "[was] not inalterably in favor of imposing the death penalty." (R. at 2308). Applying both the standard for implied bias and the liberal grant mandate, the military judge ruled that a reasonable person would not conclude that LTC Boyd harbored bias against Appellant. (R. at 2308).

The military judge did not err when he denied Appellant's challenge to LTC Boyd because an objective, reasonable observer would not believe that LTC Boyd's presence on the panel affected the fairness of Appellant's trial. While Appellant did not challenge LTC Boyd for actual bias, the Government recognizes that R.C.M. 912(f)(1)(N) encompasses both actual and implied bias. *United States v. Armstrong*, 54 M.J. 51, 53 (C.A.A.F. 2000). The test for implied bias asks whether, under the totality of the circumstances, "in the eyes of the public the challenged member's circumstances do injury to the 'perception of appearance of fairness in the military justice system.'" *United States v. Albaaj*, 65 M.J. 167, 171 (C.A.A.F. 1997) (citing *United States v. Terry*, 64 M.J. 295, 392 (C.A.A.F. 2007)). A panel member's predisposition to impose some punishment is not automatically disqualifying; the question is whether their attitude "is of such a nature that he will

not yield to the evidence presented and the judge's instructions." *Rolle*, 53 M.J. at 191; *United States v. James*, 61 M.J. 132, 138 (C.A.A.F. 2005). Reading the entirety of LTC Boyd's voir dire, an objective, reasonable observer would note that LTC Boyd discussed his prior experience as an investigating officer under AR 15-6 and as a panel member. (R. at 2127-28). The record reflects his commitment to open-mindedness and listening to the views of other panel members in the course of his duties. (R. at 2127-28). The record also shows that he committed to listening to the opinions and views of others in the instant case and that he would respect and consider the opinions of others with respect to mitigation and extenuation. (R. at 2314). LTC Boyd committed to fairly and fully considering both life imprisonment and capital punishment as a court member and stated that he would "absolutely" consider all evidence in mitigation and extenuation. (R. at 2138-39). When questioned by the military judge, LTC Boyd also stated that he would listen to and consider the evidence and the opinions of other panel member prior to coming to a decision about an appropriate sentence in Appellant's case. (R. at 2141).

Considering LTC Boyd's responses during voir dire under a totality of the circumstances, the military judge did not err when he denied Appellant's challenge to LTC Boyd because LTC Boyd displayed his willingness to listen to and consider all of the evidence before coming to a decision about an appropriate punishment

regardless of his initial reaction during voir dire. Under these circumstances, an objective, reasonable observer would not question the fairness of the military justice system based on LTC Boyd's presence on the panel. Accordingly, this Court should find that the military judge did not err when he declined to exclude LTC Boyd from Appellant's panel.

2. *MAJ Weidlich*

Appellant similarly challenges MAJ Weidlich for his inability to consider mitigation evidence. (Appellant's Br. 205). During individual voir dire, the Government asked MAJ Weidlich about his views on the death penalty:

> Q. I guess I should start it out with an open question. Could you tell us what your views are of the death penalty?
>
> A. I do believe that the death penalty is a viable option for anyone who's committed and found guilty of an egregious crime. I think the question was asked yesterday about children and my views towards that.
>
> Q. Right.
>
> A. And I think it would be a little more difficult for me to, you know, being the father of four small children under the age of 10 -- to have their lives cut short, I think that that would -- it would be hard. I mean, I could be fair and objective; but I think that it would be something that I would consider.
>
> Q. Yes, sir. But you said that you believe that you could be fair and objective?
>
> A. Yes.

(R. at 2175). Upon further questioning by the Government, MAJ Weidlich indicated that he could not think of a crime where he would automatically vote for the death penalty:

> Automatically with no other considerations? You know, I would have to hear the evidence and hear what the circumstances were. You know, I understand in our nation we have the option of life in prison or the death penalty, but I think the decision on that would have to be made based on all of the evidence at hand. Again, now I think it is a viable option; but it would be dependent on, you know, what the circumstances were -- intent, and premeditation and those sorts of things… I understand that there are extenuating circumstances in some cases. So I try to be very objective and very fair and open about those sorts of things. But I can't think of absolutely automatically death penalty, I would have to hear all of the evidence.

(R. at 2175-76). Major Weidlich also stated that he would not consider the punishment phase of the court-martial until and unless the panel decided on Appellant's guilt. (R. at 2178). Upon further questioning by the Government and the military judge, MAJ Weidlich indicated that he would "absolutely" consider any evidence presented by the defense in mitigation or extenuation. (R. at 2176-77, 2181-82).

During voir dire, MAJ Weidlich engaged in several conversations with the parties about his ability to consider aggravation and mitigation factors, including Appellant's background. Major Weidlich indicated during voir dire that he would

base decisions on whether to impose capital punishment on the evidence presented to him, including the aggravating factors like premeditation and suffering as well as sentencing evidence. (JA 520-22). Major Weidlich repeatedly emphasized that how he made a decision on capital punishment would depend on the circumstances of the crime and the evidence presented to him to make a decision. (JA 518-521).[35]

Appellant challenged MAJ Weidlich for cause based on implied bias and an alleged inelastic predisposition on sentencing. (R. at 2297-98). In his challenge, Appellant described MAJ Weidlich as "an automatic vote for death." (R. at 2298). The military judge denied Appellant's challenge, stating:

> While [MAJ Weidlich] believes the death penalty is an option for an egregious crime, and the decision becomes more difficult when children are the victims, he is clearly willing to hear all of the evidence, to include the background of the accused, before making a decision. He could not think of a case in which he would automatically impose the death penalty. While he is willing to consider all the evidence, he cannot say at this point, and is not expected to be able to say, how much weight he would give to any particular evidence. As he said, he cannot hypothesize what he does not know.
>
> Now, in response to the graphic scenario presented by the defense counsel, Major Weidlich said he may start with the death penalty; however, he is not unalterably in favor of the death penalty. And, as he said, he could not think of any case in which he would impose the death penalty.

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[35] In the middle of MAJ Weidlich's individual voir dire, the military judge excused MAJ Weidlich to take up a Government challenge to one of Appellant's death penalty hypotheticals. (JA 508-514).

> In light of all of his answers, it is clear that Major Weidlich has not made up his mind as to an appropriate sentence. And, based on all of his responses, a reasonable person would not conclude that he is biased.

(R. at 2309). The military judge denied Appellant's challenge for cause after considering both the standard for implied bias and the liberal grant mandate. (R. at 2309-10).

The military judge did not err when he declined Appellant's challenge for cause against MAJ Weidlich because an objective, reasonable observer would not believe that MAJ Weidlich's presence on the panel rendered Appellant's court-martail unfair. While Appellant did not challenge MAJ Weidlich for actual bias, the Government again recognizes that R.C.M. 912(f)(1)(N) encompasses both actual and implied bias. *Armstrong*, 54 M.J. at 53. The test for implied bias asks whether, under the totality of the circumstances, "in the eyes of the public the challenged member's circumstances do injury to the 'perception of appearance of fairness in the military justice system.'" *Albaaj*, 65 M.J. at 171 (quoting *United States v. Terry*, 64 M.J. 295, 302 (C.A.A.F. 2007). A panel member's predisposition to impose some punishment is not automatically disqualifying; the question is whether their attitude "is of such a nature that he will not yield to the evidence presented and the judge's instructions." *Rolle*, 53 M.J. at 191. Contrary to Appellant's assertion, MAJ Weidlich displayed no "inelastic disposition" regarding

an appropriate sentence: instead, MAJ Weidlich repeatedly averred that he would wait to hear all of the evidence before deciding on a punishment and that he would "absolutely" hear mitigating and extenuating evidence. (R. at 2175-78, 2180).[36] In fact, MAJ Weidlich specifically indicated his desire to look at "the whole person" before imposing punishment. (R. at 2182). Under the totality of the circumstances, looking at MAJ Weidlich's entire voir dire, the military judge did not err because no reasonable member of the public would believe either that MAJ Weidlich possessed an inelastic attitude towards sentencing or that his presence on the panel undermined the fairness of Appellant's trial.

*3. LTC Watson*

Finally, Appellant argues that the military judge erred when he denied the challenge against LTC Watson on the basis of his experience as a law enforcement officer. (Appellant's Br. 201-02). Appellant notes that LTC Watson served as a police officer and that he had negative experiences with defense counsel in other cases in the past. (JA 378-80). During voir dire, LTC Watson indicated that he had mixed experiences with defense counsel in his work on the police force:

> Q. Did you come in contact with defense attorneys?

[36] While Appellant points to MAJ Weidlich's alleged inability to consider a defendant's background as mitigation, the Government notes that MAJ Weidlich made it clear that he would consider any background information presented to him but also believed that the relevance of that "background" would depend on what it was. (R. at 2180). This is not unreasonable.

> A. Yes.
>
> Q. In general, what was your impression over the years of prosecuting attorneys in general?
>
> A. Good.
>
> Q. Okay. And what was your opinion or what kind of impression was left to you of the defense attorneys that you came in contact with?
>
> A. The ones I came in contact with, some good, some not so good.
>
> Q. Okay. What was it about that that left you with an impression of some of them that wasn't so good? What kind of things were left with you in your mind?
>
> A. When I was an arresting officer and I was the one that was sitting on the stand, the defense -- mainly on DUI cases -- just the way the defense handled officers as witnesses.

(R. at 2004-05). In particular, LTC Watson indicated that he was frustrated "at that time" by instances when he could not enter evidence or when defense counsel questioned his competence. (R. at 2005-06). Lieutenant Colonel Watson also indicated some ambivalence, however, towards fellow police officers; he indicated that his experience "[went] both ways" and that some police officers who seemed credible at first eventually lost his trust. (R. at 2006).

As to LTC Watson's views on the death penalty, he indicated at the outset that he might be more likely to vote for life imprisonment. (R. at 1988). He

indicated that he would have "no problem" waiting until the end of the sentencing case to make a decision about capital punishment. (R. at 1989). Lieutenant Colonel Watson further stated that he did not think the death penalty was the only appropriate sentence for premeditated murder; he indicated that he could "go either way" and that it would "[depend] on the amount of evidence [he'd] seen and the testimony [he'd] heard." (R. at 2011).

Appellant challenged LTC Watson based on his training and experience as a police officer as well as his "negative comments" about defense attorneys. (R. at 2042-44). The military judge denied the challenge for cause, stating:

> Lieutenant Colonel Watson made it very clear that he would not give automatic deference to a police officer.
>
> Lieutenant Colonel Watson may have thought that some defense counsel were good and some were not so good. There is absolutely no evidence he harbors any ill feelings against defense counsel as a whole and absolutely no evidence that he harbors any ill feelings against defense counsel in this case.
>
> Lieutenant Colonel Watson made it very clear he wants to hear all of the evidence before he makes any decision in this case on findings and sentencing, if we get to sentencing.
>
> Lieutenant Colonel Watson was very candid and credible with his responses.
>
> The court has considered the implied bias and, based on Lieutenant Colonel Watson's demeanor in court and his responses, no reasonable person could conclude that he is

> biased against any party in this case. The court has considered the liberal grant mandate. This is not a close call; and, even under that mandate, there is not a basis for a challenge for cause.

(R. at 2053).

The military judge did not err when he declined to excuse LTC Watson for either actual or implied bias. A panel member suffers from actual bias when he or she displays a personal bias that will not yield to the military judge's instructions and the evidence presented at trial. *United States v. Woods*, 74 M.J. 238, 243 (C.A.A.F. 2015). No such bias presents in the record of this case. Lieutenant Colonel Watson neither indicated a personal animus towards Appellant, nor towards his defense counsel. In fact, he viewed defense counsel much as he viewed law enforcement officers: some better than others. As the military judge noted, nothing in LTC Watson's responses during voir dire indicated that he harbored ill feelings towards the defense counsel in Appellant's case nor defense counsel in general. (R. at 2053). Because the record supports this factual finding, the military judge is entitled to deference. *Woods*, 74 M.J. at 243. The military judge did not err when he denied the defense challenge for cause against LTC Watson based on actual bias.

Moreover, the military judge did not abuse his discretion when he declined to grant the defense challenge to LTC Watson for implied bias. Lieutenant Colonel

Watson's presence on the panel did not create "the risk that the public will perceive that the accused received something less than a court of fair, impartial members." *Id.* (citing *United States v. Bagstad*, 68 M.J. 460, 462 (C.A.A.F. 2010)). Under the totality of the circumstances, the theoretical public would see that LTC Watson demonstrated a commitment to hearing all of the evidence and that he intended to judge all witnesses—including police officers—based on the merits and credibility of their testimony. (R. at 2006-07). The record also reflects that LTC Watson had a considered approach towards the death penalty; originally a supporter of the practice, he indicated that he had a change of heart and his vote would depend on the circumstances of the case. (R. at 1987-90). Taking LTC Watson's voir dire as a whole, the public would not perceive that LTC Watson's presence on Appellant's panel affected the fairness of his court-martial. Accordingly, the military judge did not abuse his discretion when he denied Appellant's challenge for cause and this Court should affirm the findings and sentence.

## XII.
## WHETHER THE SIZE OF THE PANEL UNCONSTITUTIONALLY LIMITED APPELLANT'S RIGHT TO CONDUCT VOIR DIRE AND SEAT AN IMPARTIAL PANEL?

This Court has previously rejected the argument that the variable size of the court-martial panel violates the Due Process Clause of the Fifth Amendment, the

Equal Protection Guarantee, and the Eighth Amendment's prohibition on cruel and unusual punishments in *United States v. Curtis*, 32 M.J. 252, 267-68 (C.M.A. 1991), and *United States v. Akbar*, 74 M.J. at 379 ("After careful review, we conclude that a majority of the assigned issues and all of the personally asserted issues do not have merit and therefore warrant no additional discussion").[37]

In *Williams v. Florida,* the Supreme Court held that there was no constitutional requirement for a twelve-person jury in state court proceedings. *Williams v. Florida,* 399 U.S. 78 (1970). "We conclude, in short, as we began: the fact that the jury at common law was composed of precisely 12 is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance 'except to mystics.'" *Id*. (quoting *Duncan v. Louisiana*, 391 U.S. 145, 182 (1968)); *but see Ballew v. Georgia*, 435 U.S. 223 (1978) (holding that a jury of less than six members in state court violates the right to trial by jury guaranteed by the Sixth and Fourteenth Amendments). As the Court made clear in *Williams*:

> It might be suggested that the 12-man jury gives a defendant a greater advantage since he has more "chances" of finding a juror who will insist on acquittal

[37] The defense in *Akbar* alleged the same issue as assignment of error B.VIII. *Akbar,* 74 M.J. at 413. At the time of Appellant's trial, Article 25a, UCMJ, required that general court-martial authorized to adjudge a sentence of death be composed of at least twelve members. The fact that Article 25a, UCMJ, was amended by the Military Justice Act, 10 U.S.C. §825a (2016), to require exactly twelve members for a capital courts-martial is of no consequence in light of this Court's decisions in *Curtis* and *Akbar*.

> and thus prevent conviction. But the advantage might just as easily belong to the State, which also needs only one juror out of twelve insisting on guilt to prevent acquittal.

*Williams,* 399 U.S. at 101.

In his brief, Appellant argues that the "Ace of Hearts" strategy for voir dire creates a dilemma for defense counsel: aggressively voir dire and challenge the members and risk a smaller panel or allow "openly biased" members to sit, thereby increasing the size of the panel and the statistical odds of a "no" vote at one of the critical junctures.[38] (Appellant's Br. 220). Without an allegation of ineffective assistance of counsel, this Court can only speculate as to what, if any, constraints Appellant's counsel felt at trial while conducting voir dire. A review of the record indicates Appellant's counsel did, in fact, pursue a very aggressive and thorough voir dire strategy through the use of the Colorado Method. There is no indication in the record that counsel held back to preserve members, let alone that they allowed openly biased panel members to sit.

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[38] Appellant also misrepresents the "Ace of Hearts" strategy as discussed by Judge Morgan in his concurring opinion in *Simoy*. *United States v. Simoy*, 46 M.J. 592, 625-26 (A.F. Crim. Ct. App. 1996) (Morgan, J., concurring). Appellant claims that the strategy favors seating "openly biased" panel members. (Appellant's Br. 211). However, according to Judge Morgan, even after the most "exacting voir dire," counsel may be left with no more than a "hunch" as to how a panel member feels. *Id.* In such a situation, it is nonsensical to challenge the member or exercise a peremptory challenge where the member will not be replaced. *Id*. Nowhere does Judge Morgan indicate that this strategy favors retention of "openly biased" panel members.

To the extent that there is an advantage to be had by seating more than twelve members, then an accused must weigh against the possibility of retaining potentially biased members in order to increase the statistical chance that one member will dissent at any of the critical stages of voting required to reach the death penalty. There is no constitutional violation where appellant has a strategic choice to make at trial and either result, whether it be twelve members or more than twelve, is constitutionally permissible. Appellant's argument, at its core, is an attack on the military's death penalty system. However, the constitutionality of R.C.M. 1004 and Article 25a, UCMJ, has been litigated and resolved. *Curtis*, 32 M.J. at 269. Accordingly, this assignment of error is without merit.

**XIII.**
**WHETHER THE MILITARY JUDGE ERRED WHEN HE DID NOT CLARIFY THE PROCEDURE FOR VOTING ON A DEATH SENTENCE.**

**<u>Facts</u>**

During sentencing deliberations, the panel members submitted the following question to the military judge:

> If there is one person who votes against the death penalty does that mean that all other votes are for a life sentence? i.e. does this automatically fulfill a confinement for life sentence considering a 3/4 concurrence (understanding para. 3, pg 21 [of the military judge's instructions])?

(App. Ex. 529). During the Article 39(a) session to address the question, the parties discussed whether a formal vote that did not reach death with unanimity would default to a sentence of life without the possibility of parole. Defense counsel asked and answered, "does that mean it automatically fulfills the confinement for life sentence concerning a three-fourths concurrence? And the answer to that is, no." (R. at 7302).

Appellant did not believe there must be a default sentence and requested a reference to the procedures for a hung jury. (R. at 7308). Appellant then requested the military judge ask whether the panel had taken a vote that included the death penalty. The military judge declined to do so in accordance with Mil. R. Evid. 606(b) and the presumption that the court should not invade panel deliberations. (R. at 7308). The military judge ultimately provided the following instructions to the panel:

> You need a required concurrence for any proposed sentence; unanimous for death, three-quarters or 11 votes for a life sentence. If you vote on a proposed sentence or sentences without arriving or reaching the required concurrence, you should repeat the process of discussion, proposal of sentence or sentences, and then voting.

(R. at 7309). The panel deliberated for an additional five hours and 50 minutes before returning with the sentence. (R. at 7311).

**Standard of Review**

This Court reviews de novo an allegation that a military judge erred in instructing the members. *United States v. Behenna*, 71 M.J. 228, 232 (C.A.A.F. 2012).

**Law and Argument**

"In regard to form, a military judge has wide discretion in choosing the instructions to give but has a duty to provide an accurate, complete, and intelligible statement of the law." *Id.* In this case, the military judge's instructions were correct. Appellant asserts that a failure to reach unanimity on the first vote for the death sentence removes death as a lawful sentence. The fundamental flaw in Appellant's argument is his premise that a panel is precluded from revisiting a death sentence. However, this presumption is not supported by the plain language of R.C.M. 1006.

When adopting a sentence a panel must either unanimously vote for death or reach the required three-fourths concurrence for a life sentence. See R.C.M. 1006(d)(4)(A); R.C.M. 1006(d)(4)(B). "All members shall vote… until a sentence is adopted by the concurrence of the number of members required." R.C.M. 1006(d)(3)(A). "This process… may be repeated as necessary until a sentence is adopted." R.C.M. 1006(d)(3)(A). Therefore, there is nothing in R.C.M. 1006 that

prohibits a panel in capital cases from repeating the voting process as necessary until a sentence is adopted.

Furthermore, R.C.M. 1006(d)(5) requires that "When a mandatory minimum is prescribed under Article 118 the members shall vote on a sentence in accordance with this rule." Under R.C.M. 1006(d)(3)(A):

> All members shall vote on each proposed sentence in its entirety beginning with the least severe and continuing, as necessary, with the next least severe, until a sentence is adopted by the concurrence of the number of members required under subsection (d)(4) of this rule. The process of proposing sentences and voting on them *may be repeated* as necessary until a sentence is adopted. (Emphasis added.).

Rules for Courts-Martial 1006(c) states, "the process of proposing sentences and voting on them may be repeated as necessary until a sentence is adopted."

Appellant also asserts that the panel question is clear evidence that the panel took a formal vote within the deliberation room. However, any number of scenarios may have occurred in that deliberation room. They might have conducted a straw poll, which is permissible. *Loving*, 41 M.J. at 235 (citing *United States v. Lawson*, 16 M.J. 38, 41 (C.M.A. 1983)). The panel may have been clarifying confusion created by Appellant when he tried to explain the sentencing procedures

during voir dire.[39] These scenarios are all plausible. Appellant's scenario that a vote was taken is equally speculative. This case is even more ambiguous than *Loving*, where the panel failed to reach a consensus on the death penalty and reengaged in deliberations and the voting process. On appeal, this "revote" was deemed unclear, *i.e.*, whether it was a formal vote or a permissible straw poll. However, this Court refused to pierce the veil to clarify the ambiguity. *Loving,* 41 M.J. at 236. Accordingly, in this instance, this Court should not pierce the veil of the panel's deliberations based solely upon Appellant's assertion that the panel may not have voted properly at the outset. Mil. R. Evid. 509, 606(b).

Even assuming the possibility of error, "members may not be questioned about their deliberations and voting." *Loving*, 41 M.J. at 236 (citing R.C.M.s 922(c) and 1007(c)). The "federal Courts of Appeals have uniformly refused to consider evidence from jurors indicating that the jury ignored or misunderstood instructions in criminal cases." *Id.* (citations omitted). This Court has expressly refused to "carve out an exception [to Mil. R. Evid. 606(b) for military capital cases." *Loving*, 41 M.J. at 238. Appellant merits no relief based upon this alleged error.

[39] In his brief, Appellant cites the voir dire interaction with CPT Eike. (Appellant's Br. 284-85). However, Appellant told CPT Eike that the default to a life sentence was the black letter rule of law. (R. at 2252).

## XIV.
## WHETHER THE PANEL PRESIDENT'S FAILURE TO PROPERLY ANNOUNCE THE AGGRAVATING FACTORS PREVENTS THIS COURT FROM AFFIRMING APPELLANT'S DEATH SENTENCE?

### Law and Argument

The panel president's failure to announce the aggravating factors does not prevent this Court from affirming Appellant's death sentence because the procedural error in this case did not infringe upon Appellant's rights or deprive him of due process. Further, the military judge followed the Rules for Courts-Martial when he reconvened the court to announce the aggravating factors listed on the sentencing worksheet.

#### A. Despite the panel president's failure to announce the aggravating factors, Appellant received the benefit of the fundamental constitutional protections afforded capital defendants at sentencing.

Despite the panel president's failure to announce the aggravating factors in Appellant's case, this Court should affirm Appellant's sentence because this omission did not deprive Appellant of due process. In *United States v. Matthews*, 16 M.J. 354, 369-70 (C.A.A.F 1983), this Court examined the capital punishment procedure in the military justice system vis-à-vis Supreme Court precedent on the procedural safeguards necessary to satisfy the Eighth Amendment. This Court found that the Eighth Amendment requires the panel to establish "aggravating

circumstances" upon which to base their capital sentence; the aggravating circumstances "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant." *Id.* at 375 (citing *Zant v. Stephens*, 462 U.S. 862, 877 (1983)). This ensures that the panel engages in an individualized examination of each case and each defendant in order to arrive at a capital sentence and prevents the arbitrary and capricious application of the death penalty. *Id.*[40] In *Matthews*, this Court listed five features of constitutionally-sound capital sentencing procedure: (1) bifurcated sentencing; (2) the identification of specific aggravating circumstances to the sentencing authority; (3) specific findings on the aggravating circumstances; (4) an unrestricted opportunity to present mitigating and extenuating evidence; and (5) mandatory appellate review. *Id.* at 377. Here, the Government identified its aggravating factors at arraignment, the military judge properly incorporated the aggravating factors into his sentencing instructions, and the panel correctly completed the sentencing worksheet in accordance with those instructions. (App. Ex.'s 3, 515, 516) (JA 1215-1239). This satisfied both the *Matthews* criteria and

[40] Quoting *California v. Ramos*, 463 U.S. 993, 999 (1983), this Court noted that, "[in] ensuring that the death penalty is not meted out arbitrarily or capriciously, the [Supreme Court's] principal concern has been more with the *procedure* by which the State imposes the death sentence than with the substantive factors the State lays before the jury as a basis for imposing death." *Id.*

provided the appellate court with an appropriate record on which to evaluate Appellant's case.[41] Therefore, despite the panel president's omission of the aggravating factors in his announcement of the sentence, this Court should affirm Appellant's sentence because this error did not undermine the constitutionality of the sentencing procedure in Appellant's case.

B. The technical violation of R.C.M. 1004(b)(8) does not invalidate Appellant's death sentence.

This Court should affirm Appellant's sentence because R.C.M. 1004 does not demand that an appellate court set aside a capital sentence based on a panel president's failure to announce aggravating factors on the record. Rule for Court-Martial 1004(b)(8) states that the president of the panel "shall… announce which aggravating factors under subsection (c) of this rule were found by the members." R.C.M. 1004(b)(8). Appellant argues that because the rule uses the word "shall,"

[41] As the Army Court noted, "[a]bsent the requirement to announce aggravating factors, we would be unable to determine compliance with the third requirement and, therefore, unable to fulfill our duty under the fifth; we would be unable to assess whether the sentencing authority 'made an individualized determination on the basis of the character of the individual and circumstances of the crime' and whether they have 'adequately differentiate[d] this case in an objective, evenhanded, and substantively rational way'" from other cases. *Hennis*, 75 M.J. at 850. Because the convening authority, trial counsel, military judge, and panel substantially complied with the requirement to present and find aggravating factors, Appellant's case adequately reflects those criteria and provides this Court with a substantial record from which to determine that Appellant "received the benefit of the fundamental protections described in *Matthews*." *Id.*

the panel president's failure to announce the aggravating factors listed on the sentencing worksheet created a fatal procedural defect. (Appellant's Br. 225-226). He also argues that the trial court could not correct this omission in a later session because that session "upwardly corrected" Appellant's sentence. (Appellant's Br. 224). This Court should not accept either argument.

1. *Appellant's court-martial sentencing procedure complied with this Court's precedent in Matthews because the panel made specific findings with respect to the aggravating factors.*

Appellant argues that *Matthews* stands for the proposition that the failure to *announce* aggravating factors invalidates a capital sentence. (Appellant's Br. 226). In *Matthews*, this Court addressed a case wherein the Government charged the appellant with premeditated murder in violation of Article 118, UCMJ, but the panel did not make any findings with respect to aggravating circumstances on the record. *Matthews*, 16 M.J. at 379-80. The Government argued that the appellate courts could infer aggravation from the panel's conviction for premeditation, but this Court disagreed because "the lack of specific findings of identified aggravating circumstances [made] meaningful appellate review… impossible." *Id.* at 380. Absent specific findings, this Court held that it could not determine whether the panel imposed its capital sentence correctly and constitutionally. *Id. Matthews* thus reflects this Court's concern with the constitutional imperative to make *findings* as

to aggravating factors and the need for a record that ensures meaningful appellate review.

In this case, the panel made the findings required by *Matthews* regardless of whether they read those findings into the record. To that end, the panel found that Appellant committed three premeditated murders in violation of Article 118, UCMJ; that Appellant murdered Katie Eastburn while committing the offense of rape; and that Appellant preceded his premeditated murder of Katie, Kara, and Erin Eastburn by intentionally inflicting substantial pain and suffering. (App. Ex. 515). The sentencing worksheets in this case bear the signatures of all of the panel members on each page. (App. Ex. 515). The panel specifically noted its finding that the aforementioned aggravating factors outweighed the evidence in extenuation and mitigation and disclaimed any improper basis for sentencing Appellant to death. (App. Ex. 515). These specific findings on the aggravating factors provide this Court with precisely the record it lacked in *Matthews*—whether the panel erred when it announced the sentence has no bearing on this Court's ability to conduct its mandatory review.

2. *The announcement of the aggravating factors in Appellant's case did not increase or revise his sentence.*

Appellant also challenges his sentence based on the military judge's decision to reopen the proceedings and have the panel president read the sentencing

worksheet into the record. The Rules for Court-Martial provide that the court may correct the erroneous announcement of a sentence "at any time prior to action by the convening authority." R.C.M. 1007. The rule does not permit the upward adjustment of the sentence reached by the sentencing authority; it merely allows the court-martial to correct the announcement of the sentence on the record. *See United States v. Jones*, 34 M.J. 270, 271-72 (C.M.A. 1992) (citing *United States v. Baker*, 32 M.J. 290 (C.M.A. 1991) and Article 60, UCMJ). In this case, Appellant suggests that the reopening of his court-martial to read the aggravating factors upwardly adjusted his sentence: the death sentence announced by the panel was "incomplete" under R.C.M. 1004(b)(8) and therefore never attached because they did not comply with the rule. Appellant cites to R.C.M. 1004(b)(8) and its imperative language to support his argument; however, he does not provide any authority for why the court-martial could not correct this announcement under R.C.M. 1007 when R.C.M. 1004(b)(8) clearly contemplates R.C.M. 1007 in its entirety.[42] Certainly, had the panel failed to make findings with respect to the aggravating factors, the trial court could not correct the erroneous announcement;

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[42] "If death is adjudged, the president shall, *in addition to complying with R.C.M. 1007*, announce which aggravating factors under subsection (c) were found by the members."

the failure to *make* adequate findings would pose an entirely different problem that could not be corrected by either R.C.M. 1007 or R.C.M. 1009.

This case presents no such error. The panel members in Appellant's case completed their deliberations and made use of the sentencing worksheet as required by the military judge's instructions. (App. Ex. 515). On that sentencing worksheet, the members voted on and attested to their findings regarding the aggravating factors. (App. Ex. 515). The military judge examined the sentencing worksheet and found it to be in proper form. (R. at 7312). When the panel president announced the sentence, he read page 5 of the sentencing worksheet, but not pages 1-4. (App. Ex. 515). (R. at 7312-7313). Two hours later, the military judge reconvened the court and asked the panel president to read pages 1-4 of the sentencing worksheet on the record. (R. at 7315). Accordingly, the panel members in this case found the required aggravating factors and the president announced those factors on the record. Because the panel did not redeliberate and because the court-martial followed the procedures of R.C.M. 1007, this Court should not find that the reading of the aggravating factors at a later proceeding revised or increased Appellant's sentence.

## XV.
## WHETHER APPELLANT'S COURT-MARTIAL VIOLATED ARTICLE 44(a), UCMJ?

Appellee addresses this assignment of error in conjunction with assignment of error IV, *supra*.

## XVI.
## WHETHER APPELLATE DEFENSE COUNSEL DEPRIVED APPELLANT OF HIS RIGHT TO EFFECTIVE ASSISTANCE?

### Standard of Review

This Court reviews an appellate defense counsel's effectiveness de novo as a question of law. *United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002).

### Law and Argument

An appellant is entitled to the effective assistance of appellate counsel. *United States v. Adams*, 59 M.J. 367, 370 (C.A.A.F. 2004). This Court uses the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), to analyze claims of ineffective assistance of appellate counsel. *Id*. Appellant bears the burden to demonstrate that appellate counsel's performance was "so deficient that it fell below an objective standard of reasonableness." *Id*. (citing *Strickland*, 466 U.S. at 688. An appellant bears a heavy burden to demonstrate deficiency in light of a strong presumption that counsel's performance was competent. *Id*. at n.5;

*United States v. Garcia*, 59 M.J. 447 (C.A.A.F. 2004). Appellant must also demonstrate that "'counsel's errors were so serious as to deprive the [appellant] of a fair [appellate proceeding] . . . whose result is reliable." *Id*. (quoting *Strickland*, 466 U.S. at 687). This Court need not determine whether appellate counsel's performance was deficient before examining whether appellant suffered prejudice as a result of counsel's alleged deficient performance. *Id*. at 370-371.

This Court should reject Appellant's assertion that his appellate counsel were ineffective for failing to further investigate the allegation in Walter Cline's affidavit that JC, the Eastburn's babysitter, had blood on her clothes on the night of the Eastburn murders and that JC's mother cleaned the bloody clothes and wiped blood off of the floors and walls at the Eastburn residence because he cannot satisfy the test for ineffective assistance of counsel under *Strickland v. Washington*. (Appellant's Br. 238-240). Appellant's bases his claim on the assertion that his appellate counsel had a duty to "conduct a thorough and independent investigation relating to issues of guilt and sentencing" in accordance with the American Bar Association (ABA) Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (2003) [hereinafter ABA Guidelines]. However, this argument fails because the ABA Guidelines are not binding upon military counsel. While the Supreme Court has recognized that the ABA Guidelines are useful "guides" to determining effective assistance of counsel, they are not "inexorable

commands," and military courts have declined to adopt the ABA Guidelines to military practice. *Bobby v. Van Hook*, 558 U.S. 4, 7-8 (2009); *Loving*, 41 M.J. at 237-38.

Moreover, the ABA Guidelines and its commentary suggest that appellate defense counsel must conduct an *independent* investigation–not a brand new investigation from scratch. ABA Guidelines, Guideline 10.15, commentary at 1085-1086. The rationale underlying the Commentary–that the record likely presents an incomplete picture–does not apply in this case. Appellant fails to state why the information obtained by his defense counsel through the assistance of his civilian investigator at trial, Mr. TV O'Malley, or the law enforcement investigation is insufficient for his current investigative purposes. Appellant fails to identify what investigative leads must be pursued, what witnesses they must interview, and that trial defense counsel or law enforcement either failed to pursue those leads or interview these witnesses. To the contrary, law enforcement considered JC a suspect. JC and her mother, AC, were repeatedly interviewed by law enforcement authorities. (JA 1996, 2003-2015).

The question under *Strickland* is whether counsels' investigative choices were reasonable based on the circumstances presented to them. *United States v. Tharpe*, 38 M.J. 8, 15 (C.M.A. 1993) ("[On appeal] [t]he question is whether trial defense counsel made a valid tactical decision, given the information and options

available… This is not a new trial on the merits smuggled into the appellate process."); *Siripongs v. Calderon*, 133 F.3d 732, 736 (9th Cir. 1998). In this case, Appellant's defense counsel interviewed JC and requested her as a defense witness to establish the possibility that one of JC's alleged drug dealer associates murdered the victims.[43] (JA 1996, R. at 1446-1465). Despite the defense attempts to suggest that JC was somehow implicated in Appellant's offenses, there was no evidence that JC was at the Eastburn home at the time of the murders.[44] In fact, defense counsel conceded that JC was not in the Eastburn home at the time Kathryn, Kara, and Erin Eastburn were slaughtered. (R. at 1460). In light of defense's concession, the lack of any forensic evidence implicating JC in the Eastburn murders, and any information indicating that the previous defense and law enforcement investigation were defective, Appellant cannot establish that his appellate defense counsel's failure to further investigate JC was defective.

Even if this Court finds that appellate defense counsel were defective for failing to investigate, Appellant was not prejudiced because his counsel are not precluded from continuing to investigate the claims in the Walter Cline affidavit,

[43] At the time of Appellant's trial, JC was known as JB. (R. at 1446). JC is referenced throughout this brief consistent with Appellant's brief.
[44] JC was excluded as the contributor of hair and latent fingerprints found at the Eastburn home. (Record of Trial Volume 26, p. 247, 250-252).

despite having nearly four years to do so[45] and raising additional allegations of error arising out of that investigation through collateral review, such as a writ of error *coram nobis*. Furthermore, in light of the strength of the Government's case, including the eyewitness testimony placing Appellant at the Eastburn home around the time of the murders and the presence of Appellant's semen in Kathryn Eastburn, Appellant has not demonstrated that additional investigation would have resulted in a favorable outcome in the proceeding. Accordingly, this assignment of error is without merit.

## XVII.
## WHETHER DENYING APPELLANT THE POSSIBILITY OF LIFE WITHOUT PAROLE VIOLATES THE FIFTH AND EIGHTH AMENDMENTS?

This Court should not find that the court-martial denied Appellant the possibility of a sentence to life without parole in violation of the Fifth and Eighth Amendments because Appellant's counsel argued against the instruction on the possibility of parole. (R. at 7209). As Appellant notes in his brief, the panel members questioned whether Appellant might receive parole. (JA 2057). The military judge asked both counsel their position on the matter in an Article 39(a) session. (R. at 7209). During that hearing, the Government argued that "it would be

[45] Walter Cline's affidavit was produced on August 10, 2016.

appropriate to inform [the panel] that there is a possibility of parole based on the law that is applicable to this case." (R. at 7210). Both Appellant's civilian defense counsel and individual military counsel opposed this instruction, stating that the Government "[invited] error" and that "[it's] clearly inappropriate in this circumstance to advise, period, about parole." (R. at 7210). Appellant's counsel went on to argue that "[to] bring in parole is highly prejudicial" as parole is a "collateral issue." (R. at 7211). After a recess, the military judge indicated that he intended to tell the panel "life means life" and reiterate the instruction he had already given the members. (R. at 7223). Appellant's individual military counsel responded, "No objection from defense." (R. at 7223).

While Appellant cites to the record and suggests that his counsel requested the parole instruction, this citation is inaccurate. Looking to the record, the citation comes from a discussion between counsel and the military judge regarding whether the "life is life" instruction sufficed to answer the members' question. (R. at 7229-31). During that discussion, trial counsel argued for an additional instruction on parole; Appellant's counsel disagreed and argued against further instruction. (R. at 7233-34). Appellant's counsel stated that he believed the military judge gave an appropriate instruction:

> Your Honor, I'd go back to the bottom line and the bottom line is that you've given an accurate answer to the panel. Life is life. We've avoided the speculation that comes that

> we talked about yesterday [sic]. I can revisit that argument, and I don't think I need to, to the court about what all the basic parole wickets are, how parole functions, and whether they need a witness to explain parole and the likelihood of parole in this type of case. *All of that is unnecessary because of the very clear instruction you gave them, which is life is life*. It allows them to go back and deliberate. It allows them to fairly allow—or excuse me—to arrive at a sentence and allows them to do their job.

(R. at 7245, 7250) (emphasis added). Appellant's counsel later argued that giving additional instruction on the possibility of parole or the distinction between life with and without parole would violate the Eighth Amendment and undermine the certainty of the trial result. (R. at 7254, 7258-59). In accordance with Appellant's request, the military judge declined to give further instructions on the possibility of parole. (R. at 7279).

In light of the complete record, the military judge honored Appellant's request that the members *not* receive further instruction on the possibility of parole. Accordingly, the issue presented to this Court has no merit.

## XVIII.
## WHETHER THE POWER TO COURT-MARTIAL A MILITARY RETIREE VIOLATES THE FIFTH AMENDMENT?

Appellant's court-martial does not offend the Fifth Amendment because retired enlisted members remain members of the "land and naval forces" subject to the UCMJ under Article 2(a)(4). *United States v. Dinger*, 76 M.J. 552, 557 (N.M.

Ct. Crim. App. 2017) ("Notwithstanding *Barker* and its implications regarding the tax status of retired pay, we are firmly convinced that those in a retired status remain 'members' of the land and Naval forces who may face court-martial."), *aff'd*, 77 M.J. at 453. None of the authorities cited by Appellant undermine the constitutionality of the Army's exercise of jurisdiction over his court-martial. Accordingly, this Court should affirm the findings and sentence in this case.

**XIX.**
**WHETHER THE DEATH SENTENCE IN THIS CASE VIOLATES THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS OF THE CONSTITUTION?**

This Court should find this assignment of error to be without merit based upon its opinions in *Curtis* and *Akbar*. See *Curtis,* 32 M.J. at 267-68 ("[W]e are not convinced that a court-martial must have 12 members in a capital case when this is not required in any other type of trial"); *see also Akbar*, 74 M.J. at 379 ("After careful review, we conclude that a majority of the assigned issues and all of the personally asserted issues do not have merit and therefore warrant no additional discussion").[46] Here, pursuant to Article 25a, UCMJ, Appellant's court-martial was required to have a minimum of twelve panel members. *See* National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 582(a), 115 Stat.

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[46] The defense in *Akbar* alleged the same issue as assignment of error B.IX. *Akbar,* 74 M.J. at 413.

1012, 1124 (2001) (enacting Article 25a, UCMJ, which requires a capital trial panel of "not less than 12" members). Consequently, Appellant is not entitled to relief.

## XX.
## WHETHER THE USE OF R.C.M. 802 SESSIONS DEPRIVED APPELLANT OF HIS RIGHT TO BE PRESENT AT EVERY PHASE OF TRIAL?

While Appellant alleges that the use of sessions convened under R.C.M. 802 violated his rights, he does not allege that the military judge or other members of the court-martial failed to comply with R.C.M. 802's requirement to announce such conferences on the record. (Appellant's Br. 243). This Court should not grant relief where Appellant does not attempt to show error. *See Center for Constitutional Rights v. Lind*, 954 F. Supp. 2d 289 (D. Md. 2013) ("Certainly, R.C.M. 802 requires that, if substantive matters are resolved in an R.C.M. 802 conference, the resolution of the issue must be placed on the record. But, plaintiffs have not made an adequate evidentiary showing that R.C.M. 802 has not been followed.").

## XXI.
## WHETHER THE PANEL ASSEMBLED IN THIS CASE VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO A FAIR TRIAL?

The Sixth Amendment requirement of a trial by jury composed of a "fair cross section of the community" does not apply to trial by courts-martial. *Loving*,

41 M.J. at 285 (citing *Ex Parte Quirin*, 317 U.S. 1, 39-41 (1942); *Ex Parte Milligan*, 71 U.S. 2, 137-38 (1966)). Appellant's assignment of error on these grounds merits no relief.

**XXII.**
**WHETHER THE SELECTION OF PANEL MEMBERS BY THE CONVENING AUTHORITY VIOLATED APPELLANT'S FIFTH, SIXTH, AND EIGHTH AMENDMENT RIGHTS?**

This Court rejected a substantially similar claim in *Curtis*, 44 M.J. at 130-133, and the same claim in *Akbar*, 74 M.J. at 379 ("After careful review, we conclude that a majority of the assigned issues and all of the personally asserted issues do not have merit and therefore warrant no additional discussion").[47] Accordingly, Appellant's claim on this assignment of error lacks merit.

**XXIII.**
**WHETHER THE PRESIDENT EXCEEDED HIS ARTICLE 36 POWERS WHEN HE GRANTED TRIAL COUNSEL A PEREMPTORY CHALLENGE?**

This Court rejected this claim in *Curtis*, 44 M.J. at 130-133, and in *Akbar*, 74 M.J. at 379 ("After careful review, we conclude that a majority of the assigned issues and all of the personally asserted issues do not have merit and therefore

[47] The defense in *Akbar* alleged the same issue as assignment of error C.IV. *Akbar*, 74 M.J. at 414.

warrant no additional discussion").[48] Accordingly, Appellant's claim for this assignment of error lacks merit.

**XXIV.**
**WHETHER THE PEREMPTORY CHALLENGE PROCEDURE IN A CAPITAL CASE VIOLATES THE FIFTH AND EIGHTH AMENDMENTS?**

This Court has routinely rejected the argument concerning the constitutionality of the Government's use of peremptory challenges to remove a member whose moral bias against the death penalty does not justify a challenge for cause. *Loving,* 41 M.J. at 294-95; *Curtis*, 44 M.J. at 131-133; *Gray*, 51 M.J. at 33-35; *Akbar*, 74 M.J. at 407. Rule for Courts-Martial 912(g) specifically authorizes one peremptory challenge by the prosecution and one by the defense. As the court noted in *Loving,* "The Supreme Court has refused to strike down the peremptory challenge process." *Id.* at 294-95 (citing *Batson v. Kentucky*, 476 U.S. 79, 98-99 (1986). Furthermore, this Court has held that "[a]s a matter of law, trial counsel [is] entitled to challenge for cause a member who was likely, because of moral bias against the death penalty, to be unable 'to give meaningful consideration to imposing a death penalty.'" *Loving*, 41 M.J. at 295 (quoting *United States v.*

[48] The defense in *Akbar* alleged the same issue as assignment of error C.V. *Akbar,* 74 M.J. at 414.

*Curtis*, 33 M.J. 101, 107 (C.M.A. 1991) (citations omitted). Therefore, Appellant is not entitled to relief.

### XXV.
### WHETHER THE DESIGNATION OF A PRESIDING OFFICE DENIED APPELLANT A FAIR TRIAL IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS?

Consistent with the Army Court's opinion, this Court should resolve this issue against Appellant consistent with *Gray*, 51 M.J. at 58.

### XXVI.
### WHETHER APPELLANT'S INABILITY TO POLL THE MEMBERS AT EACH STAGE OF TRIAL VIOLATED HIS FIFTH, SIXTH, AND EIGHTH AMENDMENT RIGHTS?

R.C.M. 1007(c) directly prohibits polling members regarding their deliberations and voting. In accordance with *Gray*, this Court should not grant Appellant's requested relief based on this issue. *Gray*, 51 M.J. at 60-61.

### XXVII.
### WHETHER THE STATUTES PROHIBITING UNPREMEDITATED AND PREMEDITATED MURDER CREATE DIFFERENTIAL TREATMENT IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS?

This Court has already resolved the distinction between premeditated and unpremeditated murder in the capital context. *See Gray*, 51 M.J. at 56 (citing

*Loving*, 41 M.J. at 279-80; *United States v. Teeter*, 16 M.J. 68, 71-72 (1983)). Accordingly, Appellant's appeal on this issue must fail.

## XXVIII.
## WHETHER APPELLANT'S TRIAL DEPRIVED HIM OF HIS FIFTH AND SIXTH AMENDMENT RIGHTS TO TRIAL BY JURY?

This Court previously rejected this claim based on the express language of the Fifth Amendment. *Loving*, 41 M.J. at 296-97 ("The Fifth Amendment expressly excludes 'cases arising in the land or naval forces' from the requirement for indictment by grand jury"); *Curtis*, 44 M.J. at 130; *Gray*, 51 M.J. at 48; *Akbar*, 74 M.J. at 379 ("After careful review, we conclude that a majority of the assigned issues and all of the personally asserted issues do not have merit and therefore warrant no additional discussion").[49] Appellant offers no legal authority or factual matter to distinguish his case. Although the Fifth Amendment expressly excludes the requirement of a grand-jury indictment in courts-martial, Article 32 of the UCMJ "grants rights to the accused greater than he or she would have before a civilian grand jury" *Curtis,* 44 M.J. at 130. Accordingly, Appellant's claim is without merit.

[49] The defense in *Akbar* alleged the same issue as assignment of error C.IX. *Akbar*, 74 M.J. at 414.

**XXIX.**
**WHETHER THE STRUCTURE OF MILITARY APPELLATE REVIEW DENIES APPELLANT EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE FIFTH AMENDMENT?**

This Court should resolve this issue against Appellant in accordance with *Loving*, 41 M.J. at 296. Further, Appellant may seek additional review of his case from the Supreme Court under Article 67a, UCMJ.

**XXX.**
**WHETHER ARMY REGULATION 15-130 VIOLATES APPELLANT'S FIFTH AMENDMENT RIGHTS?**

This Court rejected a similar challenge in *Akbar*. *Akbar*, 74 M.J. at 379 ("After careful review, we conclude that a majority of the assigned issues and all of the personally asserted issues do not have merit and therefore warrant no additional discussion").[50] Appellant cites no authority to support his proposition that AR 15-130, Army Clemency and Parole Board (October 23, 1998), violates his Fifth Amendment rights. Accordingly, this assignment of error is without merit.

[50] The defense in *Akbar* alleged the same issue as assignment of error C.XV. *Akbar,* 74 M.J. at 415-416.

## XXXI.
## WHETHER THE DEATH SENTENCE IN THIS CASE VIOLATES THE EIGHTH AMENDMENT BECAUSE THE CAPITAL REFERRAL SYSTEM OPERATES IN AN "ARBITRARY" AND "CAPRICIOUS" MANNER?

This Court specifically rejected this argument in *Loving*. *Loving*, 41 M.J. at 293-94 (relying on *Gregg v. Georgia*, 428 U.S. 153 (1976)); *see also Akbar*, 74 M.J. at 379 ("After careful review, we conclude that a majority of the assigned issues and all of the personally asserted issues do not have merit and therefore warrant no additional discussion").[51] Accordingly, this assignment of error lacks merit.

## XXXII.
## WHETHER THE DEATH PENALTY PROVISION OF ARTICLE 118, UCMJ, IS UNCONSTITUTIONAL?

This Court should resolve this issue against Appellant in accordance with its decision on a similar issue in *Loving*, 41 M.J. at 293. *See also United States v. Schafer*, 32 C.M.R. 83, 85-86 (1962).

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[51] The defense in *Akbar* alleged the same issue as assignment of error C.XVI. *Akbar,* 74 M.J. at 416.

## XXXIII.
## WHETHER THE DEATH SENTENCE IN THIS CASE VIOLATES THE FIFTH AND EIGHTH AMENDMENT BECAUSE THE CONVENING AUTHORITY HAS NOT DEMONSTRATED HOW THE DEATH SENTENCE WOULD ENHANCE GOOD ORDER AND DISCIPLINE?

This Court rejected this claim in *Akbar*, 74 M.J. at 379 ("After careful review, we conclude that a majority of the assigned issues and all of the personally asserted issues do not have merit and therefore warrant no additional discussion").[52] There is nothing in the plain language of Article 55, UCMJ, that requires a showing that any court-martial punishment must enhance good order and discipline in order to be valid. Additionally, consistent with the legal principles articulated in *Loving*, the military judge instructed the panel members regarding the "five principal reasons for the punishment of those who violate the law, [including] preservation of good order and discipline in the military." (JA 1216); s*ee Loving*, 41 M.J. at 268-69 (finding that good order and disciple is a relevant sentencing principle). Accordingly, this assignment of error is without merit.

[52] The defense in *Akbar* alleged this same headnote pleading as assignment of error C.XVIII. Akbar, 74 M.J. at 416.

## XXXIV.
## WHETHER THE COURT-MARTIAL CAPITAL SENTENCING PROCEDURE IS UNCONSTITUTIONAL?

This error merits no relief in accordance with this Court's decision on a similar issue in *Loving*, 41 M.J. at 297.

## XXXV.
## WHETHER THE APPLICATION OF THE DEATH PENALTY IN THE MILITARY VIOLATES THE EIGHTH AMENDMENT?

This Court rejected this same claim in *Curtis*, 32 M.J. at 257-270 (finding that R.C.M 1004 complies with the constitution) and *Akbar*, 74 M.J. at 379 ("After careful review, we conclude that a majority of the assigned issues and all of the personally asserted issues do not have merit and therefore warrant no additional discussion").[53] Since Appellant offers no legal authority or factual matter to distinguish his case, this assignment of error lacks merit.

[53] The defense in *Akbar* alleged this same headnote pleading as assignment of error C.XX. *Akbar*, 74 M.J. at 416.

## XXXVI.
## WHETHER THE DEATH PENALTY COMPORTS WITH CURRENT EIGHTH AMENDMENT JURISPRUDENCE?

The Supreme Court last declined an opportunity to revisit the constitutionality of the death penalty in 2015. *Glossip v. Gross*, 135 S. Ct. 2726, 2733 (2015) ("[B]ecause it is settled that capital punishment is constitutional, '[it] necessarily follows that there must be a [constitutional means of carrying it out].'"). This Court decided a similar issue against the appellant in *Akbar*, 74 M.J. at 379 ("After careful review, we conclude that a majority of the assigned issues and all of the personally asserted issues do not have merit and therefore warrant no additional discussion."). Appellant provides this Court with no authority warranting relief on this principle of law; therefore, this Court should affirm the sentence.

## XXXVII.
## WHETHER R.C.M. 1209 AND THE MILITARY DEATH PENALTY SYSTEM DENY DUE PROCESS AND CONSTITUTE CRUEL AND UNUNUSAL PUNISHMENT BECAUSE THEY PROVIDE NO EXCEPTION FOR ACTUAL INNOCENCE?

This Court rejected this claim in *Akbar*, 74 M.J. at 379 ("After careful review, we conclude that a majority of the assigned issues and all of the personally asserted issues do not have merit and therefore warrant no additional

discussion”).[54] Appellant provides no authority demonstrating that there is a legal requirement for an appellate system to have an exception to the finality of direct appellate review for claims of actual innocence.

Furthermore, Appellant has an avenue of judicial review for any claim of actual innocence. *See Triestman v. United States*, 124 F.3d 361, 378-379 (2d Cir. 1997) (“[W]e find that serious Eighth Amendment and due process questions would arise with respect to the AEDPA if we were to conclude that, by amending [28 U.S.C.] § 2255, Congress had denied Triestman the right to collateral review in this case.”]. While Appellant’s case is pending finality under Article 76, UCMJ, Appellant can raise a claim of actual innocence through collateral habeas review within the military justice system. *See Loving*, 62 M.J. at 240-46. Appellant may also seek collateral habeas review within Article III courts after finality under Article 76, UCMJ. *United States* v. *Loving*, 68 M.J. 1, 23-24 (C.A.A.F. 2009) (Ryan, J., dissenting) (describing authority of Article III Courts to consider collateral writs of habeas corpus). Accordingly, this assignment of error lacks merit.

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[54] The defense in *Akbar* alleged this same headnote pleading as assignment of error C.XXII. *Akbar*, 74 M.J. at 416.

**XXXVIII.**
**WHETHER THE MILITARY JUDGE ERRED BY ADMITTING CRIME SCENE PHOTOGRAPHS AND VICTIM FAMILY PHOTOGRAPHS?**

Appellant's challenge to his conviction based on the admission of crime scene photos should fail because "it cannot seriously be argued that [the crime scene and family] photographs were admitted only to inflame or shock this court-martial." *Akbar*, 74 M.J. at 407 (citing *Gray*, 51 M.J. at 35). This assignment of error merits no relief.

**XXXIX.**
**WHETHER THE DEATH SENTENCE IN THIS CASE VIOLATES THE EX POST FACTO CLAUSE, THE FIFTH AND EIGHTH AMENDMENTS, THE SEPARATION OF POWERS DOCTRINE, THE PREEMPTION DOCTRINE, AND ARTICLE 55, UCMJ?**

This Court rejected this claim in *Akbar*. *See Akbar*, 74 M.J. at 379 ("After careful review, we conclude that a majority of the assigned issues and all of the personally asserted issues do not have merit and therefore warrant no additional discussion").[55] Appellant fails to cite any support for the proposition that at the time of sentencing, the Government is required to designate the manner and location of Appellant's execution. (Appellant's Br. 249). However, per Army

[55] The defense in *Akbar* alleged this same headnote pleading as assignment of error C.XXVI. *Akbar*, 74 M.J. at. 417.

regulation at the time of Appellant's sentencing, military executions will be by lethal injection and take place at the United States Disciplinary Barracks, Fort Leavenworth, Kansas. AR 190-55, U.S. Army Corrections System: Procedures for Military Executions, paras. 3-1, 3-2 (Jan. 17, 2006). Accordingly, this assignment of error is without merit.

## XL. WHETHER THE DELAY BETWEEN SENTENCE AND EXECUTION IN THE MILITARY SYSTEM VIOLATES THE EIGHTH AMENDMNT?

Appellant cites no controlling authority for the proposition that the delay between the announcement of a death sentence and the execution of that sentence constitutes a violation of the Eighth Amendment prohibition on cruel and unusual punishment. The Supreme Court last declined an opportunity to address the constitutionality of the death penalty—and the delay between sentencing and execution—in *Glossip*, *supra*, 135 S. Ct. at 2749 (Scalia, J., concurring). Further, Appellant's cited authority for his position no longer constitutes good law. *Jones v. Chappell*, 31 F. Supp. 3d 1050 (C.D. Cal. Jul. 16, 2014), *rev'd sub nom Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015) ("We and other courts previously have rejected a foundation of Petitioner's proposed rule—that delay in resolving post-conviction proceedings has constitutional significance."). Accordingly, this Court should not grant relief on this assignment of error.

## CONCLUSION

**WHEREFORE**, the United States prays that this Court affirms the findings and sentence.

ALLISON L. ROWLEY
Captain, Judge Advocate
Appellate Attorney, Government Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0773
Allison.l.rowley.mil@mail.mil
U.S.C.A.A.F. Bar No. 36904

CATHARINE M. PARNELL
Major, Judge Advocate
Branch Chief, Government Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road, Room 2016
Fort Belvoir, VA 22060
(703) 693-0793
Catharine.m.parnell.mil@mail.mil
U.S.C.A.A.F. Bar No. 36827

ERIC K. STAFFORD
Lieutenant Colonel, Jude Advocate
Deputy Chief, Government Appellate Division
U.S. Army. Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0747
**Eric.k.stafford.mil@mail.mil**
U.S.C.A.A.F. Bar No. 36897

STEVEN P. HAIGHT
Colonel, Judge Advocate
Chief, Government Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0746
Steven.p.haight.mil@mail.mil
U.S.C.A.A.F. Bar No 36151

## CERTIFICATE OF COMPLIANCE

1. This brief does not comply with the type-volume limitation of Rule 21(b). Please see corresponding Motion for Leave to File Brief in Excess of Page Limit.

2. This brief complies with the typeface and type style requirements of Rule 37 because: This brief has been typewritten in 14-point font with proportional, Times New Roman typeface using Microsoft Word Version 2013.

CATHARINE M. PARNELL
Major, Judge Advocate
Attorney for Appellee
June 3, 2019

## CERTIFICATE OF FILING AND SERVICE

I certify that the original was filed electronically with the Court at efiling@armfor.uscourts.gov on this 3rd day of June, 2019 and contemporaneously served electronically and via hard copy on appellate defense counsel.

Angela Rididck

ANGELA RIDDICK
Paralegal Specialist
Government Appellate Division
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0822