IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. **NIDAL M. HASAN** Major (O-4) United States Army, Appellant	BRIEF ON BEHALF OF APPELLANT (FINAL COPY) Crim. App. Dkt. No. 20130781 USCA Dkt. No. 21-0193/AR

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

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TABLE OF CONTENTS

ISSUES PRESENTED **1**
PART A: SECTION I **1**
PART A: SECTION II **2**
PART A: SECTION III **2**
PART A: SECTION IV **3**
INTRODUCTION **3**
STATEMENT OF STATUTORY JURISDICTION **8**
STATEMENT OF THE CASE **8**
STATEMENT OF FACTS **8**
A. The shooting **8**
B. Appellant's pretrial offers to plead guilty are rejected **9**
C. Appellant goes *pro se* **11**
D. The defense of others: the conflict emerges **14**
E. Appellant vacillates on *pro se* **16**
F. The courthouse is set **18**
G. The trial **21**
1. Panel selection 21
2. The courtroom closes on the heels of appellant's opening 27
3. Trial resumes 32
H. The legal and quasi-judicial officers connected with this case **33**
1. The Staff Judge Advocate and rater of the Army Court 33
2. The convening authority 37

PART A: SECTION I **40**

ISSUE PRESENTED I **40**

WHETHER THE MILITARY JUDGE ERRED IN ALLOWING APPELLANT TO REPRESENT HIMSELF BECAUSE APPELLANT'S WAIVER OF COUNSEL WAS NOT VOLUNTARY OR KNOWING AND INTELLIGENT? **40**

SUMMARY OF ARGUMENT **40**

STANDARD OF REVIEW **41**

LAW **41**

A. The right to counsel and client autonomy under *McCoy* **41**

B. Waiving counsel **45**

ARGUMENT **48**

ISSUE PRESENTED II **51**

WHETHER THE TOTAL CLOSURE OF THE COURT OVER APPELLANT'S OBJECTION VIOLATED HIS RIGHT TO A PUBLIC TRIAL? **51**

SUMMARY OF ARGUMENT **51**

STANDARD OF REVIEW **51**

LAW **52**

A. Constitutional right to a public trial **52**

1. Waller v. Georgia 53
2. When *Waller* applies 55
3. The overriding interest under *Waller* 57
4. Reasonable alternatives under *Waller* 60

B. R.C.M. 806: the regulatory right to a public trial **61**

C. Prejudice Analysis: Structural Error **61**

ARGUMENT **62**

A. Appellant's constitutional right to a public trial was violated **62**

1. The right to a public trial applies 62

2. The closure was unjustified 64
3. The error is structural 67
B. Appellant's regulatory right to a public trial was violated 67
ISSUE PRESENTED III 68
WHETHER THE MILITARY JUDGE ERRED BY FAILING TO DISQUALIFY LIEUTENANT COLONEL GARWOLD AS A PANEL MEMBER? 68
SUMMARY OF ARGUMENT 68
STANDARD OF REVIEW 68
LAW 69
ARGUMENT 74
A. There was error: Lieutenant Colonel Garwold should have been disqualified as a panel member 74
1. Lieutenant Colonel Garwold held actual bias 74
2. There was implied bias 77
B. The error was plain and obvious 80
C. The error materially prejudiced a substantial right 84
ISSUE PRESENTED IV 84
WHETHER ARTICLE 45(B)'S PROHIBITION AGAINST GUILTY PLEAS TO CAPITAL OFFENSES IS CONSTITUTIONAL? 84
SUMMARY OF ARGUMENT 84
LAW 85
A. The Guilty Plea 85
1. Historical backdrop 85
2. Contemporary practice 88
3. Article 45(b), UCMJ 91
B. The right of autonomy under the sixth amendment 91
1. *Faretta* and its application to plea decisions 91

2. *McCoy*: the "right of autonomy" to maintain innocence or concede guilt 95

ARGUMENT 97

A. Article 45(b)'s prohibition on guilty pleas to capital offenses is an impermissible restriction on a competent accused's right of autonomy to make his defense 97

B. The denial of appellant's pleas was structural error 99

ISSUE PRESENTED V 100

ASSUMING ARGUENDO THAT ARTICLE 45(B) IS CONSTITUTIONAL, WHETHER ITS APPLICATION IN THIS CASE NONETHELESS CONSTITUTED REVERSIBLE ERROR. 100

SUMMARY OF ARGUMENT 100

STANDARD OF REVIEW 101

A. Article 45, UCMJ 101

B. Principals of statutory analysis 103

ARGUMENT 105

A. *Dock* was wrongly decided 105

1. The plain language of Article 45(b) does not prohibit a court from accepting de facto guilty pleas to an offense for which the death penalty may be adjudged 105

a. A "plea of guilty" is not ambiguous 105

b. Permitting *de facto* guilty pleas to capital offenses does not produce an absurd result 108

2. To the extent it is even necessary, resort to the legislative history and other canons of construction confirms the plain meaning result 109

a. Legislative history 109

b. The doctrine of constitutional avoidance 111

B. *Stare Decisis* should not apply 112

C. The wholesale deprivation of appellant's *right* to plead guilty to these offenses resulted in reversible error 114

PART A: SECTION II 116

ISSUE PRESENTED VI 116

WHETHER THE PROSECUTOR'S SENTENCING ARGUMENT IMPERMISSIBILY INVITED THE PANEL TO MAKE ITS DETERMINATION ON CAPRICE AND EMOTION? 116

SUMMARY OF ARGUMENT 116

STANDARD OF REVIEW 116

ADDITIONAL FACTS 117

A. Private FV's pregnancy 117

B. The government's war-themed argument that culminated in the call to use emotion for those who departed "our formation" 120

LAW 121

ARGUMENT 125

A. Repeated and gratuitous references to Private FV's pregnancy was deliberate and prejudicial misconduct 125

B. The government impermissibly called upon members to use their emotions for the victims who departed "our" formation – "we are taking his life" 128

ISSUE PRESENTED VII 130

WHETHER THE CONTINUED FORCIBLE SHAVING OF APPELLANT IS PUNISHMENT IN EXCESS OF THE SENTENCE HE RECEIVED AT HIS COURT-MARTIAL AND VIOLATED ARTICLE 55 AND THE EIGHTH AMENDMENT? 130

SUMMARY OF ARGUMENT 130

STANDARD OF REVIEW 131

ADDITIONAL STATEMENT OF FACTS 132

LAW 137

ARGUMENT 143

ISSUE PRESENTED VIII 147

WHETHER APPELLANT WAS DEPRIVED HIS RIGHT TO COUNSEL DURING POST-TRIAL PROCESSING? 147

SUMMARY OF ARGUMENT 147

STANDARD OF REVIEW 148

ADDITIONAL FACTS 148

LAW AND ARGUMENT 149

PART A: SECTION III 152

ISSUE PRESENTED IX 152

WHETHER THEN-COLONEL STUART RISCH WAS DISQUALIFIED FROM PARTICIPATING ON THIS CASE AS THE STAFF JUDGE ADVOCATE? 152

SUMMARY OF ARGUMENT 152

STANDARD OF REVIEW 152

LAW 153

ARGUMENT 156

A. Colonel Risch was disqualified from participating in this case: a reasonable person would impute to him a personal interest in the outcome of the litigation 156

B. Prejudice 159

ISSUE PRESENTED X 161

WHETHER THE JUDGES OF THE ARMY COURT OF CRIMINAL APPEALS SHOULD HAVE BEEN RECUSED BECAUSE THEY WERE SUPERVISED BY THEN-MAJOR GENERAL STUART RISCH WHILE HIS ERROR AS THE STAFF JUDGE ADVOCATE WAS PENDING LITIGATION BEFORE THEM? 161

STANDARD OF REVIEW 161

LAW 161

ARGUMENT 163

ISSUE PRESENTED XI 166

WHETHER THE CONVENING AUTHORITY WAS DISQUALIFIED TO PERFORM THE POST-TRIAL REVIEW OF APPELLANT'S CASE AFTER AWARDING PURPLE HEART MEDALS TO THE VICTIMS OF APPELLANT'S OFFENSES? 166

STANDARD OF REVIEW **166**
LAW **166**
ARGUMENT **168**
PART A: SECTION IV **171**
PART B: SYSTEMIC ISSUES **173**

TABLE OF AUTHORITIES

U.S. CONSTITUTION

Article I, Section 9, Clause 3 180
Article III, §3.....87
U.S. Const. amend. VI 41, 52, 175, 176
U.S. Const. amend. VIII..... passim

STATUTES

10 U.S.C. § 845 (1968) 107
10 U.S.C. § 866 (2020) 8
10 U.S.C. § 949a 173
10 U.S.C. §801 153
10 U.S.C. §845 (2012) 91, 102
10 U.S.C. §860.....167
10 U.S.C.S. § 1129a..... 39, 169
18 U.S.C. § 2245 173
2 Stat. 112, 119 §30 (1790).....87
42 U.S.C. §2000bb..... 130, 137
National Defense Authorization Act for Fiscal Year 2013, Pub L. No. 112-239, 126 Stat. 1632 (2013).....38
National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-328 (Dec. 2016) 91

MANUAL FOR COURTS-MARTIAL

Article 118, UCMJ..... 8, 178
Article 138, UCMJ.....143
Article 25, UCMJ..... 72, 79
Article 34, UCMJ.....35
Article 39, UCMJ.....67
Article 45, UCMJ..... passim
Article 55, UCMJ..... passim
Article 60, UCMJ.....167
Article 66, UCMJ..... 8, 131, 143
Article 67, UCMJ..... 8, 132
Article 80, UCMJ.....8

MCM, ¶70a (1951).....110
MCM, ¶70a (1968).....110
MCM, ¶70a (1969).....110
MCM, pt. IV (2008).....108
R.C.M. 1001.....179
R.C.M. 1004.....173
R.C.M. 104.....160
R.C.M. 1107.....167
R.C.M. 201.....175
R.C.M. 706..... 14, 171
R.C.M. 806..... 51, 61, 67
R.C.M. 902..... 161, 162
R.C.M. 910..... 91, 114
R.C.M. 912..... 70, 81

SUPREME COURT OF THE UNITED STATES

Adams v. United States ex rel. McCann, 317 U.S. 269 (1942).....86
Apprendi v. New Jersey, 530 U.S. 466 (2000).....88
Barnhart v. Sigmon Coal Co., 534 U.S. 438 (2001).....105
Batson v. Kentucky, 476 U.S. 79 (1986).....172
Blades v. United States, 141 S. Ct. 165 (2020).....60
Boykin v. Alabama, 395 U.S. 238 (1969) 106
Brady v. United States, 397 U.S. 742 (1970)..... 89, 90
Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) 139
Caldwell v. Mississippi, 472 U.S. 320 (1985) 83
California v. Brown, 475 U.S. 1301 (1986).....121
Conn. Nat'l Bank v. Germain, 530 U.S. 249 (1992) 103
Cooper v. Aaron, 358 U.S. 1 (1958).....177
Corbitt v. New Jersey, 439 U.S. 212 (1978).....98
Crane v. Kentucky, 476 U.S. 683 (1986).....111
Cutter v. Wilkinson, 544 U.S. 709 (2005).....138
Duncan v. Louisiana, 391 U.S. 145 (1968) 52
Duren v. Missouri, 439 U.S. 357 (1979) 176
Edwards v. Indiana, 554 U.S. 164 (2008) 45
Estes v. Texas, 381 U.S. 532 (1965) 52, 63
Evans v. United States, 504 U.S. 255 (1992).....104
Faretta v. California, 422 U.S. 806 (1975) ..... passim
Florida v. Nixon, 543 U.S. 175 (2004) 90, 98
Gannett Co. v. DePasquale, 443 U.S. 368 (1979)..... 52, 63

Gardner v. Florida, 430 U.S. 349 (1977) 121
Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) 52
Godinez v. Moran, 509 U.S. 389 (1993) 89
Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A., 530 U.S. 1 (2000) 103
Herring v. New York, 422 U.S. 853 (1975) 112
Holt v. Hobbs, 135 S. Ct. 853 (2015) ..... passim
In Re Oliver, 333 U.S. 257 (1948) 53
Iowa v. Tovar, 541 U.S. 77 (2004) 150
Irvin v. Dowd, 366 U.S. 717 (1961) ..... passim
Johnson v. Zerbst, 304 U.S. 458 (1938) 45
Jones v. Barnes, 463 U.S. 745 (1983) 41, 89, 99
Jones v. United States, 527 U.S. 373 (1999) 171
Kercheval v. United States, 274 U.S. 220 (1927) 106
Lafler v. Cooper, 566 U.S. 156 (2012) 88
Lankford v. Idaho, 500 U.S. 110 (1991) 121
Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847 (1988) 162, 163
Lockett v. Ohio, 438 U.S. 586 (1978) 121
Marbury v. Madison, 5 U.S. 137 (1803) 177
Martinez v. Court of Appeal of Cal. Fourth Appellate Dist., 528 U.S. 152 (2000) 45, 151
McCleskey v. Kemp, 481 U.S. 279 (1987) 174
McCoy v. Louisiana, 138 S Ct. 1500 (2018) ..... passim
McDonough Power Equip. v. Greenwood, 464 U.S. 548 (1984) 73, 77
McKaskle v. Wiggins, 465 U.S. 168 (1984) 63, 95
Molzof v. United States, 502 U.S. 301 (1992) 104
Monge v. California, 524 U.S. 721 (1998) 121
Neder v. United States, 527 U.S. 1 (1999) 61
Office of Workers' Compensation Programs v. Greenwich Collieries, 512 U.S. 267 (1994) 104, 106
Old Chief v. United States, 519 U.S. 172 (1997) 125
Patterson v. Illinois, 487 U.S. 285 (1988) 45, 46, 150
Penson v. Ohio, 488 U.S. 75 (1988) 41, 152
Presley v. Georgia, 558 U.S. 209 (2010) ..... passim
Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) 52, 57
Press-Enterprise Co. v. Superior Ct. California, 464 U.S. 501 (1984) ..... passim
Reynolds v. United States, 98 U.S. 145 (1878) 71
Richmond Newspapers, Inc., v. Virginia, 448 U.S. 555 (1980) 53
Ring v. Arizona, 536 U.S. 584 (2002) 173
Robers v. United States, 572 U.S. 639 (2014) 104, 108

Rock v. Arkansas, 483 U.S. 44 (1987) 112
Schriro v. Landrigan, 550 U.S. 465 (2007) 45
Skilling v. United States, 561 U.S. 358 (2010) 73
Solorio v. United States, 483 U.S. 435 (1987) 177
Strickland v. Washington, 466 U.S. 668 (1984) 121
Taylor v. United States, 495 U.S. 575 (1990) 104
United States Nat'l Bank of Ore. v. Independent Ins. Agents of America, Inc., 508 U.S. 439 (1993) 104
United States v. Frazier, 335 U.S. 497 (1948) 82, 83
United States v. Gaudin, 515 U.S. 506 (1995) 114
United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) 61
United States v. Jackson, 390 U.S. 570 (1968) 88, 90, 91
Waller v. Georgia, 467 U.S. 39 (1984) ..... passim
Weaver v. Massachusetts, 137 S. Ct. 1899 (2017) ..... passim
Woodson v. North Carolina, 428 U.S. 280 (1976) 83
Young v. UPS, 575 U.S. 206 (2015) 104, 107
Zant v. Stephens, 462 U.S. 862 (1983) 83

COURT OF APPEALS FOR THE ARMED FORCES / COURT OF MILITARY APPEALS

Brookins v. Cullins, 49 C.M.R. 5 (U.S. C.M.A. 1974) 154, 155, 158
EV v. United States, 75 M.J. 331 (C.A.A.F. 2016) 103
Hasan v. Gross, 71 M.J. 416 (C.A.A.F. 2012) 130
United State v. Jackson, 3 M.J. 153 (C.M.A. 1977) 155, 157
United States v Butler, 20 USCMA 247, 43 CMR 87 (1971) 100
United States v. Ai, 49 M.J. 1 (C.A.A.F. 1998) 68
United States v. Akbar, 74 M.J. 364 (C.A.A.F. 2015) 74, 79
United States v. Albaaj¸ 65 M.J. 167 (C.A.A.F. 2007) 72, 73, 76
United States v. Andrews, 77 M.J. 393 (C.A.A.F. 2018) 112, 113, 116
United States v. Baer, 53 M.J. 235 (C.A.A.F. 2000) 122, 124, 126
United States v. Bagstad, 68 M.J. 460 (C.A.A.F. 2010) 71
United States v. Bannwarth, 36 M.J. 265 (C.M.A. 1993) 68
United States v. Blanks, 77 M.J. 239 (C.A.A.F. 2018) 112
United States v. Bowie, 21 M.J. 453 (C.M.A. 1986) 45
United States v. Boyce, 76 M.J. 242 (C.A.A.F. 2017) 161
United States v. Boyett, 42 M.J. 150 (C.A.A.F. 1995) 112
United States v. Bungert, 62 M.J. 346 (C.A.A.F. 2006) 69, 116
United States v. Burton, 67 M.J. 150 (C.A.A.F. 2009) 81
United States v. Calley, 48 C.M.R. 19 (1973) 74

United States v. Carter, 61 M.J. 30 (C.A.A.F. 2005) 124, 127
United States v. Claxton, 32 M.J. 159 (C.M.A. 1991) 165
United States v. Cole, 31 M.J. 270 (C.A.A.F. 1990) 164
United States v. Collins, 6 M.J. 256 (C.M.A. 1979) 158
United States v. Commisso, 76 M.J. 315 (C.A.A.F. 2017) 69
United States v. Corcoran, 17 M.J. 137 (C.M.A. 1984) 153
United States v. Crossley, 10 M.J. 376 (C.M.A. 1981) 156
United States v. Curtis, 44 M.J. 106 (C.A.A.F. 1996) 174, 176, 177
United States v. Czachorowski, 66 M.J. 432 (C.A.A.F. 2008) 82
United States v. Dale, 42 M.J. 384 (C.A.A.F. 1995) 80
United States v. Daulton, 45 M.J. 212 (C.A.A.F. 1996) 80
United States v. Davis, 58 M.J. 100 (C.A.A.F. 2003) ..... passim
United States v. Deain, 17 C.M.R. 44 (C.M.A. 1954) 71
United States v. Dock, 28 M.J. 117 (C.M.A. 1989) ..... passim
United States v. Dresen, 47 M.J. 122 (C.A.A.F. 1997) 167
United States v. Elfayoumi, 66 M.J. 354 (C.A.A.F. 2008) 81
United States v. Erby, 54 M.J. 476 (C.A.A.F. 2001) 132, 143, 144
United States v. Falcon, 65 M.J. 386 (C.A.A.F. 2008) 112
United States v. Fernandez, 24 M.J. 77 (C.M.A. 1987) 167
United States v. Fletcher, 62 M.J. 175 (C.A.A.F. 2005) 122, 123
United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011) 114
United States v. Frey, 73 M.J. 245 (C.A.A.F. 2014) 122, 124
United States v. Fry, 23 C.M.R. 146 (1957) 74, 76
United States v. Gay, 75 M.J. 264 (C.A.A.F. 2016) 132
United States v. Glenn, 25 M.J. 278 (C.M.A. 1987) 69
United States v. Gomez, 76 M.J. 76 (C.A.A.F. 2017) 81
United States v. Gordon, 2 C.M.R. 161 (C.M.A. 1952) 153, 154, 155, 159
United States v. Groce, 3 M.J. 369 (CM.A. 1977) 70
United States v. Grunden, 2 M.J. 116 (C.M.A. 1977) ..... passim
United States v. Gudmundson, 57 M.J. 493 (C.A.A.F. 2002) 41
United States v. Guinn, 81 M.J. 195 (C.A.A.F. 2021) 131
United States v. Halpin, 71 M.J. 477 (C.A.A.F. 2013) 124
United States v. Hamilton, 41 M.J. 32 (C.A.A.F. 1994) 160
United States v. Hershey, 20 M.J. 433 (C.M.A. 1985) 52, 58, 65
United States v. Hill, 75 M.J. 350 (C.A.A.F. 2016) 98
United States v. Hilow, 32 M.J. 439 (C.M.A. 1991) 160
United States v. Horn, 9 M.J. 429 (C.M.A. 1980) 123
United States v. Jessie, 79 M.J. 437 (C.A.A.F. 2020) 143
United States v. Jeter, 35 M.J. 442 (C.M.A. 1992) 153, 156
United States v. Kelly, 77 M.J. 404 (C.A.A.F. 2018) 164, 165

United States v. Knickerbocker, 2 M.J. 128 (C.M.A. 1977).....112
United States v. Knight, 53 M.J. 340 (C.A.A.F. 2000).....149
United States v. Kohlbeck, 78 M.J. 326 (C.A.A.F. 2019)..... 101, 111
United States v. LaGrange, 3 C.M.R. 76 (U.S. C.M.A. 1952).....153
United States v. Lake, 36 M.J. 317 (C.M.A. 1993) 70
United States v. Lovett, 63 M.J. 211 (C.A.A.F. 2006).....143
United States v. Loving, 41 M.J. 213 (C.A.A.F. 1994)..... 174, 177, 178
United States v. Lucas, 1 C.M.R. 19 (C.M.A. 1951).....106
United States v. Mack, 41 M.J. 51 (C.M.A. 1994) 73
United States v. Marsh, 70 M.J. 101 (C.A.A.F. 2011) 122
United States v. Martinez, 70 M.J. 157 (C.A.A.F. 2011) 162
United States v. Maynard, 66 M.J. 242 (C.A.A.F. 2008).....81
United States v. McFadden, 74 M.J. 87 (C.A.A.F. 2015) 81, 82, 83
United States v. McFarlane, 23 C.M.R 320 (1957)..... 102, 172
United States v. McIlwain, 66 M.J. 312 (C.A.A.F. 2008) 161, 163
United States v. McPherson, 81 M.J. 372 (C.A.A.F. 2021) 105
United States v. Minyard, 46 M.J. 229 (C.A.A.F. 1997).....70
United States v. Mitchell, 39 M.J. 131 (C.M.A. 1994)..... 162, 163
United States v. Modesto, 43 M.J. 315 (C.A.A.F. 1995)..... 69, 73
United States v. Moran, 65 M.J. 178 (C.A.A.F. 2007)..... 68, 69, 116
United States v. Nash, 71 M.J. 83 (C.A.A.F. 2012) 70, 75
United States v. New, 55 M.J. 95 (C.A.A.F. 2001)..... 70, 71, 75
United States v. Nix,. 40 M.J. 6 (C.M.A. 1994)..... 155, 156, 159, 160
United States v. Ortiz, 66 M.J. 334 (C.A.A.F. 2008) 51, 58, 59, 62
United States v. Palenius, 2 M.J. 86 (C.M.A. 1977) 149, 150, 151
United States v. Paul, 73 M.J. 274 (C.A.A.F. 2014) 37, 39
United States v. Paulin, 6 M.J. 38 (C.M.A. 1978)..... 74, 76
United States v. Pena, 64 M.J. 259 (C.A.A.F. 2007) 143
United States v. Peters, 74 M.J. 31 (C.A.A.F. 2015) 71
United States v. Phillips, 52 M.J. 268 (C.A.A.F. 2000) 113
United States v. Quick, 74 M.J. 332 (C.A.A.F. 2015)..... 112, 114
United States v. Resch, 65 M.J. 233 (C.A.A.F. 2007).....108
United States v. Reynolds, 24 M.J. 261 (C.M.A. 1987).....158
United States v. Richardson, 61 M.J. 113 (C.A.A.F. 2005) 84
United States v. Riesbeck, 77 M.J. 154 (C.A.A.F. 2018) 160
United States v. Roane, 43 M.J. 93 (C.A.A.F. 1995) 99
United States v. Rockwood, 52 M.J. 98 (C.A.A.F. 1999).....71
United States v. Rogers, 75 M.J. 270 (C.A.A.F. 2016) 71
United States v. Rosenthal, 62 M.J. 261 (C.A.A.F. 2005)..... 41, 148
United States v. Schell, 72 M.J. 339 (C.A.A.F. 2013).....103

United States v. Schroder, 65 M.J. 49 (C.A.A.F. 2007) 122
United States v. Scott, 51 M.J. 326 (C.A.A.F. 1999) 149
United States v. Solis, 46 M.J. 31 (C.A.A.F. 1997) 109, 110
United States v. Stirling, 75 M.J. 407 (C.A.A.F. 2016) 137
United States v. Strand, 59 M.J. 455 (C.A.A.F. 2004) 68, 70, 82
United States v. Taylor, 60 M.J. 190 (C.A.A.F. 2004) 167, 168
United States v. Terry, 64 M.J. 295 (C.A.A.F. 2007) 69
United States v. Townsend, 65 M.J. 460 (C.A.A.F. 2008) 71
United States v. Tucker, 76 M.J. 257 (C.A.A.F. 2017) 112
United States v. Uribe, 80 M.J. 442 (C.A.A.F. 2021) 162
United States v. Valencia, 4 C.M.R. 7 (1952) 81
United States v. Voorhees, 50 M.J. 494 (C.A.A.F. 1999) 155
United States v. Watruba, 35 M.J. 488 (C.M.A. 1992) 106, 108
United States v. White, 54 M.J. 469 (C.A.A.F. 2001) 132, 143
United States v. Wiesen, 56 M.J. 172 (C.A.A.F. 2001) 69
United States v. Woods, 74 M.J. 238 (C.A.A.F. 2016) ..... passim
United States v. Wright, 52 M.J. 136 (C.A.A.F. 1999) 161, 166

SERVICE COURTS OF CRIMINAL APPEALS

Hasan v. United States, 2021 CCA LEXIS 114 (A. Ct. Crim. App. Mar. 15, 2021) 8
United States v. Thomas, 43 M.J. 550 (N-M. Ct. Crim. App. 1995). 178
United States v. Cooper, 28 M.J. 810 (A.C.M.R. 1989) 160
United States v. Dock, 26 M.J. 620 (A.C.M.R. 1988) 102, 103
United States v. Gordon, 2 C.M.R. 322 (A.B.R. 1952) 81
United States v. Hasan, 80 M.J. 682 (A. Ct. Crim. App. Dec. 11, 2020). 8, 156, 157
United States v. Hayes, 24 M.J. 786 (A.C.M.R. 1987) 158
United States v. Hines, 75 M.J. 734 (Army Ct. Crim. App. 2016) 72
United States v. Hutchins, 2018 CCA LEXIS 31 (N-M. Ct. Crim. App. 2018) 163
United States v. Klawuhn, 33 M.J. 941 (A.F. Ct. Crim. App. 1991) 158
United States v. Loving, 34 M.J. 956 (A.C.M.R. 1992) 178
United States v. Merriweather, 22 M.J. 657 (A.C.M.R. 1986) 125
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Boria v. Keane, 99 F.3d 492 (2nd Cir. 1996) 89
Brown v. Artuz, 283 F.3d 492 (2nd Cir. 2002) 59, 60
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Duckett v. Mullin, 306 F.3d 982 (10th Cir. 2002) 124, 127
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United States v. Marble, 940 F.2d 1543 (D.C. Cir. 1991) 93, 96, 98
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IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. **NIDAL M. HASAN** Major (O-4) United States Army, Appellant	BRIEF ON BEHALF OF APPELLANT (FINAL COPY) Crim. App. Dkt. No. 20130781 USCA Dkt. No. 21-0193/AR

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

ISSUES PRESENTED

Part A: Section I

I.
WHETHER THE MILITARY JUDGE ERRED IN ALLOWING APPELLANT TO REPRESENT HIMSELF BECAUSE APPELLANT'S WAIVER OF COUNSEL WAS NOT VOLUNTARY OR KNOWING AND INTELLIGENT?

II.
WHETHER THE TOTAL CLOSURE OF THE COURT OVER APPELLANT'S OBJECTION VIOLATED HIS RIGHT TO A PUBLIC TRIAL?

III.
WHETHER THE MILITARY JUDGE ERRED BY FAILING TO DISQUALIFY LIEUTENANT COLONEL GARWOLD AS A PANEL MEMBER?

IV.

WHETHER ARTICLE 45(b)'S PROHIBITION AGAINST GUILTY PLEAS TO CAPITAL OFFENSES IS CONSTITUTIONAL?

V.

ASSUMING ARGUENDO THAT ARTICLE 45(b) IS CONSTITUTIONAL, WHETHER ITS APPLICATION IN THIS CASE NONETHELESS CONSTITUTED REVERSIBLE ERROR.

Part A: Section II

VI.

WHETHER THE PROSECUTOR'S SENTENCING ARGUMENT IMPERMISSIBILY INVITED THE PANEL TO MAKE ITS DETERMINATION ON CAPRICE AND EMOTION?

VII.

WHETHER THE CONTINUED FORCIBLE SHAVING OF APPELLANT IS PUNISHMENT IN EXCESS OF THE SENTENCE HE RECEIVED AT HIS COURT-MARTIAL AND VIOLATED ARTICLE 55 AND THE EIGHTH AMENDMENT?

VIII.

WHETHER APPELLANT WAS DEPRIVED HIS RIGHT TO COUNSEL DURING POST-TRIAL PROCESSING?

Part A: Section III

IX.

WHETHER THEN-COLONEL STUART RISCH WAS DISQUALIFIED FROM PARTICIPATING ON THIS CASE AS THE STAFF JUDGE ADVOCATE?

X.

WHETHER THE JUDGES OF THE ARMY COURT OF CRIMINAL APPEALS SHOULD HAVE BEEN RECUSED BECAUSE THEY WERE SUPERVISED BY THEN-MAJOR GENERAL STUART RISCH WHILE HIS ERROR AS THE STAFF JUDGE ADVOCATE WAS PENDING LITIGATION BEFORE THEM?

XI.

WHETHER THE CONVENING AUTHORITY WAS DISQUALIFIED TO PERFORM THE POST-TRIAL REVIEW OF APPELLANT'S CASE AFTER AWARDING PURPLE HEART MEDALS TO THE VICTIMS OF APPELLANT'S OFFENSES?

Part A: Section IV

See below for issues previously raised at the Army Court.

Introduction

The true test of any justice system is whether it can dispassionately apply the law in the same way for an accused convicted of the most heinous offense as it would for one charged with a petty crime. Appellant killed thirteen people and attempted to kill many more in what was described as "the worst terrorist attack since 9/11." There can be no hiding from these facts, but neither can we ignore the deprivation of rights in this capital case. Appellant originally offered to plead guilty, but his pleas were rejected; later convinced of his innocence, and despite his debilitating injuries, appellant proceeded to trial *pro se* solely because of an

irreconcilable conflict over fundamental trial objectives; later undermined by that same counsel in a standby capacity, appellant was forced to litigate their impropriety in secret; and appellant was ultimately convicted and sentenced to death by the vote of at least one panel member whose bias was indisputable. This case is our justice system's test.

This brief proceeds in two parts. Part A discusses case specific issues. Part B identifies systemic issues that have been raised in previous cases.

Part A is further broken down into four sections. Section I lays out five structural trial errors in this case. First, appellant's waiver of counsel was involuntary. The record plainly reveals why appellant wanted to proceed *pro se*: his counsel intended to put on a defense that would have conceded guilt, and while he originally wanted to plead guilty, by that point, appellant wanted to maintain his innocence. Therefore, he confronted a constitutionally repugnant choice: go to trial with counsel whose "strategy" overrides his fundamental trial objective or go it alone. In this respect, his actions were not truly voluntary, and the military judge, who should have been surely aware of this impasse, failed to make the appropriate inquiry.

Second, appellant was denied his right to a public trial. Over appellant's objection, the military judge closed the court *during trial* after standby counsel moved to have the court rescind its order for them to provide assistance.

Importantly, in moving the court, standby counsel engaged in an impropriety – they appended their mitigation case to the motion and filed it publicly without appellant's informed consent to demonstrate that he was seeking the death penalty. While the military judge closed the court to preserve appellant's confidentiality, there was no confidentiality left to protect – appellant explicitly (and continually) waived it in order to openly address counsels' accusations. What's more, no confidential matters were discussed during the closed session. The closure was error under *Waller v. Georgia*, 467 U.S. 39 (1984).

Third, the military judge failed to excuse Lieutenant Colonel (LTC) Keith Garwold, whose bias was indisputable. Specifically, LTC Garwold (who extraordinarily submitted, unsolicited, a second panel member questionnaire, about which he was never questioned during voir dire) admitted to already holding an opinion on this case, and, among other facts, was "personally affected" by the shootings, repeatedly doubted his objectivity, and personally believed appellant, as someone who was accused of shooting fellow service members, "should not be given the same rights as other criminal defendants."

Fourth, it was error to deny appellant's guilty plea to capital offenses. While appellant eventually went to trial maintaining his innocence, he initially desired to plead guilty and offered to do so. In accordance with Article 45(b), Uniform Code of Military Justice (UCMJ), which prohibited guilty pleas to capital offense, his

offers were rejected. This was error in light of the Supreme Court's recent decision in *McCoy v. Louisiana* announcing a constitutionally "protected autonomy right" to maintain innocence or concede guilt, 138 S Ct. 1500, 1505, 1511 (2018), and under *McCoy*, the violation was "complete" when the court rejected his pleas, regardless of whether appellant later altered course.

Fifth, and relatedly, even if it was not error to reject appellant's pleas to *capital* offenses, it was nonetheless error to extend Article 45(b)'s prohibition to appellant's alternative plea offers to unpremeditated murder – a *noncapital* offense – on the basis that these pleas would have been the "functional equivalent" of a capital guilty plea. While the military judge correctly decided her ruling was controlled by *United States v. Dock*, which held that, for the purposes of Article 45(b), a plea is determined by the trial record's "four corners," 28 M.J. 117, 119 (C.M.A. 1989), *Dock* was wrongly decided. The *Dock* decision was a wholly unjustified departure from the rules of statutory interpretation, and it placed capital defendants who wanted to admit guilt, like appellant, in a trilemma: contest, remain silent, or non-comply with Article 45. This Court must overturn *Dock*.

Section II of Part A identifies three other errors occurring in this case: improper argument, deprivation of counsel in post-trial, and post-trial punishment.

Section III of Part A lays out the errors relating to the perception issues in the processing of appellant's case. An officer that the staff judge advocate (SJA)

supervised was among appellant's targets in the shooting. That same SJA rendered advice in this case. This was error. By the time this case reached appeal, the appellate judges who affirmed appellant's death sentence were supervised by that same disqualified SJA, but the judges refused to disqualify themselves. This was error. And the convening authority who approved appellant's death sentence – his "best hope for sentence relief" – was the same official that had previously awarded the victims of the offense Purple Hearts and publicly praised their bravery and "paid tribute to their sacrifice." This was error. Taking into account the biased panel member, bias, or an appearance of bias, occurred at *every* stage of this capital case – pretrial, trial, post-trial, and appeal, and in every single instance could have been easily avoided by appropriate recusal or excusal.

Section IV identifies case specific issues without argument. Part B identifies systemic issues without argument.

"One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure." *Irvin v. Dowd*, 366 U.S. 717, 729 (1961) (Frankfurter, J., concurring). The military justice failed to ensure those safeguards here. The errors warrant reversal.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice (UCMJ, 10 U.S.C. § 866 (2020). This Honorable Court has jurisdiction over this matter under Article 67(a)(1), UCMJ.

Statement of the Case

On August 28, 2013, a panel of officers sitting as a general court-martial convicted MAJ Hasan, appellant, of thirteen specifications of premeditated murder and thirty-two specifications of attempted murder in violation of Articles 118 and 80, UCMJ, respectively. (JA 775). The panel sentenced appellant to be put to death. (JA 798). The convening authority approved the sentence. (JA 59-65).

On December 11, 2020, the Army Court affirmed the findings and sentence. *United States v. Hasan*, 80 M.J. 682 (A. Ct. Crim. App. Dec. 11, 2020) (JA 1-48). On March 15, 2021, it reaffirmed its decision. *Hasan v. United States*, 2021 CCA LEXIS 114 (A. Ct. Crim. App. Mar. 15, 2021) (JA 49-50).

This Court docketed this case on March 23, 2021.

Statement of Facts

A. The shooting

On November 5, 2009, appellant entered the Soldier Readiness Processing (SRP) center on Fort Hood, shouted "Allahu Akbar," and opened fire, killing

thirteen individuals and wounding thirty-one more. (JA 720-22, 766). Police responded to the scene, and after an exchange of gun fire, appellant was apprehended. (JA 768-69).

Charges were preferred three days after the shootings. (JA 51-58). On July 6, 2011, following a pretrial investigation, the charges were referred capital based on the recommendations of the Investigating Officer (IO), the special court-martial convening authority (SPCMCA), and the staff judge advocate (SJA), Colonel (COL) Stuart Risch. (JA 179-82).

B. <u>Appellant's pretrial offers to plead guilty are rejected</u>

Only a few months after referral, on January 20, 2012, appellant offered to plead guilty. (JA 1020-26). According to appellant, following the shooting, he was "told by representatives of the Muslim community that [his] alleged actions went against the teachings of Islam because [he] broke his oath of office." (JA 435). For that reason alone, he offered to plead guilty. (JA 435).

His proffers included alternative pleas to unpremeditated murder and attempted unpremeditated murder as to The Charge and The Additional Charge, respectively. (JA 279-81).

The military judge rejected appellant's guilty pleas *in toto*. (JA 281). Regarding appellant's attempted plea to the offenses as charged, the military judge ruled that his plea was "contrary to Article 45(b) and […] not legally permissible,"

(JA 280), thus prohibiting a military court from "receiving a plea of guilty for which the death penalty may be adjudged." *See* Article 45(b), UCMJ (2012).

With respect to appellant's attempts to plead guilty to the lesser included offenses of unpremeditated murder and attempted unpremeditated murder, the military judge ruled that Article 45(b) similarly prohibited those pleas. (JA 282). Relying on *United States v. Dock*, 28 M.J. 117 (C.M.A. 1989), (JA 281, 303), she reasoned:

> If the government did not put on any additional evidence beyond the accused's plea, could the accused be found guilty of a capital offense under Article [118], subparagraph one? Strictly speaking, no, but practically speaking, because of the facts and circumstances of this case, yes.
>
> […]
>
> The offenses of attempted unpremeditated murder requires [sic] both the intent to kill, and an act that is more than mere preparation, and demonstrates the accused's resolve to commit the offense. The difference between that and the premeditated design to kill is very slight. You couple that with a number of acts that form the basis for the attempted murders and murders that happened in sequence, the four corners of the record will be that the accused is functionally admitting to a capital offense in violation of Article 45.
>
> […]
>
> Here, the accused is alleged to have murdered 13 people by shooting them with a firearm. In other words, you have a number of killings which are sequential over a period of time, rather than 13 murders all at once. The court

> believes that once the accused admits to intending to kill victims 1, 2 or 3, there comes a point of time when the panel could easily infer premeditation for the later murders, without anything more. […] Therefore, the court believes that it would be the functional equivalent to admitting to a premeditated design to kill, which is barred by Article 45 . . .

(JA 281-82).

Appellant later requested reconsideration of that ruling. (JA 291). That, too, was denied. (JA 302-03).

C. <u>Appellant goes *pro se*</u>

[redacted] (Sealed). [redacted] (Sealed). [redacted] (Sealed). [redacted] (JA 3120) (Sealed). [redacted]

[redacted] (Sealed). [redacted]

[redacted] (Sealed).

[redacted] By that point, the Government had produced over 400,000 pages of discovery (including a significant amount of classified material that appellant could never see[1]) (JA 275, 278, 344), 275 noticed government witnesses (JA 1291-302), and 813 noticed government exhibits. (JA 1303-23).

The military judge's primary concern was appellant's physical condition. She had good reason; appellant was a physical wreck. He had been severely

[1] [redacted]

wounded in the exchange of gunfire with police, (JA 768-69, 836-45), with news outlets initially reporting he was dead.[2] Appellant was shot seven times: twice in the chest, once in the left armpit, twice in the left arm, and twice in the left lower leg. (JA 836-45). The chest wounds severed his spine and caused severe lung damage. (JA 836-45). His right lung was lacerated and torn away from the chest wall, and his left lung filled with fluid. (JA 836-45). He was comatose and suffered a resultant brain injury. (JA 836-45). He was also left paralyzed, permanently confined to a wheelchair.

Concerned with appellant's physical disabilities, the military judge ordered a medical evaluation. (JA 321, 323). According to the evaluation, appellant could not sit for more than four hours at a time, (JA 334-35), and he could not write more than four pages at one time. (JA 336-37). He was also prone to a condition called "spasticity", which caused the muscles below his injuries to cramp so severely he suffered from involuntary spasms. (JA 335). The doctor also testified that "altered consciousness" was a "complication[] that could go on in a patient like him[.]" (JA 335). Despite all these limitations, appellant pledged to "do the best he c[ould]." (JA 338-39).

[2] *Gunman Kills 12, Wounds 31 at Fort* Hood, NBC News (Nov. 5, 2009). Available at: https://www.nbcnews.com/id/wbna33678801

With respect to appellant's mental competency, the military judge relied on the results of appellant's Rule for Courts-Martial (R.C.M.) 706 sanity board, determining that appellant had "sufficient mental capacity to understand the nature of the proceedings and to conduct or cooperate intelligently in his own defense." (JA 358). But appellant had refused to undergo the board's psychological testing, (JA 1324), a fact the military judge knew. (JA 305). Moreover, the report's "long form" indicated that the board actually suspected appellant had an "underlying personality pathology" but that there was "insufficient evidence to diagnose a personality disorder" given appellant's lack of cooperation. (JA 1406).

Ultimately, the military judge granted appellant's request, and she detailed appellant's trial defense team, including LTC Poppe, to serve as standby counsel. (JA 359).

D. <u>The defense of others: the conflict emerges</u>

The same day the military judge granted his request to proceed *pro se*, appellant offered his theory of defense – the defense of another – and moved for a continuance to prepare for the presentation of his defense. (JA 268-69). Appellant's theory of the defense of another was premised on the notion that he was defending Mullah Omar and the Taliban from the soldiers at the SRP. (JA 369, 377-78, 435). He claimed that those soldiers were about to deploy to an illegal war where they would commit illegal murders, although appellant admitted

he could not "verbally do a good job" at that point with sufficiently articulating his theory of defense. (JA 369, 377-78, 435).

The military judge granted a short continuance for appellant to prepare a motion in limine which would explain his defense theory, and directed standby counsel to assist appellant. (JA 359, 373, 378, 380). Yet, even before the military judge granted the continuance, standby counsel raised ethical concerns about their roles as standby counsel, questioning whether they could provide appellant any assistance. (JA 373). Standby counsel "were not sure [they could] do independent legal research" and believed that it would be "outside the scope of standby counsel to provide that kind of legal advice[.]" (JA 373). The following day, appellant objected to their lack of assistance, but standby counsel were even more recalcitrant – they simply could not (and would not) help appellant. (JA 380-81). The judge ordered standby counsel to comply with appellant's request for assistance. (JA 382).

Six days later, on June 11, 2013, the court-martial reconvened to litigate standby counsels' assistance. Appellant remained frustrated with standby counsel, who had by then delegated their duties to a paralegal and had continued to deny appellant assistance. (JA 384-85, 388). Despite the military judge's request to standby counsel to provide a basis for their authority to defy her order to provide assistance, standby counsel did not submit anything from their state bars. (JA 386-

88). As the military judge stated, "[y]ou've given me nothing […], and I've asked you multiple times — you've given me nothing." (JA 394).

Standby counsel then moved for an *ex parte* hearing to address the "conflict" between appellant and standby counsel. (JA 391, 397). Denying the *ex parte* hearing, the military judge ultimately determined that paralegal assistance was not sufficient – even if appellant had agreed to it – and once again directed standby counsel to submit any authority for their non-compliance by Noon the next day. (JA 397). When the parties met the following day, the military judge denied appellant's defense wholesale. (JA 399). According to the military judge, since appellant had been denied the ability to present his defense, "[w]hether [the] research assistance was adequate [wa]s irrelevant." (JA 400). Standby counsels' defiance of her orders was moot – or so the judge believed. (JA 404).

E. Appellant vacillates on *pro se*

With trial now imminent, appellant had second thoughts on his decision to proceed *pro se*. On July 2, 2013, at a pretrial hearing, appellant informed the military judge he had consulted with attorney Ramsey Clark. (JA 435). "Now, over the weekend, former U.S. Attorney General Ramsey Clark has offered to represent me as my attorney, at the request of Professor Dr. Boyle." (JA 435).

After a brief recess, the military judge asked appellant if he still wanted to proceed *pro se*. (JA 438). Appellant replied that if something "fruitful evolves"

with Mr. Clark, appellant's "default would be that [he] lose [his] pro se status." (JA 438). The military judge asked again if appellant wanted to proceed *pro se*. (JA 438). Appellant replied:

> I'll repeat what I just said – maybe saying it in a different manner. I want to proceed pro se, however, after talking to Ramsey Clark – if after talking to him, something fruitful evolves, I'm not sure what that is, then I'd have him as my attorney and not my standby counsel as currently – Colonel [sic] Poppe, Colonel [sic] Martin and Major Marcee.

(JA 438).

The military judge advised appellant he would not be granted a continuance to hire civilian counsel. (JA 438-39). "If Mr. Clark or Mr. Smith or Mr. Jones, or whoever you decide to hire, is available and ready to go on the 9th of July, then that's one matter." (JA 439). Otherwise, appellant had to choose between *pro se* or standby counsel. (JA 439, 441).

On July 9, 2013, the court-martial re-convened, and the military judge asked appellant if he had retained Mr. Clark. (JA 442). Appellant replied, "[n]ot yet." (JA 442). When asked if he still wished to proceed *pro se*, appellant replied, "[y]es, but I would like to add to the record – if the court changes its mind about me allowing [sic] to use the defense of others, Mr. Clark will be my attorney representing me through that defense." (JA 442). The military judge found that appellant's *pro se* status was "clear." (JA 442-43).

F. The courthouse is set

In anticipation of trial, III Corps and Fort Hood implemented security measures for the courthouse. Originally, this included installing a fenced area behind the courthouse, a trailer for the defense team, and a trailer for the panel members.

As trial approached, and despite the absence of any specific threat, III Corps and Fort Hood transformed the courthouse into a "Combat Outpost." (JA 286). According to LTC Poppe, "it now looks unlike any other courtroom that I've certainly been in, and frankly, I challenge anybody to come up with a court-martial that has occurred under the same circumstances, with a building that looks like this." (JA 286).

[redacted]

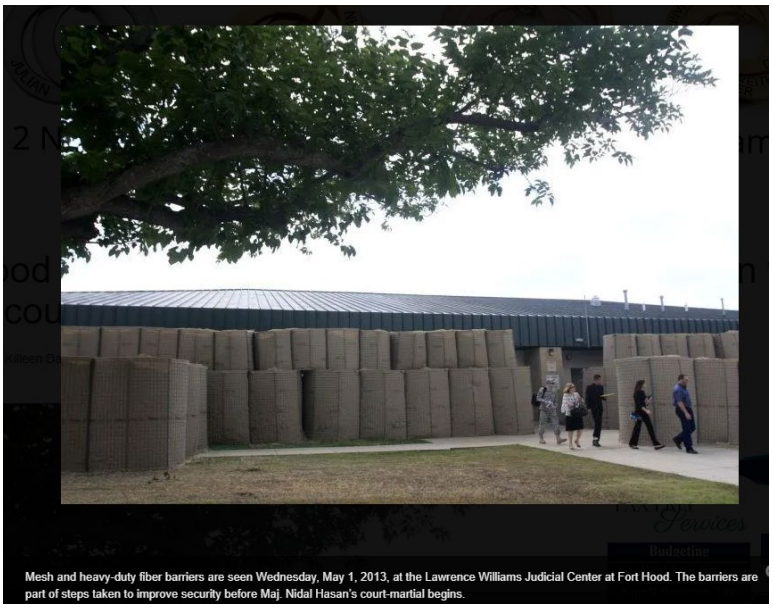
[redacted]

(Sealed). [redacted]

While the military judge found "no specific threat," she yielded to the Government's position, rationalizing, "this is a capital murder trial, emotions run high for many sides . . . [c]ommon sense would dictate that you exercise caution, and that you take safety measures." (JA 406).

[3] The Concertainer, also known as a HESCO barrier, is a modern structure primarily used for flood control and military fortifications. It is used as a levee or blast wall against small-arms fire and/or explosives. It has seen considerable use during the wars in Iraq and Afghanistan. (https://en.wikipedia.org/wiki/Hesco_bastion).

There is no indication that these measures were ever relaxed during the trial. To the contrary, the media reported on the security during trial, with ABC News reporting that "armed guards ringed the courthouse."[4] The picture below depicts the HESCOE barriers during trial.[5]



[4] Russell Goldman, *Maj. Nidal Hasan Says 'I Am the Shooter' at Ft. Hood Trial*, ABC News (Aug. 6, 2013), https://abcnews.go.com/US/ft-hood-victim-stares-nidal-hasan-points-bullet/story?id=19882668.

[5] Philip Jankowski, *Fort Hood Adds Barriers to Courthouse in Preparation for Hasan Court-Martial*, Killeen Daily Herald (May 3, 2014), https://kdhnews.com/military/hasan_trial/fort-hood-adds-barriers-to-courthouse-in-preparation-for-hasan-court-martial/article_a667e478-b3ac-11e2-860f-001a4bcf6878.html

G. The trial

1. Panel selection

Prior to voir dire, prospective members received questionnaires intended, among other things, to assist the parties and military judge to identify bias, over-exposure to pre-trial publicity, and other bases for disqualification or challenge. Indeed, in the immediate aftermath of the shootings, the publicity surrounding this event had been immense and non-stop. In fact, it dominated the national news for days and weeks. Most prominently, in a special double issue of Time Magazine, appellant's official military photograph appeared on the front cover with the word 'terrorist' spelled out across his face, wherein the article described him as the "new face of terrorism" and a "violent Islamic extremist." (JA 1283-89). Other outlets reported *extensively* on appellant's ties to terrorism, to include alleged links to Anwar al-Alwaki.[6] (JA 1358-92).

Nearly two and a half years after the shooting, and prior to panel notification, the media's appetite for appellant's case remained. By defense estimates, in those two and half years, over 21,000 newspaper articles, television reports, magazine articles, and online media pieces about appellant were produced and distributed. (JA 914).

[6] Al-Alwaki was an American born Islamic cleric who relocated to Yemen and advocated for attacks on the United States. Scott Shane, OBJECTIVE TROY at xvii (2016).

The questionnaires reflected this rampant publicity and the prospective panel members' exposure to it. [redacted] (Sealed). [redacted] (Sealed) [redacted] (Sealed).

When voir dire began, the military judge expected it to take four weeks. (JA 405). It took less than six days. (JA 678). The court, initially expecting to conduct voir dire by examining successive groups, actually conducted voir dire of only two groups of panel members, ultimately seating thirteen members. (JA 311, 407-08). Of the twenty-six prospective members, only twelve were individually voir dired. Of those twelve, six were dismissed for cause and one was

peremptorily challenged by the government. (JA 492). Of the fourteen prospective members out of twenty-six who were not individually voir dired, eight were nonetheless selected to sit, constituting more than half of the 13-member panel. As to those eight members, many of whom never provided responses in their questionnaire as to what they knew about the case,[7] the total length of their voir dire responses to questions regarding the potential impact of pretrial publicity cover only eight pages of the 233 pages of voir dire. (JA 467-70, 619-22).

Appellant did not oppose a single government challenge for cause, and he ostensibly joined government challenges before the government even identified what panel members it was challenging or providing its reasons. (JA 643, 673). Appellant called only one prospective member for individual voir dire, made no challenge for cause, and did not exercise his peremptory challenge. (JA 489-596).

Of these thirteen panel members who ultimately sat for the court-martial,

[redacted]

[7] [redacted] Thus, eleven of the panel members either did not answer the question, or provided nonresponsive answers, and of those eleven members, only three were individually voir dired.

[redacted]

(Sealed), [redacted]

These issues were never explored during individual voir dire.

Although most panel members were troubling in one way or more, one member clearly stands-out: LTC Keith Garwold. First, LTC Garwold apparently wanted to stand out. He, and only he, submitted an unsolicited second questionnaire – a redo, in which he apparently wanted to address any doubts the parties and military judge had about his qualifications to sit in judgement of appellant. His responses and statements in the two questionnaires are stunning. [redacted]

[redacted] (Sealed). [redacted]

[redacted] (Sealed), [redacted]

[redacted] (Sealed). [redacted]

[redacted]

(Sealed). [redacted]

[redacted]

[redacted] (Sealed). [redacted]

[redacted] (Sealed).

[redacted]

[redacted]

[redacted]

[redacted] (Sealed). [redacted]

[redacted]

[redacted] (Sealed).

[redacted]

[redacted] (Sealed). [redacted]

[redacted]

[redacted] (Sealed). [redacted]

[redacted]

[redacted] (Sealed). [redacted]

[redacted]

[redacted]

[redacted] (Sealed).

On April 26, 2013, LTC Garwold submitted a second questionnaire, despite neither party asking him to do so. As with the first one, this second questionnaire also told a story. [redacted] (Sealed).

[redacted] (Sealed), [redacted] (Sealed). [redacted]

[redacted]

(Sealed).

Lieutenant Colonel Garwold was still selected for appellant's panel, and he was even individually voir dired by the trial counsel, but none of this came up.

[redacted] (JA 561). After a brief exchange with appellant on religious views, (JA 561-62), the military judge then asked LTC Garwold about his knowledge of the case. He replied, "general notifications" and "headlines." (JA 563-65). He was never asked about his preconceived views, his misconceptions of the military justice system, his extensive knowledge of the facts of the case, and what on earth compelled him to submit a second questionnaire.

2. The courtroom closes on the heels of appellant's opening

Prior to the introduction of any evidence, appellant began his opening statement by telling the members:

> The evidence will clearly show I am the shooter. […] But the evidence presented during this trial will only show one side. The evidence will show also show [sic] that I was on the wrong side – America's war on Islam. But then I switched sides, and I made mistakes.

(JA 723). Appellant added that he was an "imperfect Muslim[]" trying to establish "the perfect religion of Almighty God, as supreme on the land despite the

disbeliever's hatred for it," (JA 723), and apologized "for any mistakes" he made in "this endeavor." (JA 724).

After witness testimony began, standby counsel again moved to modify their role. (JA 728). Enclosed with their motion were two enclosures – Enclosure 1 and Enclosure 3, which appeared to contain privileged material. [redacted] (Sealed). [redacted] Appellant never consented to this disclosure. (JA 731-33). Counsel served their motion on the court *and* the government. (JA 729-30). In defense of their filing, standby counsel asserted that appellant was "working in concert . . . with the prosecution towards a death sentence." (JA 739). The military judge then addressed appellant:

> Military Judge [MJ]: Major Hasan, do you have anything that you would like to present to the court to this matter ex parte? . . .
>
> Appellant: I have–I'd like to do that right now, ma'am, because I ----
>
> MJ: Right now, we're not in an ex parte setting, and I want to you give that opportunity. . .
>
> Appellant: It is done now, ma'am. I wanted it to start ex parte, but in regards to ----
>
> MJ: . . . I'm giving you the opportunity to present matters to me ex parte, and I want you to do that in writing.
>
> Appellant: I object, and I'd like to do that briefly, if I may?

> MJ: Are you specifically waiving any privileges – I don't know what you're planning on going into here – but are you specifically waiving any privileges, and you want to discuss this matter in a non-ex parte setting?
>
> Appellant: Yes, ma'am.
>
> MJ: Is anybody forcing you to make that decision?
>
> Appellant: No, ma'am.
>
> MJ: I'm giving you the opportunity to present your argument, or anything else that you want me to consider, in an ex parte forum.
>
> Appellant: I understand. I don't think it is what you think it is, ma'am. I just want to clarify about [LTC] Poppe's assertion of me seeking the death penalty.
>
> MJ: I would prefer that you give that to me in writing.
>
> Appellant: I object, ma'am.
>
> MJ: You're not going to give me anything in writing?
>
> Appellant: No, ma'am. Your Honor, [LTC] Poppe has made an assertion ----
>
> […]
>
> MJ: Hold on. I'm going to conduct the rest of this hearing as an ex parte hearing. I'm going to clear the courtroom. That includes you, Bailiff.

(JA 739-41).

The military judge cleared the court of all spectators and the government counsel. (JA 741). She made no findings beforehand. (JA 741). After reopening

the court thirty-five minutes later, she offered the following brief, conclusory, *post-hoc* justification:

> I believed that we needed to do that to address some issues that arose between standby counsel and [appellant], and issues relating to the release of privileged attorney work product, attorney/client, and other privileged communications. There was substantial probability that an overriding interest of retaining the confidentiality of those communications would be prejudiced if the proceedings remained open, and I believed that other means to address the issue were inadequate.

(JA 742).

[redacted] (Sealed). [redacted] (Sealed). [redacted] (Sealed). [redacted][8]

[8] [redacted] (Sealed).

[redacted] (Sealed). [redacted]

[redacted] (Sealed).

Despite the privileged nature of the enclosures being the *raison d'étre* for the closure, at no point did the military judge, appellant, or standby counsel actually discuss their *substance*. With respect to Enclosure 1, [redacted] the military judge briefly noted [redacted] (Sealed). [redacted] (Sealed). With respect to Enclosure 3, [redacted] (Sealed). [redacted] (Sealed).

[redacted] (Sealed).

The military judge later sealed the entire transcript from the closed hearing. (JA 1514) (Sealed); (JA 832-35). There is no indication that the military judge ever returned to appellant's request.

3. Trial resumes

When trial resumed, appellant continued with his admissions for the remainder of trial. Of the sixty government witnesses during the findings portion of the court-martial, appellant cross-examined just three.

Appellant cross-examined LTC (Retired) Ben Phillips, his former supervisor, to establish that LTC Phillips was his intermediate rater who had given appellant a "Center of Mass" evaluation. (JA 725). Appellant then asked LTC Phillips if he (appellant) had previously asked him about various crimes allegedly committed by soldiers against civilians. (JA 726). In response to an objection that such a question was beyond the scope of direct, appellant responded, "it goes towards motive." (JA 726). The military judge sustained the objection. (JA 726).

Appellant cross-examined the next witness about Islamic prayer. (JA 727).

Third and finally, during his cross-examination of Sergeant (SGT) Juan Carlos Alvarado, who had observed appellant exchange fire with responding police, appellant asked him to confirm "[a]fter it was clear that [Officer KM] was disarmed . . . that I continued to fire at her." (JA 767). Sergeant Alvarado replied, "Yes." (JA 767).

In the defense case-in-chief, appellant called no witnesses. (JA 770). He offered no evidence other than a description on an Officer Evaluation Report (OER) describing him as an "outstanding physician." (JA 725). He waived

argument on findings. (JA 770, 773-74). The panel found Appellant guilty of all charges. (JA 775).

In the penalty phase, appellate waived mitigation and argument. (JA 779, 797). Defense moved to submit independent mitigation. [redacted] (Sealed). [redacted] There is no indication that the military judge took action with respect to these enclosures.

The panel sentenced appellant to be put to death. (JA 798).

H. <u>The legal and quasi-judicial officers connected with this case</u>

1. The Staff Judge Advocate and rater of the Army Court

Colonel Risch, the III Corps' SJA from the time of the shooting through the eventual court-martial,[9] was part of the Fort Hood/Killeen community [redacted][10] [redacted]. (JA 1194-282). He worked and lived

[9] At the time of the shooting and later court-martial, Stuart Risch held the rank of Colonel. In the intervening years, he has been thrice promoted and is now Lieutenant General (LTG) Risch, the Army's Judge Advocate General. Pertaining to his actions as the III Corps SJA, this brief will refer to him as COL Risch.

[10] A behavioral health campaign later identified more than 1,100 individuals as "highly exposed" to trauma from the shooting, hundreds more than were actually

on Fort Hood. (JA 1347-48, 915). When he first learned of the shooting, and in its ensuing uncertainty, (JA 1347-48), he immediately called his wife to ensure the safety of his family. (JA 915).

He was also concerned for the safety of one of his officers, Captain (CPT) Nathan Freeburg, who was at the SRP site. (JA 1347-48). Compounding matters, the cell phone communications were down, and they could not make contact with him. (JA 1347-48).

As it turned out, CPT Freeburg was caught in the attack. (JA 1349-50). He took cover behind a car and was mere meters away when police exchanged gunfire with appellant. (JA 1349-50). The officer managed to escape. (JA 1349-50). Covered in blood, the officer met with COL Risch that night in the Office of the Staff Judge Advocate (OSJA) and personally briefed him on what happened. (JA 1349-50).

Later that night, COL Risch himself went to the site of the shooting, (JA 1349-50), which, at that time, could only be accessed by someone with law enforcement privileges. (JA 764). The scene was gruesome. (JA 763). The floors were "blood-slicked." (JA 1349-50). Hours earlier, the smell of smoke, feces, and urine had permeated the building. (JA 749, 754). Bodies were everywhere. (JA

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present at the SRP that day — a result that is in accord with multiple studies that report the traumatic impact and lingering effects on individuals in the surrounding community following a terrorist attack. (JA 274).

763, 827-30). There was so much "violence" at the site, it caused one law enforcement agent to be concerned for some of the other agents processing the scene. (JA 762). A few days later, COL Risch confided to the CPT Freeburg "it was a difficult experience that would make it hard to sleep at night," or words to that effect. (JA 1349-50).

The day after the shooting, the Federal Bureau of Investigation (FBI) raided appellant's residence and discovered a handwritten note with COL Risch's name and phone number. (JA 231). As it turned out, appellant had been communicating directly with the III Corps OSJA, specifically COL Risch's Deputy SJA, before the offense about what appellant perceived to be war crimes. (JA 1347-48). This contact caused the immediate disqualification of COL Risch's deputy SJA from the criminal case. (JA 1347-48). Colonel Risch was also aware of appellant's communications. (JA 1347-48). The report of war crimes was a relevant piece of information for the government early in the case. (JA 308-10).

Despite being part of *all* of this, COL Risch nonetheless served as the legal advisor to the convening authority in this case. He provided the Article 34, UCMJ, pretrial advice, where he recommended capital referral. (JA 1351-53). He advised on defense expert requests. (JA 1027-1193, 191-230). He absolved the trial counsel of prosecutorial misconduct allegations. (JA 276-77, 916-1019). And he

advised, and served as excusal authority for, the venire that ultimately comprised the panel that sentenced appellant to death. (JA 848-913, 183-90).

Years later, then-Major General (MG) Risch served as the Deputy Judge Advocate General (DJAG) of the Army. As DJAG, he served as the rating supervisor of the appellate judges who comprised the Army Court from this case's docketing in March 2017 almost until in September 2020 when the Office of The Judge Advocate (OTJAG) indicated that it would be removing then-MG Risch as the Army Court's supervisor. (JA 1354-57).

Throughout this time, appellate defense counsel filed several motions with the Army Court, indicating that counsel were pursuing an assignment of error against then-MG Risch from when he was the SJA and requesting it recuse itself from considering appellant's case because the subordinate relationship. Counsel also apprised the Army Court that allegations of prosecutorial misconduct were lodged by trial defense counsel in appellant's case against a then-senior judge at the Army Court who had served as the lead trial counsel at appellant's court-martial.

The Army Court denied these recusal motions. At no time did the Army Court provide its reasons for not being disqualified, even upon request.

After counsel filed the first recusal motion, the Army Court issued a multitude of rulings and orders, including ones relating directly to then-MG Risch

and the assignment of error as to his disqualification to act on this case. These included orders denying a motion for a preservation order (JA 174-76) and expert funding to conduct a survey for empirical data relating to, among other matters, whether members of the public would draw negative connotations from then-MG Risch actions as the SJA and for his relationship with the court. (JA 167-73).

A few months before the Army Court issued its opinion, and after more than three years during which then-MG Risch supervised the Army Court, the OTJAG finally removed DJAG as the Army Court's rater. However, prior to this, the Army Court indicated in its final order regarding recusal that it would disclose its reasons for not believing it had to be disqualified from appellant's case in its opinion. Nonetheless the Army Court's opinion only mentioned the error and never addressed the conflict nor provided its rationale.

2. The convening authority

Following appellant's offenses, the Army declined to award the Purple Heart to his victims because extending the eligibility criteria for the medals would be perceived as a formal declaration that appellant was a terrorist and fundamentally compromise the fairness of his court-martial proceedings.[11] A House Bill for the

[11] Pursuant to *United States v. Paul*, appellant requests this court take judicial notice of the foregoing facts. 73 M.J. 274, 278 (C.A.A.F. 2014); *See Army formally declines Purple Hearts for Fort Hood shooting victims*, Jim Forsyth, Reuters (Mar. 29, 2013), https://www.reuters.com/article/us-usa-crime-forthood-idUSBRE92S0IW20130329.

National Defense Authorization Act for Fiscal Year 2013 [NDAA 2013] included a provision to award Purple Heart medals to appellant's victims. H.R. 4310, Rep No. 112-479, Sec. 552 (2012). The Department of Defense opposed the resolution:

> The Army objects to section 552 because it would undermine the prosecution of Major Nidal Hasan by materially and directly compromising Major Hasan's ability to receive a fair trial. This provision will be viewed as setting the stage for a formal declaration that Major Hasan is a terrorist, on what is now the eve of trial. Such a situation, prior to trial, would fundamentally compromise the fairness and due process of the pending trial. . . . This laudable sentiment mistakenly and unwittingly supplants the criminal trial process by infusing official, formal statutory conclusions about the motive, intent and culpability of the man charged with the crime.
>
> Passage of this legislation could directly and indirectly influence potential court-martial panel members, witnesses, or the chain of command, all of whom exercise a critical role under the Uniform Code of Military Justice. . . . [I]t is very possible that an appellate court could overturn any convictions or punishments obtained in Major Hasan's court-martial. Mindful that capital litigation is "simply different" in the level of scrutiny imposed by reviewing courts, such legislation, and in particular its timing, would be viewed with exceptional rigor.

(JA 1407-08). The Purple Heart medal provision of the House Bill was not included in the final version of the NDAA 2013. Pub L. No. 112-239, 126 Stat. 1632 (2013).

Following appellant's trial, Congress enacted legislation expanding Purple Heart eligibility to those killed or wounded by an individual who was in

communication with a foreign terrorist organization before the attack and the attack was inspired or motivated by the foreign terrorist organization. 10 U.S.C.S. § 1129a. Pursuant to this expanded eligibility, the convening authority, LTG Sean MacFarland, presented Purple Heart medals to the individuals killed or wounded by appellant.[12] On April 10, 2015, at the award ceremony, LTG MacFarland presented the awards and made remarks, to include:

- "We honor the memories of the 13 souls laid to eternal rest [and] pay tribute to their sacrifice."
- "We also remember the acts of courage and selflessness by Soldiers and civilians, which prevented an even greater calamity from occurring that day."
- "Hundreds of lives have been woven together by this single day of valor and loss."
- "Although no words can resurrect those we lost or completely erase the scars, today's ceremony is an opportunity to provide a sense of closure to those who were injured or those who lost a loved one."
- "Their bravery has been matched only by their resilience - the spirit of which is seen throughout the Army."
- "Despite these losses, both units deployed to Afghanistan within months."

[12] *See Paul*, 73 M.J. at 278; *Fort Hood presents Purple Hearts, medals to shooting victims, Families*, Heather Graham-Ashley, III Corps and Fort Hood Public Affairs (Apr. 13, 2015), https://www.army.mil/article/146286/fort_hood_presents_purple_hearts_medals_to_shooting_victims_families; *2009 Fort Hood Attack Victims Awarded Purple Hearts*, Paul J. Weber and Ken Kalthoff, NBCDFW News (Apr. 9, 2015), https://www.nbcdfw.com/news/local/fort-hood-attack-victims-awarded-purple-hearts/1999210/.

- "It is our sincere hope that in some small way this will help heal the wounds you have suffered."

On March 27, 2017, LTG MacFarland, as the convening authority, took action on appellant's court-martial, approving the sentence as adjudged and taking no action on the findings. (JA 59-65).

PART A: SECTION I

Issue Presented I

WHETHER THE MILITARY JUDGE ERRED IN ALLOWING APPELLANT TO REPRESENT HIMSELF BECAUSE APPELLANT'S WAIVER OF COUNSEL WAS NOT VOLUNTARY OR KNOWING AND INTELLIGENT?

Summary of Argument

Appellant's waiver of counsel was not voluntary. Going into trial, he desired to maintain his innocence. By contrast, his defense team sought to admit his guilt. As a result, he confronted a constitutionally repugnant choice: go to trial with counsel who were diametrically opposed to his fundamental objectives or go alone. The choice to proceed *pro se* when it is the lesser of two evils between self-representation and constitutionally offensive representation is no choice at all.

Standard of Review

The waiver of a constitutional right is reviewed de novo. *United States v. Rosenthal*, 62 M.J. 261, 262 (C.A.A.F. 2005) (per curiam) (citing *United States v. Gudmundson*, 57 M.J. 493, 495 (C.A.A.F. 2002)).

Law

A. The right to counsel and client autonomy under *McCoy*

The Sixth Amendment provides for the right to the assistance of counsel. U.S. Const. amend. VI. "The right to be presented by counsel is among the most fundamental of rights." *Penson v. Ohio*, 488 U.S. 75, 84 (1988). "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." *Id*. (quoting Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 8 (1956)). "Representation by counsel does not merely tend to ensure justice for the individual criminal defendant, it marks the process as fair and legitimate, sustaining public confidence in the system and in the rule of law." *United States v. Singleton*, 107 F.3d 1091, 1102 (4th Cir. 1997).

Despite an accused's right to counsel, one "does not surrender control entirely to counsel." *McCoy*, 138 S. Ct. at 1508. There is a category of decisions reserved for the client. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983) (the

decisions as to whether to plead guilty, waive a jury, and testify on one's behalf are reserved for the client).

In *McCoy*, the Supreme Court announced for the first time that an accused's "[a]utonomy to decide that the objective of the defense is to assert innocence belongs in this . . . category." *McCoy*, 138 S. Ct. at 1508. There, McCoy was charged with the capital murder of his family, and he wanted to maintain his innocence, despite overwhelming evidence against him and an alibi that was "difficult to fathom." *Id*. at 1506-07. Specifically, McCoy claimed that local police killed his family, and he had been "framed by a farflung conspiracy of state and federal officials, reaching from Louisiana to Idaho." 138 S. Ct. at 1513 (Alito, J., dissenting). Conversely, his counsel believed that a concession to the murders was the only legitimate means to avoid the death penalty. *Id*. at 1506. Counsel's plan was to admit McCoy shot his family, but argue that McCoy was not guilty of first degree murder because he lacked the intent to commit the murder. *Id.* at 1512 (Alito, J., dissenting). The trial court, apprised of the disagreement, told McCoy's counsel to proceed, concluding that the decision was one of trial strategy. *Id*. at 1506. McCoy's counsel then conceded to the murders while emphasizing McCoy's "serious mental and emotional issues." *Id*. at 1507.

The Supreme Court reversed McCoy's conviction. *Id*. at 1511-12. Maintaining innocence, the Court concluded, was not a tactic about how to *achieve*

the defense; it *was* the defense. *Id*. at 1508. McCoy's counsel had violated McCoy's constitutionally "protected autonomy right" to control the objectives of his defense. *Id*. at 1511.

> Counsel may reasonably assess a concession of guilt as best suited to avoiding the death penalty, as [counsel] did in this case. But the client may not share that objective. He may wish to avoid, above all else, the opprobrium that comes with admitting he killed family members. […] When a client expressly asserts that the objective of "*his* defence" is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt.

138 S. Ct. at 1508-509 (citations omitted).

In *United States v. Read*, one of the few cases to address *McCoy*, the Ninth Circuit found an accused's Sixth Amendment right to counsel was violated where, over the accused's objection, trial defense counsel presented an insanity defense instead of, as the accused desired, a defense of demonic possession. 918 F.3d 712 (9th Cir. 2019). Read was accused, while incarcerated in a federal prison, of stabbing his cellmate with a homemade knife. 918 F.3d at 715. Read underwent a competency evaluation. *Id.* He was determined to suffer from schizophrenia, manifesting in bizarre thoughts on Satan, Christianity, and demonization. *Id.* He was nevertheless found competent to stand trial. *Id.* at 716.

As trial approached, Read successfully moved to proceed *pro se*, and his counsel assumed a standby status. *Id.* At a pretrial session, Read informed the

court he was abandoning his insanity defense, and would proceed with a defense based on "demonic possession." *Id.* "'I completely withdraw the insanity defense. That's not an option for me.'" *Id.* at 716-17.

Finding Read's proposed witness was irrelevant for the proposed defense, the trial court asked Read if he still wished to proceed *pro se*. *Id.* at 717. Read said that he did. *Id.* Read's standby counsel expressed concern with Read's competence because Read did not seem to understand "the legal distinction between a defense of insanity and his proposed instruction." *Id.* The trial court reappointed Read's standby counsel as counsel for Read, and that counsel unsuccessfully presented an insanity defense, instead of Read's desired defense of demonic possession. *Id.*

In light of *McCoy*, the court found, "Read's Sixth Amendment rights were violated when the trial judge permitted counsel to present an insanity defense against Read's clear objection." *Id.* at 719. Read's deeply held personal beliefs were paramount:

> This argument fails because pleading insanity has grave, personal implications that are separate from its functional equivalence to a guilty plea. True, *one* reason that an insanity defense should not be imposed on a defendant is that it can sometimes directly violate the *McCoy* right to maintain innocence. However, even where this concern is absent, the defendant's choice to avoid contradicting his own deeply personal belief that he is sane, as well as to avoid the risk of confinement in a mental institution and the social stigma associated with an assertion or

> adjudication of insanity, are still present. These considerations go beyond mere trial tactics and so must be left with the defendant.

Id. at 721 (emphasis in original). The court reversed Read's conviction. *Id.*

B. Waiving counsel

Under *Faretta v. California*, an accused also has the corollary right to present his defense personally. 422 U.S. 806, 807 (1975). However, "representation by counsel . . . is the standard, not the exception." *Martinez v. Court of Appeal of Cal. Fourth Appellate Dist.*, 528 U.S. 152, 163 (2000) (citing *Patterson v. Illinois*, 487 U.S. 285, 307 (1988)). As this Court's predecessor cautioned, absent binding precedent, it will not encourage self-representation, which represents "a dangerous course of action" that is "so contrary to efficient judicial administration." *United States v. Bowie*, 21 M.J. 453, 454-55 (C.M.A. 1986).

To proceed *pro se*, an accused must waive his right to counsel, and the waiver must be voluntary, knowing, and intelligent. *Edwards v. Indiana*, 554 U.S. 164, 182-83 (2008) (Scalia, J., dissenting) (citations omitted). "Courts must 'indulge every reasonable presumption against waiver' of fundamental constitutional rights." *Schriro v. Landrigan*, 550 U.S. 465, 484 (2007) (Stevens, J., dissenting) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)), and there is a "strong presumption against" wavier of counsel. *Martinez*, 528 U.S. at 161

(quoting *Patterson*, 487 U.S. at 307). Since the right to counsel "serves both individual and collective good, it is appropriate to ascribe it a constitutional primacy which the more individualistic right of self-representation does not command." *Singleton*, 107 F.3d at 1102.

As to voluntariness, circuits recognize that the decision to proceed *pro se* is not voluntary where the decision is a "lesser of two evils" between proceeding alone or going to trial with an attorney where there is "good cause" to substitute counsel. *See Maynard v. Meachum*, 545 F.2d 273, 278 (1st Cir. 1976); *United States v. Schmidt*, 105 F.3d 82, 88 (2nd Cir. 1997); *Pazden v. Maurer*, 424 F.3d 303, 313 (3rd Cir. 2005); *United States v. Gallop*, 838 F.2d 105, 108-09 (4th Cir. 1988); *Richardson v. Lucas*, 741 F2d. 753, 757 (5th Cir. 1984); *Alazazi v. Anderson*, 1983 U.S. App. LEXIS 13038, *6 (6th Cir. May 16, 1983); *Wilks v. Israel*, 627 F.2d 32, 36 (7th Cir. 1980); *Sanchez v. Mondragon*, 858 F.2d 1462, 1465 (10th Cir. 1988); *United States v. Taylor*, 113 F.3d 1136, 1140 (10th Cir. 1997); *United States v. Wright*, 923 F.3d 182, 190 (D.C. Cir. 2019) ("[a] defendant's loss of trust, lack of communication, or serious disagreement about strategy might, in some cases, . . . render the decision to proceed pro se "involuntary."). While this often arises where the request for substitute counsel is made, at least two circuits require the trial court to investigate the dissatisfaction with counsel as part of the waiver of counsel inquiry. *See United States v.*

Peppers, 302 F.3d 120, 132 (3rd Cir. 2002) (duty to investigate counsel dissatisfaction when pro se request comes close to trial); *Buhl v. Cooksey*, 233 F.3d 783, 798 (3rd. Cir. 2000) (the inquiry into counsel dissatisfaction helps determine whether an accused is truly desiring self-representation or desiring another attorney); *Sanchez*, 858 F.2d at 1465.

In *Sanchez*, for example, Sanchez, who had continually maintained his innocence, requested to proceed *pro se* after asserting that his counsel was only interested in plea bargains. *Sanchez*, 858 F.2d at 1466. This led Sanchez to believe that his counsel either did not care or was not prepared. *Id*. Rather than inquire into Sanchez' dissatisfaction with counsel, the trial court assured him that counsel was competent and further assured him that counsel could not plead guilty without his consent. *Id*.

The Tenth Circuit found error. *Id*. Specifically, it found that the trial court failed to adequately inquire into counsel's preparation, noting that the purported dissatisfaction was not an argument over "legal strategy." *Id*. at 1466. Ultimately, the Tenth Circuit granted the habeas writ. *Id*. at 1468.

Similarly, in *United States v. Silkwood*, the trial court failed to ensure that Silkwood was not forced to make the "Hobson's choice" between incompetent or unprepared counsel and going *pro se*. 893 F.2d 245, 249 (10th Cir. 1989). There, Silkwood informed the court that he believed his counsel had not spent sufficient

time on his case and that he could present a better case. *Id*. The trial court, however, attempted to persuade Silkwood otherwise rather than "inquiring thoroughly into [Silkwood's] allegations." *Id*. Consequently, Silkwood's waiver was not voluntary. *Id*; *see also United States v. Williamson*, 859 F.3d 843, 862 (10th Cir. 2017) (voluntariness "turns on whether defendant's objections to present counsel are such that he has a right to new counsel.") (quoting *United States v. Padilla*, 819 F.2d 952, 955 (10th Cir. 1987)).

Argument

Appellant's waiver was not truly voluntary. His *pro se* status was not because he wanted to be "captain of his own ship"; it was solely to ensure LTC Poppe was not. And appellant had good cause for new counsel. He desired to maintain innocence as his fundamental objective; LTC Poppe was going to concede guilt. Had LTC Poppe gone ahead to trial, or had he "stood in" for appellant, there would have been a clear constitutional violation under *McCoy*. *McCoy*, 138 S. Ct. at 1508-09. As a result, appellant's choice to proceed *pro se* was no choice at all.

Indeed, the similarities between appellant's case and *McCoy* and *Read* are striking. Recall in *McCoy*, the attorney's strategy was to attack premeditation on mental incapacity. 138 S. Ct. at 1506, n.1. But *McCoy* noted that this strategy "would have encountered a shoal, for Louisiana does not permit introduction of

evidence of a defendant's diminished capacity absent the entry of a plea of not guilty by reason of insanity." *Id.*

[redacted] (Sealed). And like in *McCoy*, [redacted] while perhaps many things, is not a legally cognizable defense. More puzzling still, LTC Poppe advised that they were not calling any experts on mental responsibility or partial mental responsibility, (JA 305), and he expressly waived special defenses.[13] (JA 306).

Similar to *Read*, the planned defense contradicted appellant's deeply held religious beliefs. In essence, counsel planned on using appellant's beliefs against his own personal interests, and he refused to be painted as a religious fanatic. As *Read* counsels, such considerations go beyond tactics and "must be left with the defendant." *Read*, 918 F.3d at 721.

Furthermore, it is clear from the defense team's *multiple* attempts to withdraw or modify its role *and* its defiance of court orders to assist appellant that

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13 [redacted] (Sealed) (Joseph M. Pierre, M.D., *Faith or Delusion? At the Crossroads of Religion and Psychosis*, JOURNAL OF PSYCHIATRIC PRACTICE, May 2001 at p. 163).

the defense team's own personal conflicts would have frustrated their ability to provide competent representation in this regard.

There was a duty upon the military judge to inquire into appellant's dissatisfaction with counsel before accepting appellant's waiver. *Sanchez*, 858 F.2d at 1465; *Taylor*, 113 F.3d at 1140. But even if this court concludes that there was no duty to investigate at that time, surely there was a duty to thoroughly investigate when counsel defied court orders to provide assistance; or when counsel disclosed appellant's privileged documents to the government and declared appellant was working in concert with prosecution; or when, on the eve of trial, appellant so clearly vacillated on his *pro se* status, demonstrating that he was not truly desiring *pro se* status, but rather an impasse with his detailed counsel. And the conflict became crystal clear when LTC Poppe submitted to the court his memorandum to appellant that caused appellant to go *pro se*.

Even then, it is unclear whether the military judge would have correctly identified the issue, pre-*McCoy*, [redacted] (Sealed). What was really at issue was a fundamental difference in the objectives.

Appellant desired counsel–one that would be an advocate for his objectives. He was entitled to one. His was waiver was involuntary. A new trial is warranted.

Issue Presented II[14]

WHETHER THE TOTAL CLOSURE OF THE COURT OVER APPELLANT'S OBJECTION VIOLATED HIS RIGHT TO A PUBLIC TRIAL?

Summary of Argument

The total closure of a session of appellant's capital trial over his objection violated his Sixth Amendment right to a public trial. The right applied to the proceeding, and the closure failed to comply with *Waller*. This is so for five reasons: (1) there was no overriding interest justifying closure; (2) to the extent there may have been an overriding interest, the military judge failed to define and articulate that interest; (3) the military judge's conclusory findings after the fact lack the specificity required for appellate review; (4) the findings did not occur before the closure; and (5) the military judge failed to consider reasonable alternatives. For these same reasons, the closure also violated R.C.M. 806. The violation of the right to public trial is structural, warranting a retrial.

Standard of Review

The decision to close the court is reviewed for abuse of discretion. *United States v. Ortiz*, 66 M.J. 334, 339 (C.A.A.F. 2008).

[14] This issue was not raised before the Army Court.

Law

A. Constitutional right to a public trial

The Sixth Amendment guarantees a right to a public trial in all criminal prosecutions. U.S. Const. amend. VI. This right extends to courts-martial. *United States v. Hershey*, 20 M.J. 433, 435 (C.M.A. 1985) (citations omitted).

"The public-trial guarantee embodies a view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings." *Estes v. Texas*, 381 U.S. 532, 588 (1965). Thus, open trials "cause all trial participants to perform their duties more conscientiously." *Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979). Where proceedings take place in the absence of the jury, "long recognized as 'an inestimable safeguard against the . . . overzealous prosecutor and against the compliant, biased . . . judge, . . . the importance of public access . . . is even more significant." *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 12-13 (1986) (*Press-Enterprise II*) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)).

Additionally, "public access to the criminal process fosters an appearance of fairness[.]" *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982). "[T]he sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become

known." *Press-Enterprise Co. v. Superior Ct. California*, 464 U.S. 501, 508 (1984) (*Press-Enterprise I*) (emphasis in original); *see also In Re Oliver*, 333 U.S. 257, 270 (1948) ("[t]he knowledge that every criminal trial is subject to contemporaneous review in the form of public opinion is an effective restraint on possible judicial power."). "Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise I*, 464 U.S. at 508 (citing *Richmond Newspapers, Inc., v. Virginia*, 448 U.S. 555, 569-71 (1980)).

1. Waller v. Georgia

In *Waller*, the Supreme Court established the standard to review Sixth Amendment public trial violations. There, the prosecutor asked to close the suppression hearing to introduce evidence from wiretaps "which [might] involve a reasonable expectation of privacy of persons." 467 U.S. at 41. The prosecution also argued that, under the state wiretap law, any publication of information obtained from a wiretap that was not "necessary and essential" would render the information "inadmissible." *Id*. at 42. Since other individuals had not yet been indicted, the prosecutor was concerned about tainted evidence. *Id*. at 42. The trial court agreed. *Id*. at 42. The court closed the entire suppression hearing, during which only a few hours were devoted to the wiretap tapes. *Id*. at 42. Waller was convicted, and the Georgia Supreme Court affirmed. *Id*. at 43.

The Supreme Court first had to determine whether the public trial right applied to a suppression hearing. *Id*. at 47. *Waller* noted four values of the right to public trial: (1) ensuring the public sees an accused dealt with fairly; (2) reminding the judge and prosecutor of their responsibility; (3) encouraging witnesses to come forward; and (4) discouraging perjury. *Id*. at 46. It then concluded that these aims and interests were "no less pressing" in a suppression hearing. *Id*. at 46. *Waller* also noted the "strong interest" in exposing allegations of misconduct to the "salutary effects of public scrutiny." *Id*. at 47.

Next, *Waller* adopted the four-part standard, relying on its First Amendment jurisprudence, for a court closure to be justified:

> [(1)] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [(2)] the closure must be no broader than necessary to protect that interest, [(3)] the trial court must consider reasonable alternatives to closing the proceeding, and [(4)] [the trial court] must make adequate findings supporting the closure.

Id. at 48.

In applying the standard, the Court found the closure plainly unjustified. *Id*. at 48. The state's proffer was not clear as to "what privacy interests might be infringed, how they would be infringed, what portions of the tapes might infringe them, and what portion of the evidence consisted of the tapes." *Id*. at 48. This then lead to overly "broad and general" findings. *Id*. at 48. Moreover, the trial

court failed to consider reasonable alternatives such as asking the state to better identify its need and subsequently "closing only those parts of the hearing that jeopardized the interests advanced." *Id*. at 48. Concluding that no finding of prejudice was needed, *Waller* ordered a new suppression hearing. *Id*. at 49.

2. When *Waller* applies

"*Waller* provide[s] standards for courts to apply before excluding the public from *any* stage of a criminal trial." *Presley v. Georgia*, 558 U.S. 209, 213 (2010) (emphasis added). However, not "all aspects of the proceedings from . . . arraignment to sentence must be open . . ." *Ali v. United States*, 398 F.Supp.3d 1200, 1220 (C.M.C.R. 2019). In determining whether *Waller* applies, courts have analyzed whether any of the four values discussed in *Waller* are implicated by the proceedings. *See United States v. Waters*, 627 F.3d 345, 360 (9th Cir. 2010) ("the public-trial right attaches to those hearings whose subject matter 'involve[s] the values that the right to a public trial serves.'") (quoting *United States v. Ivester*, 316 F.3d 955, 960 (9th Cir. 2003)).

Apart from suppression hearings, the Supreme Court has held that the right attaches to voir dire. *Presley*, 558 U.S. at 213. State and federal courts have found the right attaches to pre-trial motions to dismiss for government misconduct, *Waters*, 628 F.3d at 360 (the public "has an interest in learning of all allegations of government misconduct"); a pre-trial hearing on whether a defense interpreter was

a "plant" for the government, *Ali*, 398 F.Supp.3d at 1221-22 (there is a need for public scrutiny of misconduct); motions in limine, *Rovinsky v. McKasckle*, 722 F.2d 197, 201 (5th Cir. 1984) ("the right to a public trial does not turn on whether the inquiry of a hearing is factual or doctrinal, substantive or procedural, but on the relationship of the issue raised at the hearing to the merits of the charge, the outcome of the prosecution, and the integrity of the administration of justice."); and pretrial competency hearings. *State v. Rogers*, 919 N.W.2d 193, 201 (N.D. 2018). Moreover, in a First Amendment context, the right applies to post-trial investigations of jury misconduct. *See United States v. Simone*, 14 F.3d 833, 838 (3rd Cir. 1994) ("opening the judicial process to public scrutiny discourages misconduct and assures the public of integrity of the participants in the system.").

At least one post-*Waller* court confronted whether a *pretrial* motion for counsel to withdraw triggers *Waller*. In *United States v. Gottesfeld*, the attorney filed five motions to withdraw due to Gottesfeld's disparaging public comments about him and his practice, four of which occurred in closed settings. 2021 U.S. App. LEXIS 33013, *16-21 (1st Cir., Nov. 5, 2021). Only addressing two of the four values identified in *Waller*, the First Circuit found that the proceeding was entirely collateral and that there was a concern that information might "find its way into the jury box." *Id*. at *27. Ultimately, the Court found that the Sixth Amendment right to a public trial did not apply to the pre-trial motion, "at least

absent factors not present here." *Id*. at *26. The First Circuit placed significant weight on the timing of the withdrawal hearing, declining "to hold that the Sixth Amendment public-trial right applied to the pretrial and post-trial hearings on counsel's motions to withdrawal *in this case*." *Id.* at *27-28 (emphasis added).

Moreover, *Gottesfeld* did not address the resultant First Amendment disconnect–courts have held that the public does have a right of access to motions to withdraw except where privilege *actually* exists. *See United States v. Zambrano*, 2019 U.S. Dist. LEXIS 58596, *1-4 (E.D. Cal., Apr. 3, 2019) (order denying sealing request of motion to withdraw) (*quoting Press-Enterprise II*, 478 U.S. at 3-14); *see also Waller*, 467 U.S. at 46 ("there can be little doubt that explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public.").

3. The overriding interest under *Waller*

In the context of the military, closures have required *Waller*-like specificity with respect to the overriding interest even before *Waller* was decided. In *United States v. Grunden*, for example, the Court of Military Appeals (CMA) reversed a conviction where the military judge closed portions of Grunden's trial for "national security" related to Grunden's espionage charges. 2 M.J. 116, 120, 124 (C.M.A. 1977). The CMA concluded the military judge failed to make an *initial* inquiry as to whether the public would be exposed to national security and to what extent. *Id*.

at 122-24. The CMA noted that of the nine witnesses who later testified, only one discussed classified matters at length, and the remaining witness' testimony contained minimal or no classified information. *Id.* at 120. The military judge thus "employed an ax in place of the constitutionally required scalpel." *Id*. at 120.

In *Hershey*, "the same procedure condemned in *Grunden* was employed[.]" 20 M.J. at 436. There, the prosecutor asked to close the courtroom because it would be "embarrassing" for the witness to testify in front of spectators. *Id*. at 435. Similar to *Grunden*, the CMA found the military judge erred because he failed to conduct an appropriate inquiry into the witness' purported embarrassment and instead "acquiesced in [the prosecutor's] request." *Id*. at 436. *See also Ortiz*, 66 M.J. at 339 (closing the courtroom for a witness' "embarrassment" is inarticulate "at best").

Civilian courts have found the same. In *Guzman v. Scully*, for example, the Second Circuit found error where the trial court closed the court in reliance on the prosecution's mere representation that a witness would be intimidated without conducting a further inquiry. 80 F.3d 772, 776-77 (2nd Cir. 1996). In the absence of the inquiry, "there was no ascertainment that the reason advanced by the prosecutor was . . . 'likely to be prejudiced.'" *Id*. at 775 (quoting *Waller*, 464 U.S. at 48). Accordingly, with an interest merely alleged but not established, "there could be no compliance with [*Waller*'s] second requirement that the closure be 'no

broader than necessary to protect' the interest." *Id*. at 776 (quoting *Waller*, 467 U.S. at 48); *see also Brown v. Artuz*, 283 F.3d 492, 499 (2nd Cir. 2002) ("the trial court must 'require persuasive evidence of serious risk to an important interest in ordering closure" and that "the more extensive . . . the closure request, the greater . . . the gravity of the required interest and the likelihood of risk to that interest[.]'") (quoting *Ayala v. Speckard*, 131 F.3d 62, 70 (2nd Cir. 1997) (alternations in original)).

In short, the "particular [overriding] interest, and the threat to that interest, must 'be articulated . . .'" *Presley*, 558 U.S. at 215 (quoting *Press-Enterprise I*, 464 U.S. at 510) (emphasis added). The reason for the requirement to articulate the need is obvious: the interest must be coupled with findings "specific enough that a reviewing court can determine whether the closure order was properly entered." *United States v. Simmons*, 797 F.3d 409, 415 (6th Cir. 2015) (quoting *Press-Enterprise I*, 464 U.S. at 510). An appellate court cannot perform its own "post hoc" determination. *Ortiz*, 66 M.J. at 342 ("the question is not whether an appellate court can supply a cogent reason why it was acceptable to deprive an accused of the constitutional right to a public trial[;] [r]ather, the question is whether the military judge identified the competing interests and balanced them in a given case.").

4. Reasonable alternatives under *Waller*

Recall in *Waller* that reasonable alternatives included "closing only those parts of the hearing that jeopardized the interests advanced." *Waller*, 467 U.S. at 48. In *Press-Enterprise I*, the Supreme Court also suggested that, in the First Amendment context, "the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceeding available within a reasonable time[.]" *Press-Enterprise I*, 464 U.S. at 513; *Cf. Waller*, 467 U.S. at 1984 (transcript of the suppression was not released until prior to the trial of the remaining persons in the indictment). Courts have since applied this reasoning in the context of the Sixth Amendment. *See e.g.*, *Brown*, 283 F.3d at 502 (release of transcript constituted reasonable alternative); *Blades v. United States*, 200 A.3d 230, 239 (D.C. 2019), *cert. denied*, 141 S. Ct. 165 (2020) (practice of "husher" device, coupled with the release of the transcript within a reasonable time, constituted a reasonable alternative to closure).

The consideration of reasonable alternatives, like overriding interests, must be on the record, to include why alternatives were considered but rejected, *Ali*, 398 F. Supp. 3d at 1224, and consideration is not limited to alternatives suggested by the parties. *Presley*, 558 U.S. at 213. "Without *some* consideration of alternatives on the record . . . there will often be little basis on which a reviewing court can determine whether the trial court adequately engaged in the *Waller* and *Presley*

analysis[.]" *Moss v. Colvin*, 845 F.3d 516, 522 (2nd Cir. 2017) (emphasis in original).

B. R.C.M. 806: the regulatory right to a public trial

Separate from the Sixth Amendment, the Manual also provides an accused with a regulatory right to a public trial. "Except as otherwise provided in [R.C.M. 806], courts-martial *shall* be open to the public." R.C.M. 806(a) (emphasis added). For total closures, R.C.M. 806 requires the same test as in *Waller*. R.C.M. 806(b)(2). The Discussion also notes, "The military judge is responsible for protecting both the accused's right to, and the public's interest in, a public trial." R.C.M. 806(b), *Discussion*.

C. Prejudice Analysis: Structural Error

A constitutional public trial violation is structural error. *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1910 (2017). This is so because of the "difficulty of assessing the effect of the error." *Id*. (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149, n. 4 (2006)). Where "there is an objection at trial and the issue is raised on direct appeal, the defendant generally is entitled to 'automatic reversal' regardless of the error's actual 'effect on the outcome.'" *Id*. (quoting *Neder v. United States*, 527 U.S. 1, 7 (1999)).

This Court has not defined the prejudice standard for violations of R.C.M. 806. However, in *Ortiz*, this Court left open the possibility that violations may be

structural. *Ortiz*, 66 M.J. at 336, n. 2. ("[b]ecause the . . . application of R.C.M. 806 was not briefed by the parties and is not necessary to the disposition of the granted issues, we need not and do not decide whether failure to comply with . . . R.C.M. 806 alone would be tested for prejudice, or deemed structural error.").

Argument

A. Appellant's constitutional right to a public trial was violated

1. The right to a public trial applies

The closure here occurred *during* trial, and thus it was a stage of his criminal trial. *See Presley*, 533 U.S. at 213. Moreover, the hearing implicated two of the values furthered by the public trial right as articulated by the *Waller* Court: (1) ensuring the public sees an accused dealt with fairly and (2) reminding the military judge of her responsibility. *Waller*, 467 U.S. at 46.

With respect to the former, and distinguishable from *Gottesfeld*, appellant was *pro se*. Standby counsel, who were necessary for appellant's access to the courts, *see United States v. Taylor*, 183 F.3d 1199, 1204 (10th Cir. 1999) (*pro se* incarcerated defendants have a right to access to a law library and "providing legal counsel is a constitutionally acceptable alternative"),[15] had earlier *defied* a court order to provide appellant assistance and [redacted]

[15] The military judge informed appellant, he could "be required to rely on standby counsel to overcome some of the research handicaps that are necessarily attendant with incarceration." (JA 383).

[redacted][16] The public needed to see if appellant was dealt with fairly.

Similarly, and with respect to the latter, the military judge had an affirmative duty to "supervis[e] the protection of [appellant's] [*Faretta*] right throughout trial." *McKaskle v. Wiggins*, 465 U.S. 168, 179 (1984). The disclosure of privileged defense materials without his consent and later comments in open court undermined his self-representation. Public observation would have helped ensure a conscientious fulfillment of the military judge's duty. *Estes*, 381 U.S. at 588; *Gannett Co.,* 443 U.S. at 383.

Three other points make this case distinguishable from *Gottsfeld*. First, like *Waller*'s recognition of exposing misconduct to the salutary effects of public scrutiny, no doubt the same can be said of appointed counsel's impropriety in this case. After all, it was out of a distrust for lawyers that the constitutional right of *pro se* representation was "forged." *Faretta*, 422 U.S. at 829-30.

Second, standby counsels' actions had many observers in the public believing there could be a mistrial. *See* Manny Fernandez, *Fort Hood Suspect's Legal Team Questions His Defense*, New York Times (Aug. 7, 2013) (noting that

16 [redacted]

"military law experts said releasing privileged information to the prosecution raised the prospect of a mistrial.").[17] [redacted] Certainly, then, these proceedings were not merely collateral, but cut to the core of appellant's trial.

Third, the closed hearing also included other important decisions not captured on the open record, [redacted]. *See United States v. Balough*, 820 F.2d 1485, 1488 (9th Cir. 1987) (*Faretta* waivers need to be in "open court.").

In sum, this proceeding implicated the values discussed in *Waller*, and *Waller* therefore applies.

2. The closure was unjustified

Applying *Waller*, the military judge erred by closing the court in five distinct ways. First, appellant's confidentiality was not an overriding interest to close the hearing because appellant explicitly waived "any privilege" and directly told the military judge that he did so.

Second, even if some overriding interest could be plumbed from the record, the military judge failed to make the appropriate inquiry to define and articulate it. Two enclosures of the motion–Enclosure 1 and Enclosure 3–were identified as

[17] Available here: https://www.post-gazette.com/news/nation/2013/08/07/Fort-Hood-Suspect-s-Legal-Team-Questions-His-Defense/stories/201308070124

privileged. [redacted]

See Waller, 467 U.S. at 48. In this way, the talismanic reliance on "privilege" is indistinguishable from *Grunden*'s impermissibly broad claims of "national security," *Grunden*, 2 M.J. at 120; *Hershey*'s similarly impermissibly broad claims of "embarrassment." *Hershey*, 20 M.J. at 435; and *Guzman*'s impermissibly broad claim of "intimidation." *Guzman*, 80 F.3d at 776-77.

Third, her failure to investigate led to general, conclusory findings, which are not "specific enough" for appellate review. *Simmons*, 797 F.3d at 415 (quoting *Press-Enterprise I*, 464 U.S. at 510). Importantly, she failed to identify the *threat* to confidentiality in light of appellant's explicit waiver. *Presley*, 558 U.S. at 215 (the "particular [overriding] interest, and the threat to that interest, must 'be articulated.'") (quoting *Press-Enterprise I*, 464 U.S. at 510) (emphasis added).

Fourth, she failed to issue her findings before the closure. *Id*. at 213 ("*Waller* provide[s] standards for courts to apply *before* excluding the public from any stage of a criminal trial.") (emphasis added).

Finally, the military judge failed to consider reasonable alternatives. To this point, at least three reasonable alternatives existed. First, she could have asked counsel to better define the privilege to narrowly tailor the interest. *See Waller,* 467 U.S. at 48. Second, and in a similar vein, she could have litigated the motion in open court while having appellant and standby counsel identify the answers that would require divulging privileged information and holding a closed hearing only on those questions. Third, pursuant to *Press-Enterprise I*, she could have published the transcript, at the very least the portion that appellant wanted published. Indeed, the transcript did not reveal any privilege. And, of course, appellant had already waived any privilege.

In short, like *Grunden*'s *post hoc* dissection, an examination of the transcript reveals the fatal error. No privileged "communications" or work product were discussed – no more than had been discussed in prior withdrawal motions. But important and non-privileged matters were discussed – matters the appellant and the public had a right to discuss in open court. While in *Grunden*, the military judge employed "an ax in place of a constitutionally required scalpel," *Grunden*, 2

M.J. at 120, in the instant case, the military judge used an ax when no tool was even necessary.

3. The error is structural

As *Waller* applies, and the military judge failed to comply with it, the only appropriate result is reversal. *Weaver*, 137 S. Ct. at 1910.

B. <u>Appellant's regulatory right to a public trial was violated</u>

Because the closure standard under R.C.M. 806 is the same as *Waller*, the closure also violated R.C.M. 806 for the reasons above. Importantly, the rule requires *all* proceedings to be public, except where limited by the rule. Thus, there is no question that the *Waller* standard applied to the Article 39(a) session under the rule.

This error, too, must be structural. The right to a public trial, whether constitutional or regulatory, is critical, especially in the military justice system, and the regulatory nature of this right does not make assessing the effect of error any less difficult. *Weaver*, 137 S. Ct. at 1910. If R.C.M. 806 violations are tested for prejudice, this critical regulatory right will be effectively left without a remedy.

Issue Presented III

WHETHER THE MILITARY JUDGE ERRED BY FAILING TO DISQUALIFY LIEUTENANT COLONEL GARWOLD AS A PANEL MEMBER?

Summary of Argument

Lieutenant Colonel Garwold should have never sat on this capital case. Based on his initial questionnaire alone, LTC Garwold unequivocally demonstrated both actual and implied bias against appellant. [redacted] His case knowledge was *extensive*, to include prejudicial, inadmissible information, [redacted] His limited voir dire, which touched on *none* of this, did not – nor could – obviate the bias. It was, therefore, plain error for the military judge not to disqualify him.

Standard of Review

Whether a military judge erred by failing to excuse a panel member in the absence of challenge by any party is reviewed by this Court for "plain error." *See e.g.*, *United States v. Strand*, 59 M.J. 455, 460 (C.A.A.F. 2004); *United States v. Ai*, 49 M.J. 1, 5 (C.A.A.F. 1998); *United States v. Bannwarth*, 36 M.J. 265, 268 (C.M.A. 1993); *see also United States v. Moran*, 65 M.J. 178, 181 (C.A.A.F. 2007) (when an error is not preserved, it is forfeited absent "plain error") (citations

omitted). Whether an error constitutes "plain error" is a determination reviewed de novo. *Moran*, 65 M.J. at 181. Plain error is established where: (1) there was error, (2) the error was plain or obvious, and (3) the error materially prejudiced a substantial right of the accused. *United States v. Bungert*, 62 M.J. 346, 348 (C.A.A.F. 2006).

Law

An accused "has a constitutional right . . . to a fair and impartial panel." *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001). *See also United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017). An impartial panel is "a *sine qua non* for a fair court-martial[,]" *United States v. Modesto*, 43 M.J. 315, 318 (C.A.A.F. 1995) (emphasis in original); *see also United States v. Terry*, 64 M.J. 295, 301 (C.A.A.F. 2007); *Wiesen*, 56 M.J. at 174, and "perhaps the most vital part of the criminal justice process." *Williams v. Burt*, 949 F.3d 966, 978 (6th Cir. 2020). "No right touches more the heart of fairness in a trial." *Stockton v. Virginia*, 852 F.2d 740, 743 (4th Cir. 1988).

Yet, an impartial panel is more than a right of the accused. In the military, the "legitimacy" of a panel comprised of one's superiors is "predicated on and justified by the unique requirement . . . to provide both a fair and impartial forum[.]" *United States v. Glenn*, 25 M.J. 278, 279 (C.M.A. 1987) (quoting *United States v. Moyar*, 24 M.J. 635, 638 (A.C.M.R. 1987) (emphasis

added). "Uniformed members cannot be allowed to circumvent [that requirement]." *United States v. Groce*, 3 M.J. 369, 371 (CM.A. 1977).

This requirement of an impartial panel "is upheld through military judges' determinations on the issues of actual bias, implied bias, and the mandatory disqualifying grounds in [R.C.M. 912]." *United States v. Nash*, 71 M.J. 83, 88 (C.A.A.F. 2012). R.C.M. 912(f)(1)(N) provides that a member "*shall* be excused for cause whenever it appears that [they] . . . [s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." This "catch-all" ground covers both actual and implied bias, *United States v. New*, 55 M.J. 95, 99 (C.A.A.F. 2001), and "reflects the President's concern with avoiding even the perception of bias, predisposition, or partiality in courts-martial panels." *Strand*, 59 M.J. at 458 (quoting *United States v. Minyard*, 46 M.J. 229, 231 (C.A.A.F. 1997) (citing *United States v. Lake*, 36 M.J. 317, 323 (C.M.A. 1993)). It also does not require a challenge by either party – the only condition precedent is a finding that the prospective member should not sit.

Actual bias is a "personal bias that will not yield to the military judge's instructions and the evidence presented at trial." *Nash*, 71 M.J. at 88. Actual bias exists, for example, where the member has formed an opinion as to an accused's guilt. *See* R.C.M. 912(f)(1)(M); *see also Nash*, 71 M.J. at 88; *Irvin*, 366 U.S. at

727 ("[t]he theory of the law is that once a juror has formed an opinion he cannot be impartial.") (quoting *Reynolds v. United States*, 98 U.S. 145, 155 (1878)). Similarly, actual bias exists where a member is not "genuinely open to considering all mitigating and extenuating factors which are relevant to a just sentence *before* arriving at a fixed conclusion." *New*, 55 M.J. at 99 (quoting *United States v. Rockwood*, 52 M.J. 98, 106 (C.A.A.F. 1999)) (emphasis in original).

Implied bias, by contrast, is an objective test. The "core" of implied based is the "consideration of the public's perception of fairness in having a particular member as part of the court-martial panel." *United States v. Rogers*, 75 M.J. 270, 271 (C.A.A.F. 2016) (quoting *United States v. Peters*, 74 M.J. 31, 34 (C.A.A.F. 2015)). Bias is implied where "the risk that the public will perceive that the accused received something less than a court of fair, impartial members is too high." *United States v. Woods*, 74 M.J. 238, 243-44 (C.A.A.F. 2016) (quoting *United States v. Bagstad*, 68 M.J. 460, 462 (C.A.A.F. 2010) (quoting *United States v. Townsend*, 65 M.J. 460, 463 (C.A.A.F. 2008))); *see also Woods*, 74 M.J. at 243 ("[A]n appearance of evil must be avoided as much as the evil itself.") (quoting *United States v. Deain*, 17 C.M.R. 44, 53 (C.M.A. 1954)) (brackets in original).

This Court has found implied bias where a member misapprehends or misstates basic legal principles, regardless of their intent or their willingness to follow the correct legal guidance. In *Woods*, for example, the panel member

responded in her questionnaire that, in the military, an accused was "guilty until proven innocent." *Woods*, 74 M.J. at 240. Despite her repeated affirmations that she could follow the law and would presume the accused innocent, this Court found implied bias. *Id*. at 244.

Two factors were critical in *Woods*. First, the Convening Authority, who had possession of the panel member's questionnaire, had constructive knowledge of her responses. *Id*. at 244. To this point, this Court's concern of improper selection under Article 25, UCMJ, was a factor in the totality of the circumstances analysis. *Id*. at 244, n. 2; *see also United States v. Hines*, 75 M.J. 734, 741 (Army Ct. Crim. App. 2016) (*Woods*, in part, concerned government endorsement of an erroneous legal view). Second, the panel member's misunderstanding went to a "fundamental tenet" of law. *Id*. at 244. A reasonable member of the public "might well, ask why, absent any operational military necessity, the military judge retained [the member] as the senior member of this five-member panel." *Id*.

A lack of candor may also give rise to implied bias. *United States v. Albaaj*, 65 M.J. 167, 171 (C.A.A.F. 2007). For example, in *Albaaj*, a member's interactions with a witness, which had been "openly antagonistic," had not been disclosed. *Id*. While the member testified in a *DuBay* hearing that his personal evaluation of the witness had positively changed prior to trial, by not disclosing the *initial* interactions, the member had become the judge of his own disqualifications.

Id. at 170. The interactions, coupled with his non-disclosure, resulted in a finding of implied bias. *Id*.

As *Albaaj* admonishes, "[t]his Court expects *complete* candor from court members during voir dire." *Id*. at 169 (citing *Modesto*, 43 M.J. at 318) (emphasis added). "Anything less" puts the right to an impartial trial in jeopardy. *Id*. (citing *United States v. Mack*, 41 M.J. 51, 54 (C.M.A. 1994); *see also People v. Merriman*, 60 Cal. 4th 1, 95 (Cal. 2014) (it is "presumptively prejudicial" for a prospective juror to conceal relevant facts in the selection process); *McDonough Power Equip. v. Greenwood*, 464 U.S. 548, 556 (1984) (Blackmun, J., with whom Stevens, J. and O'Connor, J. join, concurring) ("in most cases, the honesty or dishonesty of a juror's response is the best initial indicator of whether the juror in fact was impartial."). Candor is no less important on jury questionnaires. *See United States v. Isaacson*, 752 F.3d 1291, 1302 (11th Cir. 2014) (excusal for cause based solely on questionnaires constitutes voir dire – "the expectation that jurors will tell the truth is the same whether their answers are spoken or written."); *see also United States v. Gills*, 702 Fed. Appx. 367, 381 (6th Cir. 2017) (where a juror has not been truthful in his or her questionnaire, "the court has good reason to doubt their claim of impartiality.").

Publicity also plays a role in an implied bias inquiry. *Skilling v. United States*, 561 U.S. 358, 425 (2010) (Alito, J., concurring). Courts thus have found

implied bias where a juror is aware of "highly prejudicial information" about the case, despite his or her affirmation of impartiality. *See e.g., United States v. Gonzalez*, 214 F.3d 1109, 1112 (9th Cir. 2000) (citing *Tinsley v. Borg*, 895 F.2d 520, 527-29 (9th Cir. 1990) (collecting cases)); *Willie v. Maggio*, 737 F.2d 1372, 1379-81 (5th Cir. 1984) (collecting cases); *United States v. Iribe-Perez*, 129 F.3d 1167, 1171 (10th Cir. 1997); *see also Hughes v. State*, 490 A.2d 1034, 1040-41 (Del. 1985). Part of this analysis turns on the adequacy of the voir dire. *United States v. Akbar*, 74 M.J. 364, 397 (C.A.A.F. 2015) (citing *United States v. Calley*, 48 C.M.R. 19, 23 (1973) (finding no bias where the "extensive" voir dire did not show an impact of the pre-trial publicity); *see also United States v. Paulin*, 6 M.J. 38, 39 (C.M.A. 1978) (*quoting United States v. Fry*, 23 C.M.R. 146, 149 (1957) ("The touchstone of ineligibility . . . is not the mere knowledge of the evidence, but the effect it has.")).

Argument

A. There was error: Lieutenant Colonel Garwold should have been disqualified as a panel member

1. Lieutenant Colonel Garwold held actual bias

Under the totality of the circumstances, LTC Garwold had an actual bias against appellant. As a *starting* point, LTC Garwold had followed appellant's case to such an apparent extent that nearly three years later, its specific details – [redacted]

[redacted] To put this in perspective, LTC Garwold's case knowledge far exceeded every other sitting panel member. *See Davenport v. MacClaren*, 964 F.3d 448, 466 (6th Cir. 2020) (the fact that jurors were still able to recall three years later that the accused had been shackled at his trial was indicative of the impression it made).

[redacted] *See Michigan First Credit Union v. CUMIS Ins. Soc'y, Inc.*, 641 F.3d 240, 240 (6th Cir. 2011) (discussing "universally condemned" practice of "Golden Rule" arguments as they invite bias and prejudice) (citations omitted). Thus, when LTC Garwold explicitly and unequivocally indicated that he had already formed an opinion as to guilt or punishment, the context of this statement reveals how cemented his opinion likely really was. *Nash*, 71 M.J. at 88; *New*, 55 M.J. at 99; *Irvin*, 366 U.S. at 727-28;

Paulin, 6 M.J. at 39 (*quoting Fry*, 23 C.M.R. at 149 ("The touchstone of ineligibility . . . is not the mere knowledge of the evidence, but the effect it has."). Inexplicably, no one listened to LTC Garwold's own words that he was not fit to sit as a panel member.

Nine months later, LTC Garwold submitted a "redo" questionnaire, [redacted] Yet, his tempered answers on his "redo" did not refute his original responses, and [redacted]

Voir dire did not obviate his bias. Despite indicating in both questionnaires he was unsure he could keep an open mind, he failed to disclose this in general *or* individual voir dire. Instead, he simply affirmed that he could keep an open mind and that he was aware of *no* reason why he could not be impartial. In this way, he was allowed to become his own judge as to his own disqualification. *Albaaj*, 65 M.J. at 171.

[redacted] individual voir dire that he never discussed the publicity in the case, or his thoughts on the publicity, *with anyone in anyway*; [redacted]

[redacted] Also, when asked in individual voir dire what he had read, seen, or heard about the case, he responded he saw "general notifications" and merely "headlines;" yet, [redacted] All of this deception was known to the military judge and the trial counsel who undoubtedly reviewed his questionnaires. *McDonough Power Equip.*, 464 U.S. at 556 (Blackmun, J., with whom Stevens, J. and O'Connor, J. join, concurring) ("in most cases, the honesty or dishonesty of a juror's response is the best initial indicator of whether the juror in fact was impartial.").

[redacted] There was actual bias. *Irvin*, 366 U.S. at 727 ("[t]he influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man.")

2. There was implied bias

In addition to actual bias, there was also implied bias – the risk that the public would perceive that LTC Garwold was something less than a fair and

impartial member was far "too high." The facts above establish implied bias, but there is more.

In addition to above, LTC Garwold also held beliefs that run contrary to our system of justice. [redacted]

In *Woods*, this Court found similar statements, standing alone, established implied bias. *Woods*, 74 M.J. at 243-44. Indeed, LTC Garwold's "probably guilty" comment runs contrary to the presumption of innocence that *Woods* found so problematic. *Id.* His statement that an accused, like appellant, charged with shooting fellow soldiers deserving *less rights* also runs contrary to a fundamental tenet similar to *Woods*. *See Irvin*, 366 U.S. at 722 (the Constitution guarantees *every* accused his rights, "regardless of the heinousness of the crime charged, [his] apparent guilt . . . or the station in life which he occupies."). Additionally, LTC Garwold's feeling of contempt for an accused exercising his right to turn down nonjudicial punishment fell well short of the "judicial temperament" expected of

panel members, *see* Article 25(e)(2), UCMJ, and demonstrated his intolerance for and hostility toward soldiers who have the temerity to defend themselves and exercise their rights.

Although LTC Garwold was not asked to clarify these statements on voir dire, if the member's repeated affirmations in *Woods* did not suffice, any similar affirmations here would have the same result. In short, in this capital case with a large pool of prospective members on standby, the public would be left with the same concern as in *Woods* – why this member?[18] *Woods*, 74 M.J. at 244.

Piling on to these concerns was LTC Garwold's extensive knowledge of the case, [redacted] *See e.g., Gonzalez*, 214 F.3d at 1112 (citing *Tinsley*, 895 F.2d at 527-29); *Willie,* 737 F.2d at 1379-81. On this point, this case is distinguishable from cases like *Akbar* where the *extensive* voir dire was able to root out the effect of pretrial publicity. 74 M.J. at 397. Here, the military judge's *limited* voir dire did not even touch on the inconsistencies with the few responses LTC Garwold provided to her.

[18] It should be noted that the staff judge advocate advised on the panel selection. To the extent that this court agrees that it was error for the staff judge advocate to participate in this case, that too is part of the totality of the circumstances. *Woods*, 74 M.J. at 244, n. 2.

The proverbial "cherry on top" was the fact that LTC Garwold was a self-proclaimed "major league infidel," adhering a bumper sticker to his car expressing that sentiment. This was a statement against the "enemy," [redacted] (Sealed). Every day he sat on the panel in appellant's case, he walked by the concertina wire, the HESCO barriers, and the roving patrols of armed soldiers into a courthouse that looked much like a COP, with all the attendant security measures.

Under the totality of all of these circumstances, the risk that the public would perceive that LTC Garwold was something less than a fair and impartial member in this capital case was far "too high." Ultimately, asking him to sit was "asking too much of both [him] and the system." *United States v. Daulton*, 45 M.J. 212, 217-18 (C.A.A.F. 1996) (quoting *United States v. Dale*, 42 M.J. 384, 386 (C.A.A.F. 1995)). That error was exacerbated by the fact that this capital case required a unanimous verdict and sentence.

B. <u>The error was plain and obvious</u>

An error is plain or obvious if "the military judge should be 'faulted for taking no action' even without an objection." *United States v. Gomez*, 76 M.J. 76,

81 (C.A.A.F. 2017) (citing *United States v. Burton*, 67 M.J. 150, 153 (C.A.A.F. 2009) (quoting *United States v. Maynard*, 66 M.J. 242, 245 (C.A.A.F. 2008))). Here, the standard is met. The military judge, who had a constitutional duty to ensure a fair trial – which included a duty to ensure that "deliberations will be based on the four corners of the law and not on personal views of members," *United States v. Elfayoumi*, 66 M.J. 354, 356 (C.A.A.F. 2008), failed to disqualify a member in a capital case whose bias was indisputable.[19]

The government argued to the Army Court that *United States v. McFadden*, 74 M.J. 87 (C.A.A.F. 2015), forecloses relief because the military judge has no *sua sponte* duty to excuse members. (JA 177-78). In essence, the government argued that it can *never* be plain error for a judge to not excuse a biased panel member. *McFadden*'s reach is not as far as the government wishes for three reasons.

[19] That said, the military judge was not the only participant that failed in ensuring appellant received a fair trial. Similarly, the trial counsel also had a duty in this particular instance. *See* R.C.M. 912(c) ("[t]rial counsel *shall* state *any* ground for challenge for cause against any member of which trial counsel is aware.") (emphasis added). A trial counsel's duty is to seek justice, not victory. This rule recognizes the "historical status" of the trial counsel as the "trial judge advocate" and legal representative of both the accused and the government. *See United States v. Valencia*, 4 C.M.R. 7, 10 (1952) (citing Winthrop, *Military Law and Precedents*, 2d ed., 1920 Reprint, p. 194); *see also United States v. Gordon*, 2 C.M.R. 322, 323 (A.B.R. 1952) ("[i]t has been uniformly held by this office that the language of [this rule] is of the strongest protective quality and calls for full disclosure and prompt action by the court in excusing the disqualified member.")

First, *McFadden*'s holding was much narrower than the government interprets: "[w]e hold that the military judge did not have a duty to sua sponte *excuse Major Cereste*." *McFadden,* 74 M.J. at 90 (emphasis added). Thus, the holding was explicitly limited to the facts of that case.

Second, by previously permitting plain error review, *see e.g.*, *Strand*, 59 M.J. at 460, this Court has implicitly recognized that *some* duty exists even in the absence of a challenge for cause. *See United States v. Czachorowski*, 66 M.J. 432, 440 (C.A.A.F. 2008) (Ryan, J., dissenting) (the rules put no duty on a judge except in cases of plain error). Moreover, the Supreme Court in *United States v. Frazier* explicitly recognized judges have a duty to ensure impartiality. 335 U.S. 497, 511 (1948) ("[our precedent] seems to contemplate implicitly that in each case a broad discretion and *duty* reside in the court to see that the jury as finally selected is subject to no solid basis of objection on the score of impartiality.") (emphasis added). Several circuits have relied on *Frazier* to find a *sua sponte* duty of the judge, or have otherwise recognized a *sua sponte* duty. *See e.g.*, *United States v. Torres*, 128 F.3d 38, 43 (2nd Cir. 1997) ("the presiding trial judge has the authority and responsibility, either sua sponte or upon counsel's motion, to dismiss prospective jurors for cause.") (citing *Frazier*, 335 U.S. at 511); *Miller v. Webb*, 385 F.3d 666, 675 (6th Cir. 2004) ("[w]hen a trial court is confronted with a biased juror, as in this case, the judge must, either *sua sponte* or upon a motion, dismiss

the prospective juror for cause.") (citing *Frazier*, 335 U.S. at 511); *United States v. Mitchell*, 690 F.3d. 137, 145 (3d. Cir. 2012) (remanding case to determine whether a juror was a relative of the prosecutor, and if so, "the failure to excuse her offended [the defendant's] right to trial by an impartial jury," notwithstanding the absence of a challenge); *United States v. Mitchell*, 568 F.3d 1147, 1151 (9th Cir. 2009) (describing the Ninth Circuit's test to find error in the absence of a challenge as whether "the evidence before the court was so indicative of impermissible juror bias that the court was obliged to strike [the juror] from the jury, even though neither counsel made the request.")

Third, *McFadden* was not a capital case where there is a "qualitative difference" to the death penalty and "a corresponding difference in the need for reliability in the determination that death is the appropriate punishment[.]" *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). "Death is different" jurisprudence calls for additional safeguards in panel selection. The Fifth Circuit, for example, has stated that the right to an impartial jury in a capital case must "be more carefully safeguarded" as jurors are "called upon to make a 'highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves.'" *King v. Lynaugh*, 828 F.2d 257, 259 (5th Cir. 1987) (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 340-41, n. 7 (1985) (quoting *Zant v. Stephens*, 462 U.S. 862, 900 (1983) (Rehnquist, J., concurring)). Similarly, the

Sixth Circuit has concluded that where a trial is to "have the jury pass on . . . life or death . . . [Due Process] insists on the most impartial tribunal the reasonable needs of society will permit." *United States v. ex rel. De Vita v. McCorkle*, 248 F.2d 1, 8 (6th Cir. 1957).

Thus, the military judge had a duty to act in cases where, as here, there is no question as to bias, especially in a capital case.

C. <u>The error materially prejudiced a substantial right</u>

The partiality of a panel member prejudices a substantial right. *Woods*, 74 M.J. at 245; *United States v. Richardson*, 61 M.J. 113, 121 (C.A.A.F. 2005) (same). Accordingly, appellant must be granted a rehearing before an impartial panel.

Issue Presented IV

WHETHER ARTICLE 45(b)'S PROHIBITION AGAINST GUILTY PLEAS TO CAPITAL OFFENSES IS CONSTITUTIONAL?

<u>Summary of Argument</u>

Article 45(b)'s prohibition on guilty pleas to capital offenses is an impermissible restriction on a competent accused's right of autonomy to make his defense. The respect for an accused's choices concerning his defense mandated by *Faretta* and the Supreme Court's recent decision in *McCoy* announcing for the first time a "protected right of autonomy" to maintain innocence or admit guilt, leave

no doubt that Article 45(b)'s prohibition of a historically recognized right is constitutionally offensive. While appellant later decided to maintain innocence, the violation of his autonomy was "complete" when his pleas were rejected and structural error resulted.

Law

A. The Guilty Plea

1. Historical backdrop

An accused has been able to convict himself by acknowledging his crime "from the earliest days of the common law[.]"[20] Albert A. Alschuler, *Plea Bargaining and its History*, 79 Colum. L. Rev. 1, 7 (1979). Sir Matthew Hale, whose *History of the Pleas of the Crown* was the first systematic legal study of criminal procedure for capital offenses,[21] wrote, "[W]here the defendant upon hearing of his indictment . . . confesses it, this is a conviction." 2 M. Hale, *History of the Pleas of the Crown* *225; *see also* 4 W. Blackstone, *Commentaries* *324 ("[u]pon a simple and plain confession, the court hath nothing to do but award judgment."). While courts generally discouraged such pleas out of "tenderness to

[20] Convictions from an accused's acknowledgment reportedly predate the Norman conquest of England in 1066. Albert A. Alschuler, *Plea Bargaining and its History*, 79 Colum. L. Rev. 1, 7, n. 24 (1979).

[21] Harold Berman, *The Origins of Historical Jurisprudence*: *Coke, Seldon, Hale*, 103 Yale. L.J. 1651, 1705 (1994).

the life of the subject," 4 W. Blackstone, *Commentaries* *324, the accused's final decision was respected. *See* John Langbein, *The Criminal Trial Before the Lawyers*, 45 U. Chi. L. Rev. 263, 278-79 (1978) (noting the occurrence of guilty pleas).

Drawing on the English common law, the American colonies "acknowledged and honored" guilty pleas to capital offenses.[22] Barry Fisher, *Judicial Suicide or Constitutional Autonomy? A Capital Defendant's Right to Plead Guilty*, 65 Alb. L. Rev. 181 (2001); *see also* George C. Thomas III, *Colonial Criminal Law and Procedure: The Royal Colony of New Jersey, 1749-1757*, 1 N.Y.U. J.L. & Liberty 671, 673, n. 17 (2005) (noting that a defendant could plead guilty to a capital offense). And when the United States formed, "[i]t hardly occurred to the framers . . . that an accused . . . should be prevented from surrendering his liberty by admitting his guilt." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 276 (1942).

[22] Accepting a guilty plea to a capital offense occurred as early as 1642 when Thomas Granger, reportedly the first juvenile executed in the colonies, *see* Mary Berkheiser, *Capitalizing Adolescence, Juvenile Offenders on Death Row*, 59 U. Miami L. Rev. 135, 159 (2005), confessed in open court to "buggery with a mare, a cow, two goats, five sheep, two calves, and a turkey." William Bradford, *Of Plymouth Plantation*, 248 (1647).

The first federal criminal code, like today, did not prohibit guilty pleas, even to capital offenses, *see* 2 Stat. 112, 119 §30 (1790),[23] and the Constitution expressly provides for them with respect to treason,[24] which, at the time of the Constitution's drafting, was punishable "by an exceptionally cruel method of execution." *United States v. Rahman*, 189 F.3d 88, 112 (2nd Cir. 1999) (citations omitted).

Early state practice mirrored federal practice. *See e.g.*, *People ex rel. Coberly v. Scates*, 4 Ill. 351, 353 (Ill. 1842) ("a prisoner in a capital case … may certainly plead guilty"). Throughout the nineteenth century,[25] "courts as well as leading legal commentators recognized that a defendant could plead guilty unconditionally to a crime punishable by death." Fisher, 65 Alb. L. Rev. at 186;

[23] The Federal Crimes Act imposed a plea of not guilty only on an accused who stood "mute" or who peremptorily challenged more than 20 jurors. 2 Stat. 112, 119 §30 (1790).

[24] Article III, §3 provides, in part: "No person shall be convicted of Treason unless on the testimony of two Witnesses to the same overt Act, *or on Confession in open Court*." The framers' concerns of "new-fangled and artificial treasons" prompted them to "fi[x] the proof necessary for conviction" directly in the Constitution's text. THE FEDERALIST NO. 43 (James Madison). Consequently, a conviction on a confession alone seemingly addressed the framers' concerns over treason.

[25] *See* William Ortman, *When Plea Bargaining Became Normal*, 100 B.U.L. Rev. 1435, 1436 (2020) (by the end of the nineteenth century, the guilty plea was becoming a normative mode of case disposition).

see also 2 J. Bishop,[26] *New Criminal Procedure* 619, §795 (2d ed. 1872) ("[u]ndoubtedly a [capital] prisoner of competent understanding, duly enlightened, has the right to plead guilty.") (emphasis added); W. L. Clark, *Hand Book of Criminal Procedure* 373 (1895) ("the defendant may plead guilty in a capital case […] [a court] cannot compel him to plead not guilty, and submit to a trial"); S. Greenleaf, *Treatise on the Law of Evidence* 349, 349-50 (1899) (a guilty plea is sufficient for a capital conviction).

2. Contemporary practice

Today, guilty pleas have become the primary mode of case disposition,[27] and they are now so engrained in the criminal justice system that it is "for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (citations omitted); *see also United States v. Jackson*, 390 U.S. 570, 584-55 (1968) (guilty pleas are "necessary for the . . . practical . . . administration of

[26] Joel Prentiss Bishop was a leading nineteenth century authority on criminal procedure, *see Apprendi v. New Jersey*, 530 U.S. 466, 510 (2000), and "the foremost law writer of the age." Stephen A. Siegel, *Joel Bishop's Orthodoxy*, 13 Law & History Rev. 215, 220 (1995).

[27] Approximately ninety percent of federal cases end in guilty pleas. See John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, Pew Research Center (Jun. 11, 2019). Available at: https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/ This number is equivalent in military cases. *See* Colonel Jeff A. Bovarnick, *Plea Bargaining in the Military*, 27 Fed. Sent. R. 95 (2014).

criminal law.") (citations and quotations omitted) (alterations in original); Colonel Jeff A. Bovarnick, *Plea Bargaining in the Military*, 27 Fed. Sent. R. 95 (2014) (noting the critical nature of the guilty plea in military criminal justice). With respect to capital cases, the federal government and every state but Arkansas provide for guilty pleas. *See* Major Frank E. Kostik*, If I Have to Fight for My Life – Shouldn't I Get to Choose My Own Strategy? An Argument to Overturn the Uniform Code of Military Justice's Ban on Guilty Pleas in Capital Cases*, 220 Mil. L. Rev. 242, 286, n. 287 (2014) (collecting statutes).

In this "system of pleas," the decision to plead guilty is "fundamental," *Jones*, 463 U.S. at 751, and "undeniably . . . profound." *Godinez v. Moran*, 509 U.S. 389, 398 (1993). It is a "grave and solemn act." *Brady v. United States*, 397 U.S. 742, 748 (1970). For most defendants, it is "the most important single decision" they will make. *Cardoza v. Rock*, 731 F. 3d 169, 178 (2nd Cir. 2013) (quoting *Boria v. Keane*, 99 F.3d 492, 496-97 (2nd Cir. 1996)).

In capital cases, this is especially so. A plea of guilty, while assuring confinement for the accused, may spare his life "by demonstrating that he has taken responsibility for his conduct . . . and is seeking to spare the victim[s'] family and the court unnecessary time and expense." *See Report of the Military Justice Review Group* [hereinafter MJRG Report], pt. I: UCMJ Recommendations, §B, Article 45, ¶6, 398-99 (2015). As one study reveals, the more evidence jurors

see of an accused taking responsibility from the outset, "the more likely [they] will return a life sentence." Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 Cornell L. Rev. 1557, 1591-92, 1596 (1998). Thus, there is a "powerful incentive" for a capital accused to plead guilty. *People v. Montour*, 157 P.3d 489, 500 (Col. 2007).

Conversely, a plea of not guilty in a case where there is overwhelming evidence may have "dire implications." *Florida v. Nixon*, 543 U.S. 175, 191-92 (2004) (citing Sundby, 83 Cornell L. Rev. at 1597). "[A] death penalty trial is no ordinary criminal trial and invoking one's presumption of innocence can prove deadly." Lieutenant Colonel Eric Carpenter, *An Overview of the Capital Jury Project for Military Justice Practitioners: Aggravation, Mitigation, and Admission Defenses*, 2011 Army Law. 16, 18 (2011) (quoting Scott E. Sundby, *A Life and Death Decision: A Jury Weighs the Death Penalty*, 33 (2005)).

Apart from these weighty considerations, guilty pleas may also serve other interests wholly independent of punishment. Among these, a guilty plea may spare an accused and his family "from the spectacle and expense of protracted courtroom proceedings." *Jackson*, 390 U.S. at 584; *see also Brady*, 397 U.S. at 750 (evidence may convince an accused that a trial is "not worth the agony and expense"). There is a "cruel impact" that results from forcing an accused to endure a full-dress jury

trial when he "greatly would prefer not to contest [his] guilt[.]" *Jackson*, 390 U.S. at 584.

3. Article 45(b), UCMJ

In stark contrast to most every other jurisdiction – and in a stark departure from historical military practice, *see* Kostik, 220 Mil. L. Rev. at 245-52 – Article 45(b), UCMJ, prohibited an accused from pleading guilty to any capital offense. The specific provision in effect at the time of appellant's trial provided, "[a] plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged." *See* Article 45(b), UCMJ; 10 U.S.C. § 845(b) (2012). However, in all other cases, the plea of guilty is permissible.[28] *Id*.

B. The right of autonomy under the sixth amendment

1. *Faretta* and its application to plea decisions

Recall in *Faretta*, the Supreme Court held that an accused has a constitutional right to present his own case. 422 U.S. at 807. The Court observed,

[28] In 2016, Congress repealed Article 45(b)'s prohibition. *See* National Defense Authorization Act for Fiscal Year 2017 [hereinafter 2017 NDAA], Pub. L. 114-328, §5227 (Dec. 2016). The MJRG Report recommended its repeal, stating that the reasons for the prohibition were "no longer applicable in light of statutory and constitutional requirements for a knowing and voluntary plea, the assistance of counsel, and the detailed inquiry into voluntariness and the circumstances of the offense under Article 45 and R.C.M. 910." Military Justice Review Group Report, pt. I: UCMJ Recommendations, §B, Article 45, ¶6, 399.

"[t]he Sixth Amendment does not merely provide that *a* defense shall be made *for* the accused; it grants to the accused personally the right to make *his* defense." *Id*. at 819 (emphasis added). Accordingly, to force counsel on an unwilling accused makes counsel an "organ of the state" and denies the accused the defense constitutionally guaranteed to him, "for, in a very real sense, it is not *his* defense." *Id*. at 820-21 (emphasis in original). *Faretta* was, thus, anchored in "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *Weaver*, 137 S. Ct. at 1908 (citing *Faretta*, 422 U.S. at 834).

Courts have applied *Faretta* beyond self-representation to both restrict the imposition of pleas on unwilling defendants and uphold pleas that were freely requested. With respect to the former, *Frendak v. United States*, is instructive. There, the D.C. Court of Appeals determined that *Faretta* called for a re-assessment of the "*Whalem* Rule," a common law rule that permitted courts to impose a not guilty by reason of insanity (NGI) plea when there was "sufficient question" as to an accused's mental responsibility. 408 A.2d 364, 379 (D.C. Ct. App. 1979). *Frendak* reasoned that *Faretta's* "respect for a defendant's freedom as a person mandates that he or she be permitted to make fundamental decisions about the course of the proceedings." *Id*. at 376. After noting several reasons why one would forego a NGI plea, to include the "stigma of insanity," *Frendak* found

that such tangible interests outweighed any interests in ensuring "some abstract concept of justice is satisfied by protecting one who may be . . . blameless from a conviction . . ." *Id*. at 376-78.

Ultimately, *Frendak* held that, since an accused "must bear the ultimate consequences of any decision," a court *must* defer to his decision to waive a NGI plea so long as it is voluntary and intelligent. *Id*. at 378. Other courts have engaged in a similar analysis. *See e.g.*, *State v. Jones*, 99 Wn.2d 735, 742 (Wa. 1983) ("we concur in the belief that basic respect for a defendant's individual freedom requires us to permit the defendant himself to determine his plea."); *Hendricks v. People*, 10 P.3d 1231, 1242-43 (Col. 2000) (interpreting a *statutory* rule on NGI pleas and holding that "an individual's interest in autonomously controlling the nature of her defense . . . will predominate over the broader interest of society unless pressing concerns mandate a contrary result.") (citing *Faretta*, 422 U.S. at 818-19)); *United States v. Marble*, 940 F.2d 1543, 1546 (D.C. Cir. 1991) (imposing a NGI plea on an unwilling accused makes both accused and counsel an "organ of the state.") (quoting *Faretta*, 422 U.S. at 820).

With respect to upholding pleas, *State v. Louviere* is particularly instructive. 833 So.2d 885 (La. 2002). Louviere pled guilty to capital murder and received a death sentence. 833 So.2d at 891. He contended that Article 1, §17 of Louisiana's Constitution, providing that "a criminal case in which the punishment may be

capital shall be tried before a jury," required a jury trial on the merits. *Id*. at 891-93. The court disagreed. *Id*. at 895.

Construing "case" to be confined only to the sentence, the Louisiana Supreme Court observed that "denying a defendant the choice to plead guilty arguably would impermissibly deprive the defendant, per the federal Constitution, of his strategic choice to acknowledge his crime and thereby appear remorseful before his jury." *Id*. at 894 (citing Fisher, 65 Alb. L. Rev. at 182-83 (citing generally *Faretta*, 422 U.S. 806)). To the court, "Only this interpretation of Article 1, §17 preserv[ed] a capital defendant's ability to present a defense of his choice . . ." *Id*. at 895.

Other state decisions are in accord with *Louviere*. In *Chapman v. Kentucky*, for example, the Kentucky Supreme Court turned to the notion of dignity to hold that an accused is *entitled* to plead guilty in a capital case. 265 S.W.3d 156, 175-76 (Ky. 2007). In rejecting Chapman's contention that the trial court should have prohibited him from pleading guilty in a capital case, the court concluded that "[a]dhering to a defendant's choice to seek the death penalty honors the last vestiges of personal dignity available to such a defendant." *Id*. at 175-76. It further concluded, "the rights of citizens of a free society to make these types of choices concerning their own future are essential to the proper functioning of society as a whole, as well as our system of criminal justice." *Id*. at 176 (citations

omitted); *see also Commonwealth v. Fears*, 575 Pa. 281, 298-99 (Pa. 2003) (in a capital case, "[p]ermitting a defendant to plead guilty preserves a defendant's autonomy in deciding whether to proceed to trial and allows a defendant to accept full responsibility for his conduct in the appropriate case."); *Cooke v. State*, 977 A.2d 803, 841 (Del. 2009) (the choice to plead guilty "implicat[es] inherently personal rights which would call into question the fundamental fairness of the trial if made by anyone other than the defendant.") (citations omitted).

2. *McCoy*: the "right of autonomy" to maintain innocence or concede guilt

As discussed above, the Supreme Court held in *McCoy* that an accused has a "Sixth Amendment-secured autonomy" to maintain innocence. 138 S. Ct. at 1505, 1511. This also includes the autonomy to concede guilt. *Id*. When that choice was taken from McCoy, the violation of his "protected right of autonomy" was "complete." *Id*. at 1511.

Notably, while *Faretta* was based on autonomy, *see Weaver*, 137 S. Ct. at 1908; *McKaskle*, 465 U.S. at 178, *McCoy* is the first time the Court has announced that an accused has a specific "right of autonomy." *See United States v. Rosemond*, 958 F.3d 111, 120, n. 3 (2nd Cir. 2020) (while the Court "has long recognized" autonomy as a basis for an accused's right to make decisions, prior to *McCoy,* it "had never explicitly used the term 'right of autonomy' in the criminal

context."). Moreover, the Court resolved *McCoy* solely on this right.[29] *See Smith v. Stein*, 982 F.3d 229, 234 (4th Cir. 2020) (suggesting, without deciding, that *McCoy* announced a new constitutional rule as *McCoy* rejected the application of the Court's ineffective-assistance-of-counsel precedent and was decided on autonomy).

Similar to *Faretta*, courts have not cabined *McCoy* to its facts. *See e.g.*, *Read*, 918 F. 3d at 719 (under *McCoy*, a court commits reversible error if it permits counsel to present an insanity defense over the accused's objection); *cf. Frendak*, 408 A. 2d at 376, 378-79; *Marble*, 940 F. 2d at 1546; *see also Taylor v. State*, 213 A. 3d 560, 565-66, 569 (Del. 2019) (applying *McCoy* to the withdrawal of a plea and interpreting a state statute to accord with autonomy interests). According to one state supreme court, *McCoy* is "broadly written" and "based on [its] ruling …, there is no question that a criminal defendant's decision whether to concede guilt implicates fundamental constitutional rights and the right to exercise that decision is protected under the Sixth Amendment." *State v. Horn*, 251 So. 3d 1069, 1075-76 (La. 2018).

[29] Before *McCoy*, courts previously viewed claims similar to McCoy's as one of ineffective assistance of counsel. *See e.g.*, *Cooke*, 977 A. 2d at 848-50 (a concession of guilt without the accused's consent is a denial of effective assistance of counsel). Indeed, McCoy's argument centered on this. (JA 1409-1414). However, *McCoy* explicitly rejected this approach. *McCoy*, 138 S. Ct. at 1510-11.

Argument

A. Article 45(b)'s prohibition on guilty pleas to capital offenses is an impermissible restriction on a competent accused's right of autonomy to make his defense

The fundamental principle that an accused "must be allowed to make his own choices about the best way to protect his own liberty" central in *Faretta*, *Weaver*, 137 S. Ct. at 1908 (citing *Faretta*, 422 U.S. at 834), includes the choice to plead guilty. *See* Fisher, 65 Alb. L. Rev. at 202 (arguing the *Faretta* provides a right to plead guilty); *Frendak*, 408 A.2d at 376 (restricting imposition of NGI pleas because *Faretta*'s "respect for a defendant's freedom as a person mandates that he or she be permitted to make fundamental decisions about the course of the proceedings."); *Jones*, 99 Wn.2d at 742 (the "basic respect for a defendant's individual freedom requires us to permit the defendant himself to determine his plea."); *Hendricks*, 10 P.3d at 1242-43 ("an individual's interest in autonomously controlling the nature of her defense . . . will predominate over the broader interest of society."); *Cooke*, 977 A.2d at 804, 841 (the choice to plead guilty "implicat[es] inherently personal rights which would call into question the fundamental fairness of the trial if made by *anyone* other than the defendant.") (citations omitted) (emphasis added).

As *Louviere* rightly determined, a statutory scheme prohibiting guilty pleas to capital offenses would unconstitutionally deprive an accused of his defense of

choice. *Louviere*, 833 So.2d at 895 (citations omitted). Indeed, for an accused who wants to admit his guilt, a plea of "not guilty" mandates his presumption of innocence. *United States v. Hill*, 75 M.J. 350, 356 (C.A.A.F. 2016). Its "legal effect" *denies* the offense and "puts at issue … all material allegations in … the charge." Winthrop, *Military Law and Precedents*, §415 (1920)*; see also Corbitt v. New Jersey*, 439 U.S. 212, 228, n. 3 (1978) (Stevens, J., Brennan J., and Marshall, J., dissenting) (a plea of not guilty denies the credibility of the evidence) (citations and quotation marks omitted). Moreover, in cases of overwhelming evidence of guilt, the unwanted presumption of innocence – and any attendant implicit denials – may *increase* his chances of execution. *Nixon*, 543 U.S. at 191-92. Thus, a not guilty plea imposes on an accused a defense that "in a very real sense, is not *his* defense." *Faretta*, 422 U.S. at 821 (emphasis in original); *Marble*, 940 F.2d at 1546 (imposing a NGI plea on an unwilling accused makes both accused and counsel an "organ of the state.") (quoting *Faretta*, 422 U.S. at 820)).

McCoy's recognition of a right to a "secured autonomy" leaves no doubt that an accused has a right to a guilty plea. True, *McCoy* concerned the actions of a defense counsel, but *McCoy* rejected the claim of ineffective assistance of counsel, and decided instead that McCoy's "right of autonomy" demanded a new trial. *McCoy*, 138 S. Ct. at 1511. Surely, any "right of autonomy" would be empty if it did not protect against *state* interference by the same sovereign attempting to

execute the accused, especially so where the interference is aimed at denying a "fundamental" decision, *Jones*, 463 U.S. at 751, that has been historically recognized. After all, it is the accused, "not his lawyer *or the State*, who will bear the personal consequences of [*his*] conviction[,]" *Faretta*, 422 U.S. at 834 (emphasis added), and "the rights of citizens of a free society to make these types of choices concerning their own future are essential to the proper functioning of society as a whole, as well as our system of criminal justice." *Chapman*, 265 S.W.3d at 176.

B. <u>The denial of appellant's pleas was structural error</u>

When the court rejected appellant's offers to plead guilty, the violation of his autonomy was "complete" and, per *McCoy*, structural error resulted. *McCoy*, 138 S. Ct. at 1511; *see also United States v. Trujillo*, 960 F.3d 1196, 1206 (10th Cir. 2020) (suggesting that an outright refusal of a plea would result in a structural error under *McCoy*).

The fact that appellant later maintained innocence going into trial *after* his pleas were rejected is of no real consequence. To this point, while the Army does not generally permit pleas where an accused maintains innocence, this case offers an exception to this rule. If appellant's defense is not recognized as a matter of law, then a finding of guilt would not be "inconsistent" with this proffer. *See United States v. Roane*, 43 M.J. 93, 98-99 (C.A.A.F. 1995) (the mere possibility of

a defense is not a substantial basis to reject the plea); Nor is appellant required to truly believe he is guilty. *See United States v Butler*, 20 USCMA 247, 43 CMR 87 (1971) ("even a personal belief by an unremembering accused, that he did not commit the offense, does not preclude him from entering a plea of guilty because [if] he is convinced that the strength of the [g]overnment's case against him is such as to make assertion of his right to trial an empty gesture."). Thus, the important inquiry is not whether he believes he is guilty, but whether the facts he proffers are inconsistent with guilt. In this way, appellant could maintain his innocence while receiving the benefits of a guilty plea, and avoid the spectacle of a fully-contested trial.

Accordingly, because structural error occurred here, appellant is entitled to a rehearing.

Issue Presented V

ASSUMING ARGUENDO THAT ARTICLE 45(b) IS CONSTITUTIONAL, WHETHER ITS APPLICATION IN THIS CASE NONETHELESS CONSTITUTED REVERSIBLE ERROR.

Summary of Argument

Assuming arguendo that Article 45(b)'s prohibition on guilty pleas to capital offenses is constitutional, its application to appellant's offers to plead guilty in the alternative to *noncapital* offenses constituted reversible error. While the military judge may have correctly determined that *Dock* dictated this result, that decision

was poorly reasoned. *Dock*'s holding – that Article 45(b)'s prohibition on guilty pleas includes *de facto* guilty pleas – violated the carinal rule of statutory interpretation: the plain language controls, and no other rule of statutory interpretation can justify it. Its application in this case caused the wholesale deprivation of appellant's regulatory right to plead guilty to these noncapital offenses and resulted in structural error.

Standard of Review

This Court reviews questions of statutory construction de novo. *United States v. Kohlbeck*, 78 M.J. 326, 330 (C.A.A.F. 2019).

Law

A. Article 45, UCMJ

As discussed *supra*, prior to 2016, Article 45(b), prohibited guilty pleas to all *capital* offenses. The complete text of Article 45 provided:

> [(a)] If an accused after arraignment makes an irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.
>
> [(b)] A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged. With respect to any other charge or specification to which a plea of guilty has been made by the accused and accepted by the military judge … a finding of guilty of the charge or specification

> may, if permitted by regulations of the Secretary concerned, be entered immediately without vote.

Art. 45, UCMJ, 10 U.S.C. § 845.

Under *Dock*, Article 45(b)'s prohibition on guilty pleas to capital offenses covers both formal and *de facto* guilty pleas. 28 M.J. at 119. The government charged Dock with premeditated murder while perpetrating a robbery; the charge thus encompassed premeditated murder and felony murder. *Id*. at 118. The Government separately charged the robbery. *Id*. at 118. Dock pled guilty to unpremeditated murder and the robbery. *Id.* The only remaining issue was whether the murder was committed in the course of the robbery.

At trial, Dock's defense was that he "only intended to rob [the victim]" and "only intended to inflict grievous bodily harm on him after he resisted." *United States v. Dock*, 26 M.J. 620, 623 (A.C.M.R. 1988). Dock's defense counsel opened by telling the panel members:

> [The issue is] whether the death of [the victim] was a premeditated, calculated killing as opposed to a killing that occurred when the accused attempted to inflict grievous bodily harm, while he was intoxicated, on the cab driver. The defense submits that when you have heard the evidence, you will conclude that in fact there was a plan to rob; that's hardly in issue.

Id. at 623 (emphasis added).

The Army Court of Military Review (ACMR), relying on *United States v. McFarlane*, 23 C.M.R 320 (1957), held that pleas were determined by the "four

corners" of the record and that Dock had, "for all practical purposes," pled guilty. *Id*. at 623. To the ACMR, defense's opening statement had constructively "conced[ed] murder in the course of the robbery." *Id*. at 623.

The CMA affirmed. *Dock*, 28 M.J. at 119. According to the CMA, the ACMR had "properly opined" based on the pleas and the "four corners" of the record that Dock pled guilty. *Id*. It further agreed with the ACMR that Dock's pleas, "taken within the context of [h]is case, constituted a plea of guilty to felony murder, a capital offense." *Id*. Neither the ACMR or the CMA in *Dock*, nor the CMA in *McFarlane*, conducted any statutory analysis of Article 45(b) in reaching their decisions.

B. <u>Principals of statutory analysis</u>

"Courts must presume that a legislature says in a statute what it means and means in a statue what it says[.]" *Conn. Nat'l Bank v. Germain*, 530 U.S. 249, 253-54 (1992). "Unless the text of a statute is ambiguous, the plain language of the statute will control, [except where] it leads to an absurd result." *See United States v. Schell*, 72 M.J. 339, 343 (C.A.A.F. 2013) (citations and quotations omitted). Where the plain language controls, and there is no absurd result, the "sole function" of the Court is to enforce it. *EV v. United States*, 75 M.J. 331, 333 (C.A.A.F. 2016) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000) (citation omitted) (internal quotation marks omitted)).

Terms are ambiguous only if they are "reasonably susceptible of different interpretations." *Bd. of Trs. v. C&S Wholesale Grocers*, *Inc.*, 802 F.3d 534, 542 (3rd Cir. 2015) (citations and quotations omitted). As part of this analysis, courts presume Congress intended statutory terms to "have the meaning generally accepted in the legal community at the time of enactment." *Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 275 (1994) (citations omitted).[30] Courts must also look at statutory terms in their context, where each term's meaning necessarily informs the others. *United States Nat'l Bank of Ore. v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 454 (1993). On this point, "identical words used in . . . the same statute are . . . presumed to have the same meaning[,]" *Robers v. United States*, 572 U.S. 639, 643 (2014) (citations and quotations omitted) (second alteration in original), and no term is rendered void or insignificant. *Young v. UPS*, 575 U.S. 206, 226 (2015).

An absurd result is more than an anomaly or a counterintuitive or unexpected result; it "shoc[ks] the general moral or common sense." *Lara-Aguilar v. Sessions*, 889 F. 3d 134, 144 (4th Cir. 2018) (citations omitted). Put differently,

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[30] *See also Molzof v. United States*, 502 U.S. 301, 307 (1992) (where the statute contains a term of art accumulated from legal tradition, a "cardinal rule" is that, in the absence of any contrary direction, Congress adopted its widely accepted definitions) (citations omitted); *see also Evans v. United States*, 504 U.S. 255, 259 (1992) ("a statutory term is generally presumed to have its common-law meaning.") (quoting *Taylor v. United States*, 495 U.S. 575, 592 (1990)) (internal quotation marks omitted)).

an absurd result is a result "so bizarre Congress could not have intended it." *Johnson v. Sawyer*, 120 F.3d 1307, 1319 (5th Cir. 1997). "Absurd results 'are, and should be, exceptionally rare.'" *Dickenson-Russell Coal Co., LLC v. Sec'y of Labor*, 747 F.3d 251, 259 (4th Cir. 2014) (quoting *Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 304 (4th Cir. 2000), *aff'd sub nom*. *Barnhart v. Sigmon Coal Co*., 534 U.S. 438 (2001); *United States v. McPherson*, 81 M.J. 372, 280 (C.A.A.F. 2021).

Only where a term is ambiguous or where an absurd result would occur, may courts then refer to other tools of statutory interpretation.

Argument

A. *Dock* was wrongly decided

1. The plain language of Article 45(b) does not prohibit a court from accepting de facto guilty pleas to an offense for which the death penalty may be adjudged

a. A "plea of guilty" is not ambiguous

The issue here turns on what constitutes a "plea of guilty." In 1950, when Congress enacted Article 45, a "plea of guilty" was defined as a "confession of guilt" and, itself, a conviction, *see* Black's Law Dictionary (3rd. ed. 1933), supplying both evidence and verdict and ending controversy. Wigmore, Evidence §§ 1064, 2588 (3rd. ed. 1942). As the Supreme Court has stated (and repeated), "[l]ike a verdict of a jury," "a [plea of guilty] is conclusive . . . [and] the court has nothing to do but give judgment and sentence." *Kercheval v. United States*, 274

U.S. 220, 223 (1927); *see also Boykin v. Alabama*, 395 U.S. 238, 242 (1969) ("[a] plea of guilty is more than a confession … it is itself a conviction; nothing remains but to give judgment and determine punishment."). This concept of a guilty plea bringing finality to the proceedings is historically rooted. *See* 2 M. Hale, *History of the Guilty Pleas of the Crown* *225; 4 W. Blackstone, *Commentaries* *324.

Moreover, at the time of Article 45's enactment, this definition of a "plea of guilty" was the practice "[i]n practically all federal and state courts[.]" *United States v. Lucas*, 1 C.M.R. 19, 23 (C.M.A. 1951). It was also the military practice at the time of the UCMJ's enactment. *See* Winthrop, *Military Law and Precedents*, §416 (1920) (with respect to a guilty plea, "[i]f the alleged offence indeed is duly set forth in the charge, such offence is confessed by this plea, *and a formal conviction of the same must follow*.") (emphasis added).

Therefore, the general consensus was, as it is today, that a "plea of guilty" is a confession that brings finality to the proceedings as a conviction (or its equivalent). Given this consensus, and in the absence of any contrary language, Congress is presumed to have intended this meaning when it enacted Article 45. *See Greenwich Collieries*, 512 U.S. at 275. That is to say, Congress did *not* intend to include de facto guilty pleas to capital offenses as a "plea of guilty," which do not–and cannot–independently result in a conviction for the capital offense. *See e.g. United States v. Watruba*, 35 M.J. 488, 490 (C.M.A. 1992) (there are legal

differences between a guilty plea and a confessional stipulation that amounts to a de facto guilty plea; the de facto plea still requires a trial as a matter of law).

The structure and context of Article 45 readily support this result. Article 45(b) references a "plea of guilty" twice, and, in the second reference, explicitly permits a finding of guilt on a "plea of guilty" to be "entered immediately without vote" with respect to any other offense.[31] To construe that a plea of guilty in this reference includes de facto pleas would be legally impermissible. A finding of guilt cannot be entered *without vote* on such a plea. *Id*.

Similarly, Article 45(a) also references "a plea of guilty" and instructs that if "*after* a plea of guilty [an accused] sets up a matter inconsistent with the plea . . . a plea of not guilty *shall be entered* in the record . . ." To construe that a "plea of guilty" in this paragraph includes *de facto* guilty pleas renders Congress' command to enter a "not guilty plea" wholly unnecessary – in a de facto guilty plea, a "not guilty" plea has already been entered. This interpretation, therefore, should be avoided. *Young*, 575 U.S. at 226.

It follows then that if Congress intended a "plea of guilty," to which Article 45 thrice refers, to be limited to a formal guilty plea in two of these three

[31] Article 45(b) was amended in 1968 to include the second sentence. 10 U.S.C. § 845(b) (1968).

references, it did not intend a different meaning, *sub silentio*, with respect to the third reference. *Robers*, 572 U.S. at 643.

b. Permitting *de facto* guilty pleas to capital offenses does not produce an absurd result

Article 45(b) forces a trial for capital offenses. *De facto* guilty pleas still require a trial. *See Watruba*, 35 M.J. at 490; *United States v. Resch*, 65 M.J. 233 (C.A.A.F. 2007). Accordingly, permitting *de facto* guilty pleas is not an outcome "so bizarre Congress could not have intended it." *Johnson*, 120 F.3d at 1319.

c. Conclusion

The government charged appellant with premediated murder and attempted premeditated murder. With respect to these charges, only premediated murder was punishable by death. MCM, pt. IV, ¶¶ 4.e., 43.a., e.(1) (2008). With respect to the lesser included offenses (LIOs) of unpremeditated murder and attempted unpremeditated murder, *see* MCM, pt. IV, ¶¶ 43.d.(1), (3)(a), the MCM explicitly excepted the death penalty as a punishment. MCM, pt. IV, ¶¶ 4.e., 43.e.(2). It was, therefore, error to refuse appellant's guilty pleas to these LIOs; no conviction for "an offense for which the death penalty may [have been] adjudged" could have resulted from these pleas alone. *Resch*, 65 M.J. at 237 (in a guilty plea to a LIO, the government still has the burden of *independently* proving non-common elements of the greater offense; the government cannot use an accused's plea colloquy to a LIO to prove the non-common elements of the greater offense).

2. To the extent it is even necessary, resort to the legislative history and other canons of construction confirms the plain meaning result

a. Legislative history

The legislative history shows *no* intent for Article 45(b)'s prohibition to encompass *de facto* guilty pleas. *See e.g. United States v. Solis*, 46 M.J. 31, 33 (C.A.A.F. 1997) (referring to UCMJ's legislative history to discern statutory intent). For one, there was a concerted effort to ensure a full opportunity to plead guilty to noncapital offenses. As originally drafted, Article 45(b) prohibited a plea of guilty in a "capital case." *Uniform Code of Military Justice*: *Hearings before a Subcomm. of the Comm. on Armed Forces on H.R. 2498* [hereinafter Hearings on H.R. 2498], 81st Cong., 1st Sess., 577 (1949). But due to concerns that the term "case" would unduly restrict an accused's ability to plead guilty to noncapital offenses, especially LIOs[32] – a result that was explicitly disclaimed by the drafters,

[32] According to one witness:

> If [Article 45(b)] dealt with the offense rather than the case that would make more sense. […] If the offense were substituted for case that would mean the accused could plead guilty to . . . *a non-capital offense necessarily included in the capital offense for which he is charged*. [W]artime desertion is a capital offense. The accused should be able to plead guilty to absence without leave while denying he meant to leave the service . . . An accused may not want the evidence before the court and on the record; he may prefer to plead guilty.

Hearings on H.R. 2498, 81st Cong., 1st Sess., 822 (1949).

see H.R. 2498 at 1056 – the Subcommittee voted to amend Article 45(b) to prohibit a military court from accepting a guilty plea to a capital "offense." H.R. 2498 at 1056. Article 45(b) passed with substantially the same language.[33] Notably, until 1984, every MCM expressly provided, "a plea of guilty may be received as to a noncapital offense which is necessarily included in a capital offense" without any accompanying limitation. *Compare* MCM, ¶70a (1951) *with* MCM, ¶70a (1968) *and* MCM, ¶70a (1969); *see also Solis*, 46 M.J. at 33 (discussing Executive implementation in tandem with legislative history for the purposes of statutory analysis).

For another, when Congress later amended Article 45(b) to provide for the entry of findings after a plea of guilty, the intent was to specifically conform to civilian practice "where the record of judgment entered on such a plea constitutes a judicial determination of guilt" and to permit an entry of findings except where the *offense* was capital. *Hearings before a Subcomm. of the Comm. on Armed Services on S. 745* [hereinafter Hearings on S. 745], 89th Cong., 2nd Sess., 543 (1966). Specifically, the drafters stated:

> [T]he amendment is to allow, . . . if the offense is not one for which the death penalty may be adjudged, the entry of

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[33] Before its final passage, this provision was again amended to prohibit a guilty plea to "any charge or specification alleging an offense for which the death penalty may be adjudged." *See* Uniform Code of Military Justice, Conference Report (1950).

> findings of guilt upon acceptance of a plea of guilty without the necessity of voting on the findings. At common law and under the practice in the U.S. district courts, the court may enter judgment upon a plea of guilty without a formal finding of guilty and the record of judgment entered on such a plea constitutes a judicial determination of guilt. The amendment is intended to conform military criminal procedure with that in civilian jurisdictions, and to delete from military practice the merely ritualistic formality of requiring the assembled court to vote on the findings.

Hearings on S. 745. Thus, Article 45(b), as amended, contemplates only those guilty pleas that result in a final determination of guilt, and prohibits such pleas only to *capital* offenses.

b. The doctrine of constitutional avoidance

The doctrine of constitutional avoidance also counsels that Congress did not intend for Article 45(b)'s prohibition to encompass *de facto* guilty pleas. *See Kohlbek*, 78 M.J. at 332 (statutes should be "interpreted in a way that avoids placing [their] constitutionality in doubt.") (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 247 (2012)) (alterations in original). Assuming this Court finds Article 45(b) constitutionally permissible, prohibiting *de facto* pleas gleaned from a record's "four corners" implicates not only *McCoy*'s autonomy to concede guilt at trial, *see McCoy*, 138 S. Ct. at 1505, but also implicates the right to "present a complete defense," *Crane v. Kentucky*, 476 U.S. 683, 690 (1986), the right to "present [an accused's] own version of

events in his own words," *Rock v. Arkansas*, 483 U.S. 44, 52 (1987), and the right to present argument, *Herring v. New York*, 422 U.S. 853, 865 (1975), which necessarily includes the right to argue all reasonable inferences from the evidence. *See United States v. Knickerbocker*, 2 M.J. 128, 130, n. 3 (C.M.A. 1977).

B. *Stare Decisis* should not apply

Under *stare decisis*, a court follows its earlier decisions when resolving the same issue addressed in an earlier decision. *United States v. Andrews*, 77 M.J. 393, 399 (C.A.A.F. 2018) (citations omitted). However, *stare decisis* is not an "inexorable command." *United States v. Blanks*, 77 M.J. 239, 242 (C.A.A.F. 2018) (quoting *United States v. Falcon*, 65 M.J. 386, 390 (C.A.A.F. 2008)). This Court considers four factors to determine whether to depart from precedent: "[(1)] whether the prior decision is unworkable or poorly reasoned; [(2)] any intervening events; [(3)] the reasonable expectations of servicemembers; and [(4)] the risk of undermining public confidence in the law." *Id*. (citations omitted); *see also United States v. Quick*, 74 M.J. 332, 336 (C.A.A.F. 2015) (citing *United States v. Boyett*, 42 M.J. 150, 154 (C.A.A.F. 1995) (internal citations omitted).

All four factors weigh in favor of departing from *Dock*. First, by failing to perform any statutory analysis, *Dock* was poorly reasoned. Specifically, *Dock* violated the cardinal rule of statutory interpretation: look to the plain language. *See e.g.*, *United States v. Tucker*, 76 M.J. 257, 258 (C.A.A.F. 2017) (in interpreting

a statute, "we are obligated to engage in a 'plain language' analysis of the relevant statute."); *Andrews*, 77 M.J. at 400 (suggesting that a decision was poorly reasoned where it provided for plain error review despite the regulation calling for "waiver").

Moreover, *Dock* presented an unworkable decision. At the time of a guilty plea, the record's "four corners" have not yet been developed. How, then, does a military judge know whether to accept a plea to a noncapital offense? Moreover, if, after the record develops, there is no *de facto* plea, how can an accused who has been denied his pleas obtain relief? *See United States v. Simoy*, 46 M.J. 592, 620 (A. F. Ct. Crim. App. 1996) (under *Dock*, rejection of capital plea was not error based on what the military judge knew at the time of the ruling; "20/20 hindsight is not the standard"); *see also United States v. Phillips*, 52 M.J. 268, 272 (C.A.A.F. 2000) (a military judge's abuse of discretion is reviewed "on the basis of the facts before . . . her at the time of the ruling.") (citation omitted). While concern over *Dock*'s workability has been mooted by Article 45(b)'s repeal, it nonetheless represented serious practical issues, as this case demonstrates.

Second, since *Dock*, the Supreme Court in *McCoy* announced that an accused has a constitutional right of autonomy to concede guilt at trial. *McCoy*, 138 S. Ct. at 1511. *McCoy* thus represents an intervening event, which undercuts, if not decimates, *Dock*'s "four corners of the record" analysis. *See United States v.*

Fosler, 70 M.J. 225, 232 (C.A.A.F. 2011) ("stare decisis cannot possibly be controlling when . . . the decision in question has been proved manifestly erroneous, and its underpinnings eroded, by subsequent decisions of [the Supreme] Court.") (quoting *United States v. Gaudin*, 515 U.S. 506, 521 (1995)) (alternations in original).

Third, there is nothing to suggest that servicemembers have relied on *Dock*. To the contrary, *Dock* stands as an impediment to the capital accused. *See e.g.*, *Simoy*, 46 M.J. at 620.

Finally, departing from *Dock* to safeguard an accused's defense in a capital case does not risk undermining public confidence. This is especially so given that *Dock* has been relied on only relatively few times. *Cf*. *Quick*, 74 M.J. at 338 (declining to depart from precedent where the rule had been consistently interpreted for sixty years and provided a "predictable and consistent appellate remedy for both litigants and the lower courts."). And, in any event, *Dock* is nearly a dead letter. Only a capital crime occurring before Article 45(b)'s repeal would implicate *Dock*.

C. The wholesale deprivation of appellant's *right* to plead guilty to these offenses resulted in reversible error

Appellant had the *right* to plead guilty to noncapital offenses, even if only guaranteed by regulation. *See* R.C.M. 910(a). The wholesale denial of a this right infringed on constitutionally protected autonomy interests, and is, therefore,

structural error. *See McCoy*, 138 S. Ct. at 1511 (noting that a structural error may occur "[i]f the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest," such as "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty.") (quoting *Weaver,* 137 S. Ct. at 1908) (citing *Faretta*, 422 U. S. at 834)); *see also Trujillo*, 960 F.3d at 1206 (where the court "strips a defendant of his choice to plea or proceed to trial entirely . . . we can imagine such error would so impermissibly infringe upon the defendant's protected autonomy right as to be a structural error.").

However, even if this error falls short of a constitutional deprivation, its denial nonetheless constitutes reversible error. *See United States v. Martinez*, 486 F.2d 15, 21 (5th Cir. 1973) (rejection of a guilty plea not for "good reason" under Rule 11 is reversible error).

For the reasons already stated in Issue Presented IV, appellant's later desire to maintain his innocence does not foreclose relief.

PART A: SECTION II

Issue Presented VI[34]

WHETHER THE PROSECUTOR'S SENTENCING ARGUMENT IMPERMISSIBILY INVITED THE PANEL TO MAKE ITS DETERMINATION ON CAPRICE AND EMOTION?

Summary of Argument

The gratuitous and *repeated* references to a victim's pregnancy on the merits which were clearly inadmissible, coupled with the repeated references in sentencing and an argument for "a single bullet–two lives lost," was improper argument, solely calculated to play to prejudices of the panel. Moreover, the specific call to the panel to use their *emotion* for those who have left "our formation" was similarly improper. Taken together, this improper argument resulted in prejudice.

Standard of Review

This Court reviews unpreserved errors of improper argument for plain error. *Andrews*, 77 M.J. at 398. Whether an error constitutes "plain error" is a determination reviewed de novo. *Moran*, 65 M.J. at 181. Plain error is established where: (1) there was error, (2) the error was plain or obvious, and (3) the error materially prejudiced a substantial right of the accused. *Bungert*, 62 M.J. at 348.

[34] This issue was not raised before the Army Court.

Additional Facts

A. Private FV's pregnancy

One of the victims, Private (PV2) FV, was nine weeks pregnant. (JA 765). Private FV was struck by a single bullet, and neither she nor her unborn child survived. (JA 765). The Government did not charge appellant with the unborn child's death. (JA 51-58).

According to pretrial testimony, PV2 FV cried out "My baby! my baby!" as the shooting unfolded, (JA 283), and Sergeant First Class (SFC) Maria Guerra testified she heard those screams followed by gunfire. (JA 284). The government sought to introduce this evidence. According to the government, if SFC Guerra could hear PV2 FV's screams, so could appellant, and the government contended that the fact that SFC Guerra did not hear PV2 FV after the gunfire indicated that PV2 FV was shot after her pleas. (JA 284). To the Government, this showed that the act was premeditated. (JA 284). That is, PV2 FV was saying, in essence, "Don't shoot me. I'm pregnant." (JA 285).

The defense objected, noting that SFC Guerra never actually saw PV2 FV and that the evidence actually indicated the opposite of the government's proffer. (JA 283). Appellant renewed this objection after proceeding *pro se*. (JA 409). The military judge, however, overruled the objection. (JA 409).

In its opening statement, the government drew attention to PV2 FV's screams of "My baby! My baby!" (JA 719). As anticipated, it elicited SFC Guerra's testimony that she heard PV2 FV scream before gunfire, but not after. (JA 750).

But the government did not stop there. The government elicited testimony from *seven* more witnesses as to hearing the screams of "My baby! My baby!" (JA 747-48, 751-53, 755, 759-60). Unlike SFC Guerra, no other witness testified to PV2 FV's screams in relation to gunfire. (JA 747, 751-53, 755, 759-60). Most witnesses testified to simply hearing the screams, (JA 747, 751-53, 755, 759), and the one witness who saw PV2 FV testified to seeing her scream *after* she was shot, (JA 756-58), in direct contradiction to the government's proffer. He was also shown a picture of PV2 FV to confirm her identity. (JA 758). In other testimony, PV2 FV was referred to by the witness and the prosecution as "the pregnant female." (JA 761).

Adding to this, the government also called PV2 FV's First Sergeant (1SG), 1SG James Cox, on the merits to testify that PV2 FV had become pregnant, causing her deployment to Iraq to be abbreviated. (JA 745). This was purportedly to establish why PV2 FV was at the SRP site. (JA 745-46). Yet, the government did not do the same for other victims.

Also on the merits, the government had the medical examiner confirm that PV2 FV was, in fact, pregnant. (JA 765).

In closing, the government again highlighted the screams of "My baby! My baby!" The government argued that appellant, as a doctor, must have known that he would encounter pregnant females at the SRP.

It was not until deliberations, after *weeks* of hearing this evidence, that the military judge instructed the panel that the "my baby" testimony could not be used to conclude that appellant was a "bad person or has general criminal tendencies." (JA 772). However, she did instruct them that they may use the evidence for premeditation. (JA 771).

In sentencing, the government limited victim impact to one witness for each deceased victim with four exceptions, one being PV2 FV. (JA 776). The government first called PV2 FV's father, who testified that there were more than thirteen murders because appellant "killed my grandson." (JA 777). The government then recalled 1SG Cox for the specific purpose of testifying to her "military character." (JA 776). His testimony focused on his efforts to keep PV2 FV in Iraq after learning of her pregnancy. (JA 778). Private FV was the only victim where a witness was called for the purpose of "military character."

After having eight witnesses testify to the screams of "My baby! My baby!", two additional witnesses discuss her pregnancy, and her father testify as to a fourteenth victim, the government then argued:

> [PV2 FV], a mother's thoughts not for herself, not for her own life, but for that of her unborn child. [PV2 FV], whose final words were, "My baby! My baby!" A single bullet punctured her lungs and her heart; a single bullet ended her life, and that of her unborn child, and broke her father's heart. . . . A single bullet–*two lives lost* . . .

(JA 792-93) (emphasis added).

B. The government's war-themed argument that culminated in the call to use emotion for those who departed "our formation"

The government's argument regarding PV2 FV was part of a broader war-themed argument. The government began by telling the panel that appellant should be executed, not only for what he did, but *who* he did it to. (JA 780). The victims were those who "gave the final measure not in Iraq, not in Afghanistan, but answering the call to duty" at the SRP site. (JA 780). They were "united" in death. (JA 780, 784). The government repeatedly referenced nearly each victim's death notification, portraying the scene as a car pulled up to a home with "two uniformed officers in Class A uniforms," (JA 782, 784-91, 793), interweaved with references to a deceased victim's bloody Combat Infantry Badge, (JA 790), and a deceased victim's tattoo, inscribed "Sacrifice. All gave some, some gave all," (JA 792), a picture of a flag-draped casket at Arlington National Cemetery. (JA 831).

The government then asked the panel to use their "emotion" for the souls that had departed "*our* formation . . . ." (JA 797). As for appellant, "he is not giving his life. *We* are taking his life." (JA 797).

Law

"It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, *and appear to be*, based on reason rather than caprice or emotion." *Gardner v. Florida,* 430 U.S. 349, 358 (1977) (emphasis added), *followed* in *Lankford v. Idaho,* 500 U.S. 110, 124-26 (1991); *Zant v. Stephens,* 462 U.S. 862, 885 (1983); and *California v. Brown,* 475 U.S. 1301, 1304 (1986) (Rehnquist, Circuit Justice). "Because the death penalty is unique 'in both its severity and its finality,' *id.* at 357, [the Court] ha[s] recognized an acute need for reliability in capital sentencing proceedings." *Monge v. California*, 524 U.S. 721, 732 (1998) (citing *Lockett v. Ohio,* 438 U.S. 586, 604 (1978) (opinion of Burger, C. J.) (the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); *Strickland v. Washington,* 466 U.S. 668, 704 (1984) (Brennan, J., concurring in part and dissenting in part) ("[w]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding").

Accordingly, "[a] prosecutor may not attempt to inflame jurors faced with this awesome choice by playing on their passions, prejudices, and fears[,]" or by "goading [them] into an emotional state more receptive to a call for the imposition of death." *Tucker v. Zant*, 724 F.2d 882, 887-88 (11th Cir. 1984) (citations omitted); *see also United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000) (arguments "aimed at inflaming the passions or prejudices of the court members are clearly improper.") (citations omitted); *United States v. Frey*, 73 M.J. 245, 248 (C.A.A.F. 2014) ("it is error for trial counsel to make arguments that 'unduly . . . inflame the passions or prejudices of the court members.'") (quoting *United States v. Marsh*, 70 M.J. 101, 102 (C.A.A.F. 2011) (alteration in original) (quoting *United States v. Schroder*, 65 M.J. 49, 58 (C.A.A.F. 2007)).

While the line between permissible advocacy and impropriety is "exceedingly fine," *United States v. Fletcher*, 62 M.J. 175, 183 (C.A.A.F. 2005), certain arguments unquestionably fall in the latter camp. For example, openly asking the jury to use their emotion is always impermissible. On this point, *State v. Taylor* is instructive. There, over defense objection, the prosecutor urged the jury to "get mad" and make their decision on "the evidence, the law, the facts, and your emotion." 944 S.W.2d 925, 937 (Mo. 1997). The Missouri Supreme Court found error. *Id*. at 938. The court reversed the death sentence, concluding that

there was a "reasonable probability that the jury would have reached a different result without the improper argument." *Id*. at 938.

Prosecutors are also prohibited from interjecting their personal beliefs into arguments. *Fletcher*, 62 M.J. at 179 (citing *United States v. Horn*, 9 M.J. 429, 430 (C.M.A. 1980)). This includes suggesting that the jurors be on the government's side. *Commonwealth v. Silvelo*, 486 Mass. 13, 20-21 (Mass. 2020); *Westbrook v. General Tire & Rubber Co.*, 754 F.2d 1233, 1238-39 (5th Cir. 1985) ("us versus them" arguments "have no appeal other than to prejudice" and their "condemnation . . . extends to all impassioned and prejudicial pleas intended to evoke a sense of community loyalty, duty, and expectation."). In *People v. Gonzalez*, for example, the California Supreme Court found the prosecutor's "letter" to the child victim to be improper where the letter asked jurors to feel shame for society's failure and to join him in assuming the role of the deceased child's nuclear family. 253 P.3d 185, 229 (Cal. 2011). More specifically, "using first person plural . . . to speak to the jurors themselves, [the prosecutor] sa[id], '[y]ou are a member of *our* family, those of *us* who have lived with you here in Department 32,' and '*we* will hold your torturers accountable' by imposing death." *Id*. at 235 (Wiseman, J., concurring in part and dissenting in part) (emphasis in original). There, however, the trial court made immediate "admonitions," which were "partially effective," *id*. at 229-30, and in finding no prejudice, the majority noted, in part, that the letter

was not central to the argument and that the prosecutor "did not return to the objectionable themes." *Id*. at 230.

In assessing prejudice of an improper argument, this Court has looked to three factors: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the [sentence]." *Frey*, 73 M.J. at 250 (citing *United States v. Halpin*, 71 M.J. 477, 480 (C.A.A.F. 2013)). Moreover, the argument must be viewed in the context of the entire case. *Baer*, 53 M.J. at 238.

Typically, this Court must decide whether it can "be confident that [the appellant] was sentenced on the basis of the evidence alone." *Frey*, 73 M.J. at 248 (quoting *Halpin*, 71 M.J. at 480) (brackets in original) (internal quotation marks omitted in original). However, where improper argument impacts an accused's constitutional rights, a showing of harmlessness beyond a reasonable doubt is required. *See e.g.*, *United States v. Carter*, 61 M.J. 30, 35 (C.A.A.F. 2005). Some courts have tested improper arguments in capital cases for constitutional error because such error implicates an accused's Eighth Amendment right to a reliable death judgment. *See e.g., Duckett v. Mullin*, 306 F.3d 982, 992 (10th Cir. 2002) ("[t]he Eighth Amendment requires that sentencing procedures in a capital case be evaluated under a heightened standard of reliability . . . [w]e have therefore held that 'the standard governing appellate review of closing arguments during the

sentencing stage of capital cases is whether the comments *might* have affected the sentencing decision.'" (quoting *Coleman v. Brown*, 802 F.2d 1227, 1238 (10th Cir. 1986) (emphasis added).

Argument

A. Repeated and gratuitous references to Private FV's pregnancy was deliberate and prejudicial misconduct

In arguing for death, the government appealed to the panel – "a single bullet – two lives lost." Isolated, this may have been innocuous. In the context of the entire trial, this was part of a deliberate plan to unduly inflame the prejudice of the panel.

As an initial matter, this evidence should have never been admitted at the trial on the merits.[35] Nonetheless, the government did not limit itself to the

[35] From the outset, it was error to admit any evidence regarding PV2 FV's screams of "My baby, my baby." *See Old Chief v. United States*, 519 U.S. 172, 184-85 (1997) (citing 22 C. Wright & K. Graham, *Federal Practice and Procedure* § 5250, pp. 546-547 (1978) ("[t]he probative worth of any particular bit of evidence is obviously affected by the scarcity or abundance of other evidence on the same point."); *United States v. Merriweather*, 22 M.J. 657, 664-65 (A.C.M.R. 1986) (the military judge must "measure the probative value of the contested evidence in light of . . . the need for that evidence in view of the contested issues and the other evidence available to the government on those issues.") (citing *United States v. Beechum*, 582 F.2d 898, 916-17 (5th Cir. 1978) (emphasis added). Considering the military judge already *ruled* on appellant's plea offers, finding that the sequential nature of the killing alone would essentially *prove* premeditation, and considering the trove of evidence the government had on the preparation of the offenses, the probative value of PV2 FV's unobserved screams to show premeditation – a far-fetched proposition in itself – was nil. *See e.g.*, *Orona-Rangal v. State*, 53 P.3d 1080, 1084-85 (Wy. 2002) (finding error in the admission

admission for that purpose; instead, it stretched the military judge's already erroneous ruling far beyond its proffered intent. It elicited testimony from numerous other witnesses as to hearing these screams. And unlike SFC Guerra's testimony, whose auditory observations alone amidst the unfolding chaos to prove premeditation is a stretch – this testimony had *nothing* to do with premeditation. Yet, the panel heard this testimony, over and over and over again. It also heard from two different witnesses how PV2 FV was, in fact, pregnant. How did the fact that she was pregnant make any fact of consequence more or less probable?

There is but one explanation for the multitude references to PV2 FV's pregnancy: the government repeatedly put her pregnancy in evidence in a calculated and impermissible effort to emotionally charge the panel, and when the government circled back during sentencing to a "single bullet – two lives lost" after *eleven* witnesses had testified to her pregnancy, its plan came to fruition. No doubt the members were led to believe there was an unnamed, fourteenth victim on the charge sheet. This was error. *See Baer*, 53 M.J. at 237; *see also White v. Thaler*, 610 F.3d 890, 910-12 (5th Cir. 2010) (finding counsel ineffective where victim's pregnancy was introduced on the merits and rejecting the contention that references were brief as pregnancy had been discussed "nine times;" references

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of pregnancy for vehicular homicide victim where the evidence, while technically relevant, was not necessary); *see also People v. Cash*, 50 P.3d 332, 346-47 (Cal. 2002) (error to admit pregnancy evidence in a capital trial).

were likely made "to appeal to the jury's emotions"); *Lewek v. State*, So.2d 527, 534 (Fla. Dist. Ct. App. 1997) (granting new trial where evidence of eyewitness testimony contradicted government's theory on why victim's pregnancy was relevant and concluding that "such testimony was unduly prejudicial and could only be calculated to play upon the jury's passions and evoke sympathy for the tragic victims of this accident.").

This error implicates constitutional rights, and thus, the standard is whether the error was harmless beyond a reasonable doubt. *Carter*, 61 M.J. at 35; *Duckett*, 306 F.3d at 992. Going through the *Frey* factors, the government cannot meet this burden.

First, the error was pervasive *and* intentional. For weeks, the panel members heard this evidence over and over and over again.

Second, there was no immediate, corrective action by the military judge, either on the merits or on sentencing. *See Grunden*, 2 M.J. at 119 ("[n]o evidence can so fester in the minds of court members as to the guilt or innocence of the accused as to the crime charged as evidence of uncharged misconduct[;] [i]ts use must be given the weight of judicial comment."); *State v. Hernandez*, 388 P.3d 1016, 1024 (N.M. Ct. App. 2016) ("[a]ccording to the record, the jury was excused for approximately nine minutes, which is ample time for the reference to evidence to take root and fester in the jurors' minds").

Third, the evidence of guilt was overwhelming, but as repugnant as the offenses were, the introduction of a child victim put appellant's crimes in a worse context. *See Vaczek v. State*, 477 So.2d 1034, 1035 (Fla. Dist. Ct. App. 1985) ("[t]he loss of the victim's unborn child was such an inflammatory fact that we cannot deem the error harmless nor cured by the judge's instruction[.]'); *see also* Scott Phillips and Jamie Richardson, *The Worst of the Worst: Henious Crimes and Erroneous Evidence*, 45 Hofstra L. Rev. 417, 434 (2016) (the egregiousness of a murder depends on who kills whom; "[e]specially reviled are offenders who kill children"). It is not unreasonable to presume that the pregnancy was a tipping point for a member.

In sum, the error was not harmless beyond a reasonable doubt and warrants a new sentence rehearing.

B. The government impermissibly called upon members to use their emotions for the victims who departed "our" formation – "we are taking his life"

The government not only impermissibly flaunted the "my baby" evidence, it also improperly argued that the panel should reserve their emotion for those who left "our formation" and that "we are taking his life." This was error as both an explicit emotional plea, *see Taylor*, 944 S.W.2d at 937, and as an impermissible "us vs. them" argument. *Gonzalez*, 253 P.3d at 229. Assuming this Court does not

find prejudice with respect to PV2 FV's pregnancy, the cumulative effect of this error tips the scale.

Context is important. This came at the end of the government's sentencing argument, with the argument's heavy undertones of war, to a panel of combat officers deciding the case in a courthouse that resembled a Combat Outpost.

Most importantly, at least two of the panel members equivocated on whether they could maintain an open mind if references relating to the Taliban or jihad were made, at least one of whom believed soldiers who kill other soldiers deserve less rights. [redacted] (Sealed). It may be one thing to presume these members could follow the military judge's instructions, but it is quite another to remain confident that their wavering objectivity could withstand an improper argument designed to play to their specific prejudice in the absence of an immediate, curative instruction.

The cumulative effect of these errors warrants a new sentence hearing.

Issue Presented VII

WHETHER THE CONTINUED FORCIBLE SHAVING OF APPELLANT IS PUNISHMENT IN EXCESS OF THE SENTENCE HE RECEIVED AT HIS COURT-MARTIAL AND VIOLATED ARTICLE 55 AND THE EIGHTH AMENDMENT?

Summary of Argument

Article 55 and the Eighth Amendment prohibit the infliction of cruel or unusual punishment. Article 55 prohibits punishment in excess of that adjudged at trial. The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, et seq., guarantees religious freedom to all Americans, and provides that the government cannot impinge on the free exercise of religion without having a compelling governmental interest in doing so. The RFRA provides an analytical framework to address appellant's Eighth Amendment and Article 55 claims.

Appellant is a devout Muslim who earnestly believes that the wearing of a beard is an important tenet of his faith. The forcible shaving of appellant both before trial and after trial violated Article 55 and the Eighth Amendment. Appellant has maintained that the government, by forcibly shaving him, violated his free exercise both during his court-martial and during his appeal, and the government continues to do so to this day. Indeed, appellant's being forcibly shaved was the subject of pretrial litigation before this Court. *Hasan v. Gross*, 71 M.J. 416 (C.A.A.F. 2012). The Army's treatment of appellant impinges on his

religious freedom, and the government has advanced no legitimate interest in forcibly shaving him. It is illegal punishment that cuts to the core of American values.

Appellant wishes to observe one of the basic tenets of his faith. To do this, he asked for an exception to the United States Disciplinary Barracks (USDB) policy to allow him to grow a beard. Instead of granting that exception, the USDB forcibly shaved appellant. They denied him privileges as punishment for exercising his faith. They did so for no other reason than appellant's crimes and his status as a Death Row prisoner. This is increased punishment as a direct result of the crimes he was convicted of, and it also serves to humiliate and degrade appellant because of his religious faith. Such increased punishment calls for an extraordinary but appropriate remedy.

Standard of Review

This Court conducts a de novo review of whether an issue is within a service court's scope, and whether that court has authority to address a claim under Article 66, UCMJ. *United States v. Guinn*, 81 M.J. 195, 199 (C.A.A.F. 2021). Under Article 66, UCMJ, a service court must, among other things, "ensure that the sentence imposed on an appellant is 'correct in law,'" and also "determine whether the sentence imposed on an appellant 'should be approved.'" *Id., citing* Art. 66, UCMJ. Pursuant to Article 66, service courts "are empowered to grant relief based

on post-trial confinement conditions." *Id.* at 200, citing *United States v. Gay*, 75 M.J. 264 (C.A.A.F. 2016); *United States v. White*, 54 M.J. 469 (C.A.A.F. 2001); and *United States v. Erby*, 54 M.J. 476 (C.A.A.F. 2001). This Court's responsibility, pursuant to Article 67, UCMJ, is to ensure prison officials have not unlawfully increased the sentence; and to ensure that the sentence is executed in a manner that adheres to Article 55, UCMJ, and the Eighth Amendment. *White*, 54 M.J. at 472.

Additional Statement of Facts

Appellant is a devout Muslim housed on Death Row at the USDB. He is also a paraplegic confined to a wheel chair. (JA 836-45). Based on information and belief, he is the only inmate at the USDB confined to a wheelchair.

On September 16, 2013, appellant requested an exception to the grooming standards of Army Regulation (AR) 670-1, so he could wear a beard in accordance with his religious beliefs as a practitioner of Islam. (JA 1393-1401). Citing grooming standards as a means of building "team identity" and promoting "esprit de corps," Lieutenant General Howard Bromberg, the Army Deputy Chief of Staff, G1, denied the request due to the erosion of "values, discipline, and team identity," resultant from the uneven application of said standards. (JA 1393-1401). He also cited his subordinates, COL Siobhan Ledwith and MG David Quantock's

unspecified concerns that such an exception would "harm the discipline, safety, security . . . and efficient functioning," of the USDB. (JA 1393-1401).

On December 11, 2016, the appellant submitted another religious accommodation and requested a waiver to grooming policies in accordance with AR 670-1. (JA 1344). In his request, appellant cited two statements attributed to Islam's founder, Muhammad, which require adherents of that faith to grow beards. (JA 1345-46). Appellant further noted that Islam's holy book, the Quran, requires Muslims to obey the commandments of their god as conveyed through Muhammad, or risk spiritual damnation. (JA 1345-46). Appellant stated that obeying his religion's requirements for the remainder of his life is particularly important to him as he is sentenced to death. (JA 1344).

On December 15, 2016, Chaplain MAJ Edward Franklin, a USDB chaplain, learned of appellant's request. To ensure the sincerity of appellant's religious beliefs, Chaplain Franklin met with him to discuss it. (JA 1402-05). In his report on that meeting, MAJ Franklin noted that many Muslims regard wearing a beard as "an important religious practice." He determined appellant's request "to be from a genuine religious belief and personal understanding of his faith." (JA 1402-05).

Shortly after appellant's request, in January 2017, the Secretary of the Army issued *Army Directive 2017-03, Policy for Brigade-Level Approval of Certain Requests for Religious Accommodation* (JA 1490-99), streamlining the processing

of religious accommodation requests, such as appellant's. For the first time, this set the Army's default result for these types of requests to be a *granting* of the exception, absent extraordinary circumstances. The policy specifically directs brigade-level commanders to approve requests unless they determine that it is not based on a sincerely held religious belief or they identify a specific, concrete hazard that cannot be mitigated. *AD 2017-03, para. 3c*. Brigade-level commander can only approve such a request. If a request is not approved, it must be forwarded to the Deputy Chief, G-1 Command Policy Division. *Id*., *para. 3f*. Ultimately, only the Secretary of the Army or his designee may take final action to deny such a request. *Id., para. 3f.*

In discussing the types of situations when an accommodation may not be appropriate, the Directive focuses more on the ability of bearded Soldiers to wear chemical protective masks and less on the traditional wear and appearance concerns. *Id., paras. 3-4*. "Study results show that beard growth consistently degrades the protection factor provided by the protective masks currently in the Army inventory to an unacceptable degree." *Id., para. 5b.*

To ensure timely review of such personally-important and religiously-sensitive requests, the Army requires through AD 2017-03 that complete packets for religious exemptions are submitted within 30 days of the initial request. However, it was not until 94 days later on March 15, 2017, that COL D. L. Hilton,

the Commandant of the USDB, made his recommendation to COL Samuel Curtis, the U.S. Army Garrison Commander at Fort Sill, Oklahoma. (JA 1393-1401). Based on information and belief, by the time COL Hilton made his recommendation, appellant had been forcibly shaved and punished for his misconduct — denying the order to shave — at least five times.

Colonel Hilton recommended against granting the accommodation because he did not believe it was "based on a sincerely held religious belief," and appellant's "status as a death sentence inmate" presented "specific health and safety hazards" not addressed by any policy. (JA 1393-1401). Colonel Hilton provided no rationale for his determination of appellant's lack of sincere religious belief – which contradicted the detailed findings of Chaplain MAJ Franklin – despite he never having met with appellant or discussing his beliefs, as Chaplain Franklin had. Furthermore, COL Hilton did not actually cite any "specific health and safety hazards" a death row prisoner presents (especially a paraplegic prisoner confined to a wheel chair), nor how, specifically an unshaven face exacerbates those hazards. (JA 1393-1401).

Colonel Curtis concurred with no further explanation on March 23, 2017. (JA 1393-1401). On March 24, 2017, he forwarded his recommendation to the Deputy Chief of Staff, G-1, echoing COL Hilton's conclusions verbatim. (JA 1393-1401). Again, no explanation was provided as to why the Chaplain's

assessment was erroneous, or how appellant's status as a death sentence inmate sporting facial hair would affect health and safety at the facility. (JA 1393-1401).

A final decision to deny the request was not made until March 19, 2018, 463 days after appellant made his request. (JA 1393-1401). Mr. Raymond T. Horoho, the Senior Official Performing the Duties of the Assistant Secretary of the Army (Manpower and Reserve Affairs) cited "the recommendations of [appellant's] chain of command" but gave no other specific reasoning related to religious belief or safety/security. (JA 1393-1401). In a subsequent email to COL William Smoot, the Chief of the Criminal Law Division at the Office of the Judge Advocate General, Mr. Horoho once again parroted the conclusory and circular rationale that he denied the request "based on safety concerns, particularly since [appellant] was a death row inmate." (JA 1393-1401). Nothing indicated what those safety concerns were, or how appellant's death sentence inmate status implicated those concerns, not by those providing recommendations or Mr. Horoho. (JA 1393-1401).

To date, appellant's practice of his sincere religious belief causes him to be forcibly shaved, in continual restraint of his religious expression. Based on

information and belief, the forcible shaving also results in disciplinary infractions and punishment, requiring the facility to place even greater restrictions upon him.[36]

Law

While addressing no specific or stated health or safety concern, the forcible shaving of appellant directly violates federal law.

The Religious Freedom Restoration Act (RFRA) provides:

> (a) In General.--Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
>
> (b) Exception.--Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person —
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. §2000bb. The Act applies to the Armed Forces. *United States v. Stirling*, 75 M.J. 407 (C.A.A.F. 2016).

[36] Appellant had requested to grow a full beard. On July 19, 2021, LTG Gary M. Brito, Deputy Chief of Staff, G-1, approved appellant to wear a beard no longer than ¼ inch, subject to inspection at any time, due "to the unique security concerns present in a confinement facility…" with no further explanation. Memorandum, "Decision Regarding Request for Religious Accommodation – DSI Nidal Hasan, United States Disciplinary Barracks, Fort Leavenworth, KS".

The Supreme Court has already addressed this issue in a strikingly similar case. In *Holt v. Hobbs*, the Court analyzed an inmate's religious freedom claim under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §2000cc et. seq., the sister statute to RFRA.[37] 135 S. Ct. 853, 859 (2015). Holt, an inmate in the Arkansas penal system, was a devout Muslim who, in accordance with his faith, wished to grow a beard. *Id.* But his desire to follow that tenet of his faith was denied because it violated the Arkansas Department of Correction's grooming policy, which prohibited beards. *Id.* at 860. The Arkansas policy made no exceptions to beards grown for religious purposes, and provided that failure to follow the policy was "grounds for disciplinary action." *Id.* at 860.

Holt challenged the grooming policy. 135 S. Ct. at 861. In analyzing Holt's claim, the Court first observed that Holt had established that he had a sincerely held religious belief, that the growing of a beard was a dictate of his Islamic faith. *Id.* at 862. The Court also determined that the Arkansas grooming policy substantially burdened Holt's free exercise of religion. *Id.* Under the policy, Holt could shave his beard or face disciplinary action. *Id.* "Because the grooming

[37] The RLUIPA applies to inmates at state facilities receiving federal funds. *See Cutter v. Wilkinson*, 544 U.S. 709, 715 (2005).

policy puts [Hobbs] to this choice, it substantially burdens his religious exercise." *Id.*

Because Hobbs had established that the grooming policy substantially burdened his exercise of religion, Arkansas was required to show that its grooming policy furthered a compelling governmental interest and was the least restrictive means of furthering that interest. 135 S. Ct. at 863. Arkansas argued that its grooming policy was the least restrictive means of advancing its interest in "prison safety and security." *Id.* But the Court observed that both RLUIPA and RFRA require the government demonstrate that the compelling interest is served by applying the policy "'to the particular claimant whose exercise of religion is being substantially burdened.'" *Id.* (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 708 (2014)). In *Hobbs,* the Court looked to the application of the grooming policy *as it applied to Inmate Hobbs*, not to Arkansas inmates in general. *Id*.

Arkansas claimed that the grooming policy was the least restrictive means of furthering prison safety and security because it prevented inmates from hiding contraband in their beards. *Id.* The Court recognized that Arkansas had a compelling interest in limiting or stopping the flow of contraband into its prisons, but found that Arkansas had not established that the grooming policy actually accomplished that objective. "Th[e] test requires the Department not merely to

explain why it denied the exemption but to prove that denying the exemption is the least restrictive means of furthering a compelling governmental interest." *Id.* at 864.

The Court determined that even if Arkansas could show that denying Hobbs a half-inch beard furthered the legitimate government interest of controlling contraband, it was not the least restrictive means for doing so. *Id.* The Court noted that "the least restrictive means standard" required the government to show that it lacked other means of achieving its goal without imposing a substantial burden on the exercise of religion. *Id.* If a less restrictive means is available, the government must use them. *Id.*

The Court found that Arkansas had failed to use the least restrictive means. *Id.* at 864. Arkansas already searched the hair and clothing of its inmates, and it could do the same for beards. *Id.* Additionally, Arkansas could merely require inmates to run a comb through their beards to detect contraband. *Id.*

Arkansas also argued that that its grooming policy furthered the compelling governmental interest in "preventing prisoners from disguising themselves." *Id.* at 864. Arkansas argued "that bearded inmates could shave their beards and change their appearance in order to enter restricted areas within the prison, to escape, and to evade apprehension after escaping." *Id.*

The Court agreed that prisons have a compelling interest in quickly and reliably identifying prisoners. *Id.* The Court suggested that Arkansas could remedy the perceived identity problem by taking two photographs of inmates — one without a beard and one with a beard. *Id.* at 865. Additionally, the Court found that Arkansas had failed to show why growing a beard posed a risk but growing a mustache, longer hair, or a beard because of dermatological reasons would not. *Id.* "All of these could be shaved off at a moment's notice, but [Arkansas] apparently does not think that this possibility raises a serious security concern." *Id.*

The Court was concerned that Arkansas had a policy regarding beards that differed from most other states. *Id.* at 866. "That so many other prisons allow inmates to grow beards while ensuring prison safety and security suggests that the Department could satisfy its security concerns through a means less restrictive than denying petitioner the exemption he seeks." *Id.* The Court determined that Arkansas violated RLUIPA by preventing him from growing a beard. *Id.* at 866.

Likewise, in *Greenhill v. Clarke*, the Fourth Circuit found that an inmate's RLUIPA rights were violated, and possibly his free exercise of religion may have been impaired. 944 F.3d 243, 253-54 (4th Cir. 2019). Greenhill was a Muslim inmate at Red Onion State Prison in Pound, Virginia. *Id.* at 246. Greenhill claimed that Virginia violated RLUIPA by denying Greenhill a beard and access to

television so he could participate in a Muslim prayer service called *Jum'ah*. *Id.* Because of his frequent disciplinary infractions, Greenhill was confined in Red Onion's equivalent to solitary confinement. *Id.* Greenhill often failed to abide by the prison rules, so Red Onion denied him religious accommodations in an effort to reform his behavior. *Id.* at 250-51. The court found this carrot-and-stick approach violated RLUIPA. *Id.* at 250. The court determined that, "although sophisticated and well-conceived," Red Onion's disciplinary program violated RLUIPA, at least as applied to Greenhill. *Id.*

> But holding inmates' religious exercise hostage to incentivize their participation in the [disciplinary] Program is impermissible under RLUIPA. Access to bona fide religious exercise is not a privilege to be dangled as an incentive to improve inmate conduct, and placing such religious exercise in the category of *privilege* to be earned is fundamentally inconsistent with the *right* to religious exercise that RLUIPA guarantees to prisoners.

Id. The court emphasized that an inmate's "*religious exercise is not a privilege, but a right.*" *Id.* (emphasis in original). *See also Williams v. Annucci*, 895 F.3d 180, 193-94 (2d Cir. 2018) (finding that prison violated prisoner's rights under RLUIPA by forcibly shaving him and failing to provide a halal diet); *Tucker v. Collier*, 906 F. 3d 295, 304-06 (5th Cir. 2018) (holding Texas prison officials failed to conduct an individualized assessment that religious group's potentially extremist views supported prohibiting the group from holding religious meetings).

For an Eighth Amendment claim of cruel and unusual punishment before this Court, appellant must show (1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to appellant's health and safety; and (3) that appellant has exhausted the prisoner-grievance system and petitioned for relief under Article 138, UCMJ. *United States v. Lovett*, 63 M.J. 211, 215 (C.A.A.F. 2006).

Argument

Not only has appellant established that the USDB violated RFRA and the Eighth Amendment, the Army Court had the unique statutory ability to remedy these ongoing constitutional violations that unlawfully increased the severity of appellant's sentence. *United States v. Jessie*, 79 M.J. 437, 440 (C.A.A.F. 2020); *United States v. Pena*, 64 M.J. 259, 266 (C.A.A.F. 2007); *White*, 54 M.J. at 472; *Erby*, 54 M.J. at 478. But the Army Court failed to grant appellant relief, even though the senior Army official responsible for granting an accommodation refused to do so because appellant was sentenced to death.

Second, the Army Court possessed the authority pursuant to Article 66, UCMJ, to ensure sentence severity is not unconstitutionally increased, is not cruel and unusual, and is appropriate. "In addition to its duty and authority to review sentence appropriateness, a Court of Criminal Appeals also has the duty and

authority under Article 66(c) to determine whether the sentence is correct 'in law.'" *Erby*, 54 M.J. at 478.

The USDB policy, as applied to appellant, violates Article 55 and the Eighth Amendment. The only stated reason why his religious accommodation was denied is the fact that he resides on Death Row. Therefore, the denial of his request is a direct result of and punishment for the crimes he was convicted of. It is punishment over and above that adjudged at his court-martial and subjects him to cruel and unusual punishment in violation of the Eighth Amendment. Appellant is forcibly shaved every other week. Furthermore, each time he is forcibly shaved, he is also deemed in violation of the USDB's rules and regulations, and he loses additional privileges that he might otherwise obtain.

The USDB and the United States Army have never articulated a legitimate government basis for forcibly shaving appellant. The stated reason has shifted over time, from an original, rather nonsensical, concern about *espirit de corps* to Mr. Horoho's blanket decision that inmates on the USDB death row cannot have beards. In effect, Mr. Horoho stated what has been clear. The forcible shaving of appellant is additional punishment for his crime. The government seemingly does not dispute that appellant has a sincerely held religious belief that he must wear a beard consistent with the tenets of his faith. The government apparently does not

dispute that the USDB's grooming policy substantially burdens appellant's exercise of his religion.

The government cannot hide behind any notion that they are doing so for prison safety. Having established that the grooming policy substantially burdens appellant's exercise of his religion, the government bears the burden of establishing (1) the grooming standard furthers a compelling governmental interest, and (2) the government uses the least restrictive means available in furthering that interest. *Holt*, 135 S. Ct. at 862.

"That test requires the [government] not merely to explain why it denied the exemption but to prove that denying the exemption is the least restrictive means of furthering a compelling governmental interest." *Holt*, 135 S. Ct. at 864. Here, the government has completely failed to satisfy that test. In determining whether it has employed the least restrictive means, the government must make a focused inquiry on the individual claimant whose religious freedom is being substantially burdened. *Id*. at 863. Contrary to this requirement, the latest and thus official reason provided by Mr. Horoho is a blanket prohibition covering all death row inmates and fails — utterly — to address appellant's specific circumstances.

The individual claimant here is appellant, an inmate who is housed in the Special Housing Unit, aka "Death Row," a secure facility deep in the heart of the USDB. Importantly, he is a paraplegic. He presents no discernible security threat.

He cannot disguise himself. He has no use of his legs and is confined to a wheelchair. What specific "safety concerns" does this paraplegic present simply because he is on Death Row? The government does not say and has never said. Instead, it appears to have employed a one-size-fits-all policy that permits the government to infringe on the religious liberty of inmates on Death Row at the USDB. That clearly violates RFRA, which requires that the government provide the reason for its decision and an explanation why enforcing the government policy is the least restrictive means and that the decisions be based on the individual facts and circumstances of the requestor. If the facts of appellant's physical condition were properly assessed to determine that he is not a security threat, he would have been granted a religious exception.

In violating the RFRA, the government also violated the Eighth Amendment under *Lovett*. The violation of RFRA is an objectively, sufficiently serious act or omission resulting in the denial of necessities, because the forcible shaving is a direct repression of appellant's right to exercise his religious freedom. There is a culpable state of mind on the part of the USDB officials amounting to deliberate indifference to appellant's health and safety, based on the refusal to provide a reconciliation between the USDB's compelling governmental interest and an individualized assessment of appellant, or to consider the least restrictive means to accomplish their identified compelling governmental interest. Additionally,

appellant has raised this issue numerous times, at the USDB and also on direct appeal.

The continued forcible shaving of appellant, at least twice a month, increases the severity of appellant's sentence. Every time appellant is forcibly shaved, he receives further demerits and is denied benefits as a result. As the Army officials admit, this is a direct result of his having been convicted of a capital offense. This is over and above the punishment adjudged by the court-martial and over and above that permitted by law.

Accordingly, this Court must return this case to the Army Court for an appropriate consideration of appellant's Eighth Amendment claim.

Issue Presented VIII[38]

WHETHER APPELLANT WAS DEPRIVED HIS RIGHT TO COUNSEL DURING POST-TRIAL PROCESSING?

Summary of Argument

Appellant was denied his fundamental right to counsel during post-trial processing when the SJA accepted a handwritten note as his waiver of counsel without ensuring he properly understood the dangers of self-representation during post-trial processing.

[38] This issue was not raised before the Army Court.

Standard of Review

The waiver of a constitutional right is reviewed de novo. *Rosenthal*, 62 M.J. at 262 (citations omitted).

Additional Facts

During post-trial, appellant indicated that he wanted his detailed defense team, specifically, LTC Kris Poppe, to represent him in submitting post-trial matters. Specifically, appellant stated, "Right," when asked by the military judge if he wanted LTC Poppe's team to represent him. (JA 799). The military judge also acknowledged that appellant "elected to be represented post-trial by LTC Poppe." (JA 1341-43). Appellant then executed a post-trial and appellate rights advisement, dated August 28, 2013. (JA 1336-40).

Thereafter, LTC Poppe left the case, and Mr. John Galligan, a civilian defense counsel, entered an appearance. Lieutenant Colonel Marc Washburn served as appellant's detailed army counsel.

On February 13, 2017, three and a half years after executing the advisement form, and shortly before his R.C.M. 1105 matters were due, appellant personally wrote to the Convening Authority's SJA. (JA 74-75). He indicated that "effective immediately," he was representing himself. (JA 74-75). He further advised her not to get the "lawyers involved" and that the presiding judge permitted him to represent himself, so "[the SJA] should do so now." (JA 74-75).

The SJA then wrote to Mr. Galligan, stating, "[g]iven that we have yet to receive any formal notice of your release as counsel to the [a]ccused, I forward a copy of the Accused's letter, enclosed, to you and ask that you immediately clarify what matters the Convening Authority should consider before taking Action." Mr. Galligan replied that, per appellant's "personal request," he only wanted a manuscript to go before the convening authority. The SJA later confirmed receipt, and also confirmed with Mr. Galligan he had spoken "with his client." (JA 76-77).

The SJA then advised the Convening Authority that appellant was representing himself. (JA 74-75). There is no indication that any other pertinent communications occurred. No written waiver of counsel for post-trial matters is in the record. The Convening Authority approved the sentence. (JA 59-65).

Law and Argument

The right of assistance of counsel in post-trial proceedings is a fundamental right. *United States v. Knight*, 53 M.J. 340, 342 (C.A.A.F. 2000); *see United States v. Palenius*, 2 M.J. 86 (C.M.A. 1977); *see also United States v. Scott*, 51 M.J. 326, 329 (C.A.A.F. 1999) ("Sixth Amendment right to counsel codified under Article 27 applies to the . . . post-trial stag[e]."). "Representation by adequate counsel is an integral part of [our] system." *Knight*, 53 M.J. at 343.

The waiver of this fundamental right must be knowing, intelligent, and voluntary. Before waiver can take effect, appellant must be warned specifically of

the hazards ahead, and the information an accused must possess in order to make an intelligent election will depend, in part, on the stage of the process. *Iowa v. Tovar*, 541 U.S. 77, 88-89 (2004). For example, *Miranda* warnings suffice for post-indictment questioning, which inform him of his right to counsel, the benefits of counsel, and the ultimate adverse consequence of uncounseled admissions. *Id*. (citing *Patterson v. Illinois*, 487 U.S. 285, 299, n.3 (1988)). At trial, the inquiry into an accused's waiver of counsel must be sufficient to make him aware of the dangers of representation so that his decision is made with eyes wide open. *Faretta*, 422 U.S. at 835 (citations omitted). On appeal, "[a]n accused convicted at trial cannot make an informed decision concerning whether to accept or reject representation by an attorney in his appeal from that conviction unless he is made aware of the powers of the Court of Military Review and of the defense counsel's role in causing those powers to be exerted." *Palenius*, 2 M.J. 86 at 91. Relying merely on the advice contained on the post-trial forms is unduly restricted and does not adequately and fully advise post-trial rights. *Id*.

Here, the necessary inquiry must, at the very least, naturally lie somewhere between the thorough colloquy for waiver at trial and thorough advisement on appeal. Yet, the inquiry fell short of what is even required of law enforcement during post-indictment questioning. The SJA relied on a handwritten note alleging

waiver, made no follow up with counsel or the appellant, and, in fact, continued to engage with Mr. Galligan as if appellant were still represented.

Appellant's waiver from trial does not extend to clemency.[39] For one, appellant expressly stated that he wanted to be represented for post-trial matters, and presumably was so represented for more than three years. For another, clemency is a wholly different stage of the proceeding requiring new and different advisements. *See Allen v. Daker*, 311 Ga. 485, 495 (Ga. 2021) (discussing the need for new *Faretta* warnings on appeal than at trial). And appellant's advisement form, to the extent it may have sufficed, *but see Palenius*, 2 M.J. 86 at 91, was more than three years old, during which time he was represented.

There needed to be at least *some* assurance that appellant's waiver for knowing, intelligent, and voluntary. Here, there was none.

Proceeding to the action with neither a formal waiver nor representation undermined the trustworthiness of the post-trial process and led to a denial of

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[39] Arguably a *right* under *Faretta* to *pro se* representation likely does not exist in clemency. As *Martinez* makes clear, autonomy interests begin to become less compelling post-conviction, but state interests continue to remain as strong as they are at trial. *Martinez*, 528 U.S. at 163. Clemency matters "are simply not a case of 'haling a person into its criminal courts.'" *Id*. (quoting *Faretta*, 422 U.S. at 807). In this way, clemency matters are more akin to an appeal than to trial, for it is the accused asking the CA to "overturn a finding of guilty by the judge or jury below" rather than "seeking . . . to fend off the actions of the State's prosecutor." *Id*. (citations omitted). Thus, there is a fundamental right to counsel but not a corollary right to *pro se* representation.

appellant's fundamental right. The denial of this fundamental right of trial is structural error. *See Gonzalez-Lopez*, 548 U.S. at 149; *see also Penson v. Ohio*, 488 U.S. 75, 88 (1988) ("[b]ecause the fundamental importance of the assistance of counsel does not cease as the prosecutorial process moves from the trial to the appellate stage, the presumption of prejudice must extend as well . . . ").

PART A: SECTION III

Issue Presented IX

WHETHER THEN-COLONEL STUART RISCH WAS DISQUALIFIED FROM PARTICIPATING ON THIS CASE AS THE STAFF JUDGE ADVOCATE?

Summary of Argument

Colonel Risch was disqualified from participating in this case since a reasonable person would impute to him a personal interest. The shooting caused him to initially fear for the safety of his family; his own officer had been directly involved in the attack; he personally witnessed the crime scene the same day and expressed a lasting emotional disturbance; and he was part of the Fort Hood community that had been personally affected.

Standard of Review

This court reviews claims of disqualification de novo. *United States v. Davis*, 58 M.J. 100, 102 (C.A.A.F. 2003).

Law

An accuser is disqualified from participating in the proceedings in any way. *United States v. Corcoran*, 17 M.J. 137, 139 (C.M.A. 1984) (citing *United States v. LaGrange*, 3 C.M.R. 76, 79 (U.S. C.M.A. 1952). It is necessary that an accused "be brought to trial in an atmosphere free from coercion by one who could, directly or indirectly, influence the court. This atmosphere requires that the officer who convenes the court and reviews the sentence shall himself be free from any influence from the accuser." *Id*. (quoting *LaGrange*, 3 C.M.R. at 79).

An accuser is defined as a person who: (1) signs and swears to the charges, (2) directs that the charges be nominally signed and sworn by another; or (3) has an interest other than official interest in the prosecution of the accused. 10 U.S.C. §801(9). An individual has an "other than official interest" in the case where "a reasonable person would impute to him a personal feeling or interest in the outcome of the litigation." *United States v. Jeter*, 35 M.J. 442, 445 (C.M.A. 1992) (citing *United States v. Gordon*, 2 C.M.R. 161, 166 (C.M.A. 1952)).

In *United States v. Gordon*, the CMA first established the test for an other than official interest. 2 C.M.R. at 166-67 (C.M.A. 1952). There, Gordon originally faced two charges, one being the attempted burglary of the convening authority's home, which was eventually dismissed. *Id*. at 166-67. The CMA found that the convening authority was disqualified as an accuser because he was

"so closely connected to the offense that a reasonable person would conclude that the he had a personal interest in the matter." *Id*. at 167. The true test is not *animus*. *Id*. at 167. Rather, "[h]uman behavior is such that an injured party might be inclined to be more severe in approving the sentence than would a person entirely untouched by the crime" and those acting on an accused's case must be "free from any connection with the controversy." *Id*. at 168. *Gordon* cautions that "[c]onvening officers should remember that there are easy and adequate means to have a court appointed by one entirely divorced from the offense[,] and if there is any doubt about the propriety of the selection it should be resolved in favor of the accused." *Id*. at 167-68.

Later, in *Brookins v. Cullins*, the CMA enjoined a commander from referring charges over a personal interest in the case. 49 C.M.R. 5, 7 (U.S. C.M.A. 1974). There, the commander had witnessed a riot on his ship, and he spent over five hours talking separately to the contesting groups, making efforts to dispel the fear some of the personnel. *Id*. at 6. He was subsequently briefed extensively. *Id*. at 6. In granting the writ of prohibition, the CMA made a point that it was not condemning the commander; rather, his only fault was that he did not "remember that there [were] easy and adequate means to have a court appointed by one entirely divorced from the offense and if there is any doubt about the propriety of

the selection it should be resolved in favor of the accused." *Id*. (quoting *Gordon*, 2 C.M.R. at 167).

In *United State v. Jackson*, the CMA found the convening authority to have a disqualifying personal interest where, upon hearing of a potential plot of perjury, he confronted government witnesses to remind them to tell them truth, admitting he was angry. 3 M.J. 153, 154 (C.M.A. 1977). Rejecting the contention that this was nothing more than a concern for perjury, the CMA noted that he communicated his emotion in a clear and direct way on the day of the trial, and this framed the nature of his involvement as personal rather than purely official. *Id*. As *Jackson* points out, it is not just what is said, but the tone and context as well. *United States v. Voorhees*, 50 M.J. 494, 499 (C.A.A.F. 1999) (citing *Jackson*, 3 M.J. at 154).

In *United States v. Nix*, the CMA again found a personal interest. 40 M.J. 6 (C.M.A. 1994). There, the Special Court-Martial Convening Authority (SPCMCA) recommended a general court-martial against Nix, who others speculated to be having a romantic relationship with a woman the SPCMCA later married shortly before trial. 40 M.J. at 7. Despite the fact that his recommendation was not binding on the General Court-Martial Convening Authority (GCMCA), the CMA still reversed, concluding that the court "could not assume [his] recommendation had no bearing . . . [t]o do so would render [the

recommendation requirement] without tenor." *Id*. at 8; *see also United States v. Crossley*, 10 M.J. 376, 377-78 (C.M.A. 1981) (finding disqualifying personal interest where band refused to play for the convening authority who was left in "shock and disbelief"); *Jeter*, 35 M.J. 442 (C.M.A. 1992) (finding disqualifying personal interest where the accused alleged the convening authority promised to take care of appellant if he did not involve the convening authority's son).

Argument

A. Colonel Risch was disqualified from participating in this case: a reasonable person would impute to him a personal interest in the outcome of the litigation

Here, a reasonable person would conclude that COL Risch was "so closely connected" that he had a personal interest in the outcome of the case for four reasons. First, the shootings caused him to reasonably fear for his family. As soon as COL Risch was notified of the incident, he immediately called his wife to ensure the safety of her and his family who resided on post. (JA 915). Recall that in the immediate aftermath of the shooting, there was uncertainty as to what was happening. (JA 1347-48). Only after being guaranteed of their safety, did he report the incident to the command. (JA 915).

Second, he feared for the safety of CPT Freeburg, a member of his OSJA family, who was directly involved in the attack. While the Army Court dismissed this fact because CPT Freeburg was not injured, *see Hasan*, 80 M.J. at 706,

whether or not CPT Freeburg was fortunate to escape unscathed from the shooting should not be the line that demarcates official interest from personal. That appellant reportedly engaged in a deliberate plan to murder uniformed members, and that one of those uniformed members was COL Risch's own officer, is reason enough to impute a personal interest. Surely, *Nix* would have come to the same result if, instead of the intermediary convening authority's girlfriend being flirtatious with Nix, she had been among the targets of his murderous plot. *See People* v. *Superior Court* (*Greer*), 561 P.2d 1164 (Cal. 1977) (because the mother of the victim worked in district attorney's office, the office was disqualified).

Third, COL Risch personally investigated the scene that very night. To this point, the Army Court indicated that his statement of not being able to sleep after what he saw was simply one of "empathy." *Hasan*, 80 M.J. at 706. This ignores the context. *See Jackson*, 3 M.J. at 154. Colonel Risch actually went to the crime scene that night, which was still being processed, and no doubt saw the deceased victims in their fallen manner. The scene was so violent that FBI supervisors feared for the mental health of the crime scene examiners. In this context, his statement was more than empathy; it evidenced an emotional disturbance. *Id*. While this fact alone may not be disqualifying, it underscores the point above – only hours earlier, COL Risch's own officer had escaped the scene COL Risch personally witnessed. He later returned to that same officer to confide in him and

relay his emotional experience. *Brookins*, 49 C.M.R. at 7 (disqualifying the convening authority where he witnessed the offense and later engaged with those present at the offense).

Lastly, COL Risch was part of the Fort Hood community that, itself, was a victim of the attack. The crime had such an effect on Fort Hood that over 1,100 individuals – hundreds more than were even at the scene – were "highly exposed" and were tracked to ensure their mental well-being. (JA 846-47). As LTG Cone noted after the shootings in an address to Fort Hood, "the tragic events of November 5th profoundly impacted each of us personally and the community as a whole." Colonel Risch, himself, later "recognized that those at Fort Hood, at the time of the shooting, might be greatly affected by the event." (JA 915).

Under the totality of the circumstances, a reasonable person would impute to COL Risch a personal interest in the outcome of this litigation.[40] *See Gordon*, 2

[40] Assuming *arguendo* that a reasonable person would not impute a personal interest under these facts, this Court should review the pretrial advice under a quasi-judicial standard. In *United States v. Hayes*, the Army Court of Military stated that, in light of the 1983 UCMJ amendments, the Article 34, UCMJ, advice became less of a prosecutorial tool and more of a substantial right of the accused. 24 M.J. 786, 790, n. 7 (A.C.M.R. 1987). Since then, at least one service court has stressed the need for the Article 34 advice to be considered quasi-judicial. *See United States v. Klawuhn*, 33 M.J. 941, 943 (A.F. Ct. Crim. App. 1991). When acting in a quasi-judicial capacity, persons are held to a similar standard of impartiality as a military judge. *United States v. Reynolds*, 24 M.J. 261, 263 (C.M.A. 1987) (citing *United States v. Collins*, 6 M.J. 256, 258-59 (C.M.A. 1979)). The test is an objective standard: whether a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality. *Nichols v.*

C.M.R. at 166-67. Any doubt as to this conclusion is resolved in favor of appellant. *Id*. at 167. This is not to say that COL Risch's actions were less than professional or that his motives were not pure, but *animus* is not the test. *Id*. at 167. The only fault here was not realizing that there was an easy and adequate means to involve a legal advisor totally divorced from this case. *Id*. at 167.

B. Prejudice

Similar to *Nix*, this Court should presume prejudice with regard to the capital referral. *See Nix*, 40 M.J. at 8 (Gierke, J., dissenting) (suggesting that the decision was establishing a presumption of prejudice). There, the CMA *presumed* the SPCMCA's recommendation had *some* bearing, otherwise it would have rendered the SPCMCA's recommendations, which were required by R.C.M. 401, to be "without tenor." *Id*. at 7. The same reasoning applies here. Colonel Risch provided the pretrial advice in this case, and this Court should presume that this advice, which recommended a capital referral, had some bearing on the decision to

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Alley, 71 F. 3d 347, 350-51 (10th Cir. 1995) (internal citations omitted). Here, a reasonable person would harbor doubts about COL Risch's impartiality with respect to the Article 34 pretrial advice. Notably, in addition to the reasons argued above, appellant also had direct contact with COL Risch's office right before the attack about matters that were alleged to have been part of appellant's motive. This caused COL Risch's deputy to immediately disqualify himself, and COL Risch was aware of appellant's communications before the shootings. (JA 1347-48).

refer this case capital. Otherwise, it would render this *statutory* requirement "without tenor." *Id*. at 7.

Alternatively, the prejudice standard should be harmless beyond a reasonable doubt because the participation of a disqualified officer in the processing of appellant's case is akin to apparent unlawful command influence. This makes logical sense. Colonel Risch's actions fall within a plain reading of R.C.M. 104 – that is, COL Risch is a person subject to the Code and there was an attempt to influence, *by unauthorized means*, the convening authority with regard to a judicial act. R.C.M. 104(a)(2). Colonel Risch provided Article 34 advice for referral*, see also United States v. Hamilton*, 41 M.J. 32, 36 (C.A.A.F. 1994) (referral is a "judicial act"), and he advised on the selection of the members. *See United States v. Cooper*, 28 M.J. 810, 813 (A.C.M.R. 1989) (panel selection is a "quasi-judicial act"); *see also United States v. Riesbeck*, 77 M.J. 154, 166 (C.A.A.F. 2018) ("[w]e are particularly unforgiving in the context of court member selection, as where manipulation of the member selection process is 'fostered or perpetuated by military authorities through ignorance or deceit, it substantially undermines the public's confidence in the integrity of the court-martial proceedings.'") (quoting *United States v. Hilow*, 32 M.J. 439, 443 (C.M.A. 1991)). Although COL Risch may not have intended to improperly influence the convening authority, intent is immaterial; the key is the effect. *United States v.*

Boyce, 76 M.J. 242, 251 (C.A.A.F. 2017) (citations omitted). Accordingly, the prejudice standard here should be whether it was "harmless beyond a reasonable doubt that [COL Risch's actions] did not place 'an intolerable strain' on the public's perception of the military justice system, and that 'an objective, disinterested observer, fully informed of all the facts and circumstances, would [*not*] harbor a significant doubt about the fairness of the proceeding.'" *Id*. at 249 (citations omitted) (alterations in original). That standard cannot be met.

Issue Presented X

WHETHER THE JUDGES OF THE ARMY COURT OF CRIMINAL APPEALS SHOULD HAVE BEEN RECUSED BECAUSE THEY WERE SUPERVISED BY THEN-MAJOR GENERAL STUART RISCH WHILE HIS ERROR AS THE STAFF JUDGE ADVOCATE WAS PENDING LITIGATION BEFORE THEM?

Standard of Review

Recusal is reviewed for abuse of discretion. *United States v. McIlwain*, 66 M.J. 312, 314 (C.A.A.F. 2008).

Law

"An accused has a constitutional right to an impartial judge." *United States v. Wright*, 52 M.J. 136, 140 (C.A.A.F. 1999) (citations omitted). Accordingly, a military judge "shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned." R.C.M. 902(a)

(emphasis added). This rule applies to appellate judges. R.C.M. 902(c)(1); United States Army Judiciary, Code of Judicial Conduct for Army Trial and Appellate Judges [hereinafter Code of Judicial Conduct], Rule 2.11 (May 16, 2008) (JA 1500-02). Ultimately, the test under R.C.M. 902 (a) is "whether a reasonable person who knows all the facts would reasonably question a military appellate judg[e's] impartiality." *United States v. Mitchell*, 39 M.J. 131, 143 (C.M.A. 1994). "Any doubts must be resolved in favor of recusal." *In re Moody*, 755 F. 3d 891, 895 (11th Cir. 2014) (citations omitted).

Moreover, when presented with the issue of recusal, a judge must act promptly to rectify the conflict. *In re Initial Pub. Offering Sec. Litig.*, 174 F. Supp. 2d 70, 90 (S.D.N.Y. 2001). Otherwise, "if a court presides over a case while maintaining a conflict of interest, it must disqualify itself–not because it could not preside in the future without having a conflict, but because it cannot retroactively repair the damage." *Id*. *See also*, *In re Al Nashiri,* 921 F. 3d 224, 238 (D.C. Cir. 2019).

When a military judge abuses his or her discretion in denying a recusal motion, this Court examines "whether, under *Liljeberg* [*v. Health Servs. Acquisition Corp*.], reversal is warranted." *United States v. Uribe*, 80 M.J. 442, 449 (C.A.A.F. 2021) (quoting *United States v. Martinez*, 70 M.J. 157, 159 (C.A.A.F. 2011)). There are three *Liljeberg* factors to weigh: (1) the risk of

injustice to the parties; (2) the risk that the denial of relief will produce injustice in other cases; and (3) the risk of undermining public confidence. *McIlwain*, 66 M.J. at 315 (citing *Liljeberg*, 486 U.S. 847, 864 (1988)).

Argument

In this case, a reasonable person would certainly question the impartiality of the Army Court when litigation was pending before them regarding their supervisor. While this Court has not directly addressed this issue, the CMA suggested in *United States v. Mitchell* that fact pattern presented here would be grounds for disqualification. There, the CMA denied a systemic challenge to having an Assistant Judge Advocate General rate an appellate court, but specifically stated that its "judgment might be different if […] the Judge Advocate General or Assistant Judge Advocate General, *prior to their appointment*, acted as a military trial judge, trial counsel, defense counsel, *or staff judge advocate in that case*." 39 M.J. at 145, n.8. (emphasis added). Furthermore, since then, at least one service court has specifically stated that a military judge should disqualify himself or herself from ruling on the impropriety of a superior. *United States v. Hutchins*, 2018 CCA LEXIS 31, at *116 (N-M. Ct. Crim. App. 2018). Such a rule should be self-evident.

The fact that the OTJAG eventually removed MG Risch as the rater did not resolve the conflict. This is so for two reasons. First, the Army Court ostensibly

failed to take any affirmative steps to remedy the conflict and knowingly operated under the conflict for more than three years in which it issued numerous rulings that directly and substantively affected the resolution of this case. Rulings include those involving then-MG Risch.

Second, by telling the parties that it would disclose the reason(s) in its final opinion for not disqualifying themselves, the Army Court signaled that it had already decided this issue, and it did so *while the conflict still persisted*. The OTJAG's administrative action did not, nor could not, retroactively resolve the Army Court's improper ruling. *See In re Initial Pub. Offering Sec. Litig.*, 174 F. Supp. 2d at 90. Compounding this error is the fact that the Army Court's opinion did not address the conflict at all.

Turning to the *Liljeberg* factors, they weigh in favor of appellant. First, the risk of injustice is high. As *Al-Nashiri* observed, "in no proceeding is the need for an impartial judge more acute than one that may end in death[,]" as the gravity of the penalty "makes the need for an unimpeachable adjudicator all the more important." *In re Al-Nashiri*, 921 F. 3d at 239, 241. This is especially so in proceedings where the impartial adjudicators have an "awesome, plenary, de novo power of review," *United States v. Kelly*, 77 M.J. 404, 407 (C.A.A.F. 2018) (citing *United States v. Cole*, 31 M.J. 270, 272 (C.A.A.F. 1990)), that gives them "*carte*

blanche to do justice." *Id*. (quoting *United States v. Claxton*, 32 M.J. 159, 162 (C.M.A. 1991)).

Second, remanding this case for a new Article 66, UCMJ, review may prevent future harm by encouraging judges to more carefully examine grounds for disqualification. *See In re Al-Nashiri*, 921 F. 3d at 239. Indeed, in a case which seems so cut and dry, "[i]t would seem, therefore, that some additional encourage[ment] . . . to more carefully examine possible grounds for disqualification would be especially appropriate under the circumstances." *Id*. at 240 (internal citations and quotations omitted).

Third, there is a risk of undermining public confidence. "Any institution that wields the government's power to deny life and liberty must do so fairly, and the public's ultimate objective is not in securing a conviction but in achieving a just outcome." *Id*. at 240. The costs of remand, which are slight, are far outweighed by the "hefty burdens that would be shouldered by both [appellant] and the public were his [execution] to proceed under a cloud of illegitimacy." *Id*. at 249. This risk of public confidence is further compounded by the fact that the Army Court's opinion has never disclosed its reasons for not recusing, despite indicating that it would do so, and despite multiple requests from appellate defense counsel. *See Wright*, 52 M.J. at 141 ("despite an objective standard, the judge's statements concerning his intentions and the matters upon which he will rely are

not irrelevant to [the RCM 902(a)] inquiry."); *see also Jordan v. Dep't of Labor and Econ. Growth*, 480 Mich. 869, 870 (Mich. 2007)(Weaver, J., concurring) ("in the matter of disqualification, transparency, rather than secrecy, is vital").

The Army Court had a clear conflict in this case. The only recourse the members of the Army Court had was to recuse themselves from considering appellant's case. This bell could not be un-rung. This Court must vacate the Army Court's decision.

Issue Presented XI[41]

WHETHER THE CONVENING AUTHORITY WAS DISQUALIFIED TO PERFORM THE POST-TRIAL REVIEW OF APPELLANT'S CASE AFTER AWARDING PURPLE HEART MEDALS TO THE VICTIMS OF APPELLANT'S OFFENSES?

Standard of Review

This Court reviews claims that a convening authority was disqualified from taking post-trial action on a court-martial de novo. *Davis*, 58 M.J. at 102.

Law

Under Article 60, UCMJ, in effect at the time action was approved,[42] the authority to modify the findings and sentence of a court-martial "[wa]s a matter of command prerogative involving the sole discretion of the convening authority."

[41] This issue was not raised before the Army Court.
[42] This case was referred and tried prior to the 2016 changes to Article 60, UCMJ.

Article 60(c)(1), UCMJ, 10 U.S.C. §860(c)(1) (2012); R.C.M. 1107(b). The convening authority was required to take action on the sentence of a court-martial by approving, disapproving, commuting, or suspending the sentence in whole or in part. R.C.M. 1107(a), (d). The convening authority's post-trial action was "an accused's best hope for sentence relief." *Davis*, 58 M.J. at 102 (citations omitted). The convening authority could take action on the findings, to include dismissing any charge or specification by setting aside a finding of guilty thereto, or reducing an offense to a lesser included. R.C.M. 1107(a), (c).

"As a matter of right, each accused is entitled to 'an individualized, legally appropriate, and careful review of his sentence by a convening authority.'" *Davis*, 58 M.J. at 102 (citing *United States v. Fernandez*, 24 M.J. 77, 78 (C.M.A. 1987)). The convening authority on review "must be, and appear to be, objective." *United States v. Taylor*, 60 M.J. 190, 193 (C.A.A.F. 2004) (quoting *United States v. Dresen*, 47 M.J. 122, 124 (C.A.A.F. 1997)). The neutral convening authority serves two important interests: "(1) the accused's right to a fair post-trial review; and (2) the system's integrity." *Id.*

The standard for prejudice is low. *Id*. at 195. A new review is necessary where there is "some colorable showing of possible prejudice." *Id*. at 195. In *United States v. Davis*, there was prejudice in a marijuana case where the convening authority had made general comments that those convicted of drug

offenses should "not come crying to him about their situations and their families." *Davis*, 58 M.J. at 103. This Court noted that "statements reflecting an unwillingness to consider each case fully and individually create a perception that a convicted servicemember denied the material right to individualized post-trial consideration and action." *Id*.

Similarly, in *United States v. Taylor*, this Court ordered a new post-trial review based on an article in a newsletter. *Taylor*, 60 M.J. at 195 There, one of the officers in the OSJA published an article in the base newsletter about Taylor's case, without naming him, and suggested that justice was not served because the panel did not see all of Taylor's misconduct. *Id*. at 192. It further suggested that Taylor "was not a good candidate for rehabilitation." *Id*. at 194. The article was imputed to the SJA. *Id*. at 194. In ordering a new rehearing, this Court was unpersuaded by the convening authority's affidavit that he would have taken the same action, independent of the SJA's recommendations. *Id*. A new rehearing ensured the protection of the military justice system's integrity. *Id*. at 195.

Argument

Just as the Army predicted, appellant was denied his substantial right to an individualized, legally appropriate, and careful post-trial review of his convictions and sentence. The convening authority, by awarding Purple Heart medals and publically commenting on appellant's case on April 10, 2015, displayed an

inelastic attitude to providing appellant with an impartial action on his case. As such, the convening authority was disqualified when he took action on appellant's court-martial on March 27, 2017.

Based on the eligibility criteria under 10 U.S.C.S. § 1129a, Congress declared that appellant was the agent of a foreign terrorist organization, cementing his position regarding appellant's motive, intent, and culpability. In addition to issuing the awards, the convening authority made public statements regarding the victims, identifying their deaths and injuries as a sacrifice, construing their actions as courageous, brave, selfless, and valorous, and conjecturing that appellant would have inflicted greater calamity given the opportunity. Similar to the statements in *Davis* and *Taylor*, the plain language of these comments establish the convening authority could not fairly evaluate appellant's case, and render a judgment free from preconceived notions. He could not give appellant's case a fair review or protect the integrity of the process. Indeed, his speech at the ceremony referenced bringing "closure" to the process, indicating he was not open to any pleas to justice or mercy. *Davis*, 58 M.J. at 103.

Like *Taylor*, the real damage here is the integrity of the system, regardless of how confident this Court can be that the action would have been the same. The Army specifically stated its concerns that there would be prejudice to appellant based on the legislation *alone*. The legislation was delayed until after appellant's

trial but was enacted prior to his court-martial's approval. Thus, the chain of command – namely, the convening authority – still needed to "exercise a critical role under the Uniform Code of Military Justice." As problematic as this was, the Army then – brazenly or ignorantly – had the same official that awarded the Purple Hearts serve as that convening authority, appellant's "best hope for sentence relief." *Davis*, 58 M.J. at 102.

The Army could have forwarded the responsibility to act on appellant's case to a different, neutral commander after the convening authority issued Purple Heart medals and commented on appellant's case. A different commander or some civilian functionary could have presented the medals. But the Army engaged in no prophylactic measures, although institutionally aware of the potential negative impact on appellant's case.

Appellant was denied his substantial right to an impartial review of his case, and this Court should remand appellant's case for a new convening authority action.

PART A: SECTION IV

I.

WHETHER THE MILITARY JUDGE ERRED IN FINDING THAT APPELLANT'S WAIVER OF COUNSEL WAS KNOWING AND INTELLIGENT WHEN SHE RECEIVED NOTICE [redacted] BUT FAILED TO REOPEN THE WAIVER INQUIRY, ESPECIALLY IN LIGHT OF THE FACT THAT SHE KNEW APPELLANT REFUSED TO SUBMIT TO PSYCHOLOGICAL TESTING DURING HIS RULE FOR COURTS-MARTIAL (R.C.M.) 706 BOARD.

II.

WHETHER THE MILITARY JUDGE ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY DENYING HIS MOTION FOR CHANGE OF VENUE.

III

WHETHER THE MILITARY JUDGE ERRED BY NOT ENSURING ADEQUATE VOIR DIRE THAT RESULTED IN A PANEL THAT WAS TAINTED BY EXCESS PUBLICITY.

IV.

WHETHER THE AGGRAVATING FACTORS IN THIS CASE, TO INCLUDE "THE PROSECUTION EXHIBITS" AND "THE NATURE OF THE WEAPON," WERE UNCONSTITUTIONALLY VAGUE AND DUPLICATIVE. *SEE JONES V. UNITED STATES*, 527 U.S. 373 (1999).

V.

WHETHER THE MILITARY JUDGE ERRED BY ABDICATING HER RESPONSIBILITY OF COURTHOUSE SECURITY TO THE GOVERNMENT.

VI.

ASSUMING *ARGUENDO* THAT THIS COURT DOES NOT OVERTURN *UNITED STATES V. DOCK*, WHETHER APPELLANT'S ACTIONS AT TRIAL, TO INCLUDE ADMITTING THAT HE WAS THE SHOOTER, AMOUNT TO A GUILTY PLEA PROHIBITED BY ARTICLE 45, UCMJ. See also *UNITED STATES V. MCFARLANE*, 23 C.M.R 320 (1957).

VII.

WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT BY DENYING STANBY COUNSELS' MOTION TO SUBMIT MATTERS IN MIGITATION AND EXTENUATION.

VIII.

THE GOVERNMENT FAILED TO OFFER REASONABLE, PLAUSIBLE, AND NON-DISCRIMINATORY REASONS TO CHALLENGE LTC S., A PROSPECTIVE PANEL MEMBER, PURSUANT TO *BATSON V. KENTUCKY*, 476 U.S. 79 (1986).

IX.

THE CUMULATIVE ERRORS IN THIS CASE COMPEL REVERSAL OF THE FINDINGS AND SENTENCE.

PART B: SYSTEMIC ISSUES

I.

WHETHER THE PRESIDENT EXCEEDED HIS AUTHORITY IN PROMULGATING AGGRAVATING FACTORS IN RULE FOR COURTS-MARTIAL (R.C.M.) 1004.

II.

STANDARDS APPLICABLE TO FEDERAL AND STATE CAPITAL DEFENSE COUNSEL HAVE APPLICABILITY TO COURTS-MARTIAL AS RELEVANT STANDARDS OF CARE, AND THE ARMY COURT'S ANALYSIS OF MAJOR HASAN'S CASE WAS FLAWED BECAUSE OF ITS MISAPPLICATION OF THE GUIDELINES AND ITS DETERMINATION COUNSEL WERE "WELL-QUALIFIED."

III.

UNDER THE SUPREME COURT'S REASONING IN *RING v. ARIZONA,* 536 U.S. 584 (2002), CONGRESS UNCONSTITUTIONALLY DELEGATED TO THE PRESIDENT THE POWER TO ENACT ELEMENTS OF CAPITAL MURDER, A PURELY LEGISLATIVE FUNCTION.

IV.

THE LACK OF A SYSTEM TO ENSURE CONSISTENT AND EVEN-HANDED APPLICATION OF THE DEATH PENALTY IN THE MILITARY VIOLATES BOTH MAJOR HASAN'S EQUAL PROTECTION RIGHTS AND ARTICLE 36, UCMJ. *See* 18 U.S.C. § 2245 AND U.S. DEP'T OF JUSTICE, U.S. ATTORNEY'S MANUAL § 9-10.010 (JUNE 1998) (USAM) AND 10 U.S.C. § 949a(b)(2)(C)(ii). IN CONTRAST TO THE USAM, NO PROTOCOL EXISTS FOR CONVENING AUTHORITIES IN CAPITAL CASES, CREATING AN *AD HOC* SYSTEM OF CAPITAL SENTENCING.

V.

THE MILITARY JUSTICE SYSTEM'S PEREMPTORY CHALLENGE PROCEDURE, WHICH ALLOWS THE GOVERNMENT TO REMOVE ANY ONE MEMBER WITHOUT CAUSE, IS AN UNCONSTITUTIONAL VIOLATION OF THE FIFTH AND EIGHTH AMENDMENTS TO THE U.S. CONSTITUTION IN CAPITAL CASES, WHERE THE PROSECUTOR IS FREE TO REMOVE A MEMBER WHOSE MORAL BIAS AGAINST THE DEATH PENALTY DOES NOT JUSTIFY A CHALLENGE FOR CAUSE. But see *UNITED STATES v. CURTIS,* 44 M.J. 106, 131-33 (C.A.A.F. 1996); *UNITED STATES v. LOVING,* 41 M.J. 213, 294-95 (C.A.A.F. 1994).

VI.

RULE FOR COURTS-MARTIAL (R.C.M.) 1004 DOES NOT ENSURE THE GOALS OF INDIVIDUAL FAIRNESS, REASONABLE CONSISTENCY, AND ABSENCE OF ERROR NECESSARY TO ALLOW THIS COURT TO AFFIRM APPELLANT'S DEATH SENTENCE BECAUSE R.C.M. 1004 DOES NOT ENSURE THE RACE OF THE VICTIM OR ALLEGED PERPETRATOR IS NOT A FACTOR IN THE DEATH SENTENCE. *McCLESKEY v. KEMP,* 481 U.S. 279 (1987).

VII.

THE VARIABLE SIZE OF THE COURT-MARTIAL PANEL CONSTITUTED AN UNCONSTITUTIONAL CONDITION ON MAJOR HASAN'S FUNDAMENTAL RIGHT TO CONDUCT VOIR DIRE AND PROMOTE AN IMPARTIAL PANEL. *IRVIN v. DOWD,* 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961).

VIII.

THE DEATH SENTENCE IN THIS CASE VIOLATES THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS AND ARTICLE 55, UCMJ, BECAUSE THE MILITARY SYSTEM DOES NOT GUARANTEE A FIXED NUMBER OF MEMBERS. ***IRVIN v. DOWD,*** **366 U.S. 717, 722, (1961).**

IX.

THE ROLE OF THE CONVENING AUTHORITY IN THE MILITARY JUSTICE SYSTEM DENIED MAJOR HASAN A FAIR AND IMPARTIAL TRIAL IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS AND ARTICLE 55, UCMJ, BY ALLOWING THE CONVENING AUTHORITY TO ACT AS A GRAND JURY IN REFERRING CAPITAL CRIMINAL CASES TO TRIAL, PERSONALLY APPOINTING MEMBERS OF HIS CHOICE, RATING THE MEMBERS, HOLDING THE ULTIMATE LAW ENFORCEMENT FUNCTION WITHIN HIS COMMAND, RATING HIS LEGAL ADVISOR, AND ACTING AS THE FIRST LEVEL OF APPEAL, THUS CREATING AN APPEARANCE OF IMPROPRIETY THROUGH A PERCEPTION THAT HE ACTS AS PROSECUTOR, JUDGE, AND JURY.

X.

ARTICLE 18, UCMJ, AND R.C.M. 201(f)(1)(C), WHICH REQUIRE TRIAL BY MEMBERS IN A CAPITAL CASE, VIOLATES THE GUARANTEE OF DUE PROCESS AND A RELIABLE VERDICT UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS.

XI.

MAJOR HASAN WAS DENIED HIS RIGHT TO A TRIAL BY AN IMPARTIAL JURY COMPOSED OF A FAIR CROSS-SECTION OF THE COMMUNITY IN VIOLATION OF THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION. *DUREN v. MISSOURI,* 439 U.S. 357 (1979). But see *UNITED STATES v. CURTIS,* 44 M.J. 106, 130-33 (C.A.A.F. 1996).

XII.

THE SELECTION OF THE PANEL MEMBERS BY THE CONVENING AUTHORITY IN A CAPITAL CASE DIRECTLY VIOLATES MAJOR HASAN'S RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE 55, UCMJ, BY IN EFFECT GIVING THE GOVERNMENT UNLIMITED PEREMPTORY CHALLENGES.

XIII.

THE PRESIDENT EXCEEDED HIS ARTICLE 36 POWERS TO ESTABLISH PROCEDURES FOR COURTS-MARTIAL BY GRANTING TRIAL COUNSEL A PEREMPTORY CHALLENGE AND THEREBY THE POWER TO NULLIFY THE CONVENING AUTHORITY'S ARTICLE 25(d) AUTHORITY TO DETAIL MEMBERS OF THE COURT.

XIV.

THE DESIGNATION OF THE SENIOR MEMBER AS PRESIDING OFFICER FOR DELIBERATIONS DENIED MAJOR HASAN A FAIR TRIAL BEFORE IMPARTIAL MEMBERS IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE 55, UCMJ.

XV.

MAJOR HASAN WAS DENIED HIS CONSTITUTIONAL RIGHT UNDER THE FIFTH AMENDMENT TO A GRAND JURY PRESENTMENT OR INDICTMENT.

XVI.

COURT-MARTIAL PROCEDURES DENIED MAJOR HASAN HIS ARTICLE III RIGHT TO A JURY TRIAL. *SOLORIO v. UNITED STATES,* 483 U.S. 435, 453-54, (1987) (MARSHALL, J., DISSENTING). But see *UNITED STATES v. CURTIS,* 44 M.J. 106, 132 (C.A.A.F. 1996).

XVII.

THIS COURT LACKS THE JURISDICTION AND AUTHORITY TO REVIEW THE CONSTITUTIONALITY OF THE RULES FOR COURTS-MARTIAL AND THE UCMJ BECAUSE THIS COURT IS AN ARTICLE I COURT, NOT AN ARTICLE III COURT WITH THE POWER TO CHECK THE LEGISLATIVE AND EXECUTIVE BRANCHES UNDER *MARBURY v. MADISON,* 5 U.S. 137, 2 L. Ed. 60, 1 CRANCH (1803). See also *COOPER v. AARON,* 358 U.S. 1 (1958) (THE POWER TO STRIKE DOWN UNCONSTITUTIONAL STATUTES OR EXECUTIVE ORDERS IS EXCLUSIVE TO ARTICLE III COURTS). But see *LOVING,* 41 M.J. at 296.

XVIII.

MAJOR HASAN IS DENIED EQUAL PROTECTION OF LAW IN VIOLATION OF THE FIFTH AMENDMENT AS ALL U.S. CIVILIANS ARE AFFORDED THE OPPORTUNITY TO HAVE THEIR CASES REVIEWED BY AN ARTICLE III COURT, BUT MEMBERS OF THE UNITED STATES MILITARY BY VIRTUE OF THEIR STATUS AS SERVICE MEMBERS ARE NOT. But

see *UNITED STATES v. LOVING*, 41 M.J. 213, 295 (C.A.A.F. 1994).

XIX.

MAJOR HASAN IS DENIED EQUAL PROTECTION OF LAW UNDER THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION BECAUSE [IN ACCORDANCE WITH] ARMY REGULATION 15-130, PARA. 3-1(d)(6), HIS APPROVED DEATH SENTENCE RENDERS HIM INELIGIBLE FOR CLEMENCY BY THE ARMY CLEMENCY AND PAROLE BOARD, WHILE ALL OTHER CASES REVIEWED BY THIS COURT ARE ELIGIBLE FOR SUCH CONSIDERATION. But see *UNITED STATES v. THOMAS,* 43 M.J. 550, 607 (N-M. CT. CRIM. APP. 1995).

XX.

MAJOR HASAN'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT BECAUSE THE CAPITAL REFERRAL SYSTEM OPERATES IN AN ARBITRARY AND CAPRICIOUS MANNER.

XXI.

THE DEATH PENALTY PROVISION OF ARTICLE 118, UCMJ, IS UNCONSTITUTIONAL AS IT RELATES TO TRADITIONAL COMMON LAW CRIMES THAT OCCUR IN THE U.S. But see *UNITED STATES v. LOVING,* 41 M.J. 213, 293 (C.A.A.F. 1994). THE COURT RESOLVED THE ISSUE AGAINST PRIVATE LOVING, ADOPTING THE REASONING OF THE DECISION OF THE ARMY COURT OF MILITARY REVIEW. See *UNITED STATES v. LOVING,* 34 M.J. 956, 967 (A.C.M.R. 1992). HOWEVER, PRIVATE LOVING'S ARGUMENT BEFORE THE ARMY COURT RELIED ON THE TENTH AMENDMENT AND NECESSARY AND PROPER CLAUSE OF THE U.S.

CONSTITUTION. *Id*. MAJOR HASAN'S ARGUMENT RELIES ON THE EIGHTH AMENDMENT TO THE U.S. CONSTITUTION.

XXII.

THE DEATH SENTENCE IN THIS CASE VIOLATES THE FIFTH AND EIGHTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE 55, UCMJ, AS THE CONVENING AUTHORITY DID NOT DEMONSTRATE HOW THE DEATH PENALTY WOULD ENHANCE GOOD ORDER AND DISCIPLINE.

XXIII.

THE MILITARY CAPITAL SENTENCING PROCEDURE IS UNCONSTITUTIONAL BECAUSE MILITARY JUDGES DO NOT HAVE THE POWER TO ADJUST OR SUSPEND A DEATH SENTENCE IMPROPERLY IMPOSED.

XXIV.

DUE TO THE MILITARY JUSTICE SYSTEM'S INHERENT FLAWS CAPITAL PUNISHMENT AMOUNTS TO CRUEL AND UNUSUAL PUNISHMENT UNDER ALL CIRCUMSTANCES.

XXV.

R.C.M. 1001(b)(4) IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD AS APPLIED TO THE APPELLATE AND CAPITAL SENTENCING PROCEEDINGS BECAUSE IT PERMITS THE INTRODUCTION OF EVIDENCE BEYOND THAT OF DIRECT FAMILY MEMBERS AND THOSE PRESENT AT THE SCENE IN VIOLATION OF THE FIFTH AND EIGHTH AMENDMENTS.

XXVI.

R.C.M. 1001(b)(4) IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD AS APPLIED TO THE APPELLATE AND CAPITAL SENTENCING PROCEEDINGS BECAUSE IT PERMITS THE

INTRODUCTION OF CIRCUMSTANCES WHICH COULD NOT REASONABLY HAVE BEEN KNOWN BY MAJOR HASAN AT THE TIME OF THE OFFENSE IN VIOLATION OF HIS FIFTH AND EIGHTH AMENDMENT RIGHTS.

XXVII.

THE MILITARY JUDGE ERRED IN ADMITTING VICTIM-IMPACT EVIDENCE REGARDING THE PERSONAL CHARACTERISTICS OF THE VICTIMS WHICH COULD NOT REASONABLY HAVE BEEN KNOWN BY MAJOR HASAN AT THE TIME OF THE OFFENSE IN VIOLATION OF HIS FIFTH AND EIGHTH AMENDMENT RIGHTS.

XXVIII.

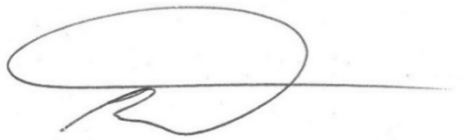
THE DEATH SENTENCE IN THIS CASE VIOLATES THE *EX POST FACTO* CLAUSE, FIFTH AND EIGHTH AMENDMENTS, SEPARATION OF POWERS DOCTRINE, PREEMPTION DOCTRINE, AND ARTICLE 55, UCMJ, BECAUSE WHEN IT WAS ADJUDGED NEITHER CONGRESS NOR THE ARMY SPECIFIED A MEANS OR PLACE OF EXECUTION.

XXIX.

WHETHER THE PANEL AND THE MILITARY JUDGE WERE BIASED AGAINST APPELLANT.

Conclusion

Wherefore, appellee respectfully requests this Honorable Court remand for a new trial.



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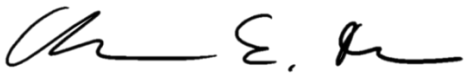

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APPENDIX

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Major Nidal M. Hasan, through appellate defense counsel, personally requests that this Court consider the following matters:

Facts

In this capital trial, appellant sought to present only one defense–the defense of others. Specifically, appellant proffered that his actions were in defense of Taliban members who were being unlawfully targeted by the United States. The Taliban are those who are trying to establish God's law as the supreme law of the land.

The military judge denied the defense on two grounds. First, the military concluded that the victims did not pose an immediate *or imminent* threat to any Afghan. (JA 399). Second, according to the military judge, the legal status of the Afghanistan War was a "non-justiciable political question." (JA 399). The military judge informed appellant that he was "not permitted to present extrinsic evidence or argument for a defense of defense of others." (JA 399). This was error in this capital case.

Law and Argument

1. The victims did pose an imminent threat to Taliban members

Self-defense is available where an accused apprehended, on reasonable grounds, that death or grievous bodily harm was *about to be* inflicted wrongfully

on the accused. R.C.M. 916(e)(1). This defense applies to the defense of others, like the Taliban. R.C.M. 916(e)(5).

The term "about to" in the context of self-defense is not further defined. The Merriam-Webster Dictionary defines "about to" as "on the verge of." In normal parlance, the term is expansive, and "on the verge of" may mean days or weeks.

In the context of self-defense, military cases have used "imminent" to describe what is "about to" be. *See United States v. Bransford*, 44 M.J. 736, 738 (Army Ct. Crim. App. 1996). "Imminent" similarly allows for a span of time. *See State v. Hundley*, 236 Kan. 461, 466 (1985).

Here, there are two bases to conclude the threat was imminent. First, because the United States had already engaged–and continued to engage–in an illegal attack against the Taliban, *see para. 2 infra*, military personnel already represented an imminent danger to members of the Taliban.

Second, even if that is not the case, those pending deployment to support the United States operations constituted an imminent threat to the Taliban. This view comports with international law. For just one example, the United States Government concluded that it could act in self-defense and target cleric Anwar Al-Aulaqi because he posed what it deemed to be a "continued and imminent threat" despite the fact the United States was unaware of when attacks would take place, or indeed even if they would. *See* Memorandum for the Attorney General, Re:

Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi (Jul. 16, 2010). So too, here, was the threat imminent, though the time and date when that threat would actually manifest was otherwise unknown.

2. The threat was unlawful

a. The Afghanistan War is illegal

The United States must have permission from United Nations (UN) Security Council to attack a fellow UN Member. Further, Congress and the President have signed the requirement for prior approval from UN Security Council this into law. President Bush indeed acknowledged this in the lead up to both the Iraq War and the Afghanistan attack by asking for permission (twice for Iraq) from the UN Security Council to go to war. The UN never granted such permission.

The United States is bound by the UN Security Council decision because Article VI, para. 2 of the U.S Constitution make treaties adopted by the U.S part of the "law of the land." "[A]ll Treaties . . . which shall be made . . . under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." Art. VI, cl. 2. That means that the military judge was bound to regard "a treaty . . . as equivalent to the act of the legislature, whenever it operates of itself without the aid of any legislative

provision." *Foster v. Nielson*, 27 U.S. 253 (1829); *see also Ware v. Hylton*, 3 U.S. 199, 220-21 (1796).

Furthermore, a treaty (one among many others) was already in existence, the Montreal Sabotage Convention to which both the United States and the Islamic Emirate of Afghanistan were parties. They are both member states of the United Nations. The UN has an entire regime to deal with issues in dispute, including access to the International Court of Justice to resolve international disputes arising under the Treaty, such as the extradition of Bin Laden. Former President Bush did not take this more peaceful and lawful approach. The Nuremberg Principles, which define a crime against peace, "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan for conspiracy for accomplishment of any of the forgoing."

President Bush's justification for attacking the Islamic Emirate of Afghanistan after being denied permission from the UN Security Council and three weeks after 9/11 was that it was harboring Osama bin Laden and training terrorists. That impoverished third-world country, which had a small informal army and no standing navy or air force, stated it had nothing to do with 9/11. Both the Federal Bureau of Investigation Director Robert Mueller and the Deputy Director of the

Central Intelligence Agency publically admitted there was no evidence linking Afghanistan to the September 11 attacks.

Afghanistan even offered to hand over Osama bin Laden to a neutral country until evidence was presented that linked bin Laden to the attacks. President Bush refused this offer and insisted Osama Bin Laden be handed over to the United States. Approximately three weeks later, the U.S. military attacked Afghanistan and continued its illegal attack until only recently. Any Afghan soldier that fought back to repel the illegal attack against them was classified as an unlawful enemy combatant, thus denying Afghan soldiers protection under the Third Geneva Convention, i.e., prisoner of war status.

It is clear that the Taliban, led by Mullah Umar, at that time the recognized leader of the Islamic Emirate of Afghanistan, and a member state of the United Nations, were the innocent victims of an unlawful attack. They had the right of self-defense under UN Charter 51 and had no duty to retreat. The fact that the attacks on Afghanistan were in response to attacks believed to have been committed by people believed to be hiding in Afghanistan does not provide any legal justification whatsoever. The U.S. attacks on Afghanistan constitute an act and war of aggression by the United States against Afghanistan. No international/national law or policy legalizes these attacks on Afghanistan. No

resolution of the North Atlantic Treaty Organization (NATO) provides legal justification for these attacks.

The United States, under President Bush, did not get approval of the U.N. Security Council thus making the attack on Afghanistan illegal under Article VI, paragraph 2 of the Constitution and the War Crimes Act of 1996 (U.S. Federal Law 18 U.S.C. 2441) which makes committing a war crime, defined as: ". . . a grave breech in any of the international conventions signed at Geneva 12 August 1949, or any protocol of such convention to which the United States is a party . . . punishable by fine, imprisonment or death." In other words, the Afghanistan war violated the Constitution, stripping the Taliban of their rights under the Geneva Convention and violated the War Crimes Act of 1966. It cannot be ignored that the government of Afghanistan is again Taliban controlled, and President Biden called an end to the "forever war." Nor can it be ignored that once the United States forces abandoned the war in Afghanistan, the rightful rulers—the Taliban—assumed control again.

As far as the Soldiers under President's Bush command: one of the most important principles established at Nuremberg is that individuals are responsible for their own actions, even if they were obeying orders, and that those in a position to give orders are responsible for the actions of those under them.

"Complicity in the commission of a crime against peace, a war crime, or a crime against humanity" is "a crime under international law." See Paragraph 500 of the Department of the Army Field Manual 27-10, The Law of Land Warfare (1956), that was valid and binding at the time and was drafted for the Pentagon by Professor Francis Boyle's teacher of The Laws of War and of International Law at Harvard Law School, Army Major Richard R. Baxter, who later became the sole Judge of American Nationality sitting on the International Court of Justice.

b. The illegality of the war is not a political question

The political question doctrine, formulated in *Baker v. Carr*, 369 U.S. 186 (1962), places a jurisdictional limit on those issues that are justiciable, thus subject to trial, and those matters that are the province of the other two branches of government which cannot be disturbed by the judiciary. *Id.*

But the political question doctrine does not apply in criminal cases. *In Re Winship,* 397 U.S. 358, 363-64 ((1970); s*ee also* Francis A. Boyle*, Protesting Power: War, Resistance, and Law* (2008) at 157. Even if it does, it only acts as a restraint on Article III courts as a limitation to the "case in controversy" requirement. And military courts, as Article I courts, are not bound by such limitations. *Zevalkink v. Brown*, 102 F.3d 1236, 1243 (Fed. Cir. 1996).

Assuming *arguendo* that the political question does apply here, it should be interpreted narrowly. *Zivotofsky v. Clinton*, 566 U.S. 189 (2012). The principles

presented by appellant present matters that require examination of the historical and structural evidence regarding the war-making and treaty powers, but these are questions courts are well-prepared to resolve. Because the questions are difficult does not make his defense theory invalid. *Id*. at 201.

Moreover, all three cases cited by the military judge – *Huet-Vaughn*, *New*, and *Rockwood* – are distinguishable to appellant's.

In *Huet-Vaughan*, unlike here, the accused was able to introduce evidence of her motives in leaving her unit. *United States v. Huet-Vaughn*, 43 M.J. 105 (C.A.A.F. 1993). "Considerable evidence was admitted regarding CPT Huet-Vaughn's moral, ethical, philosophical, and legal objections to the Persian Gulf War. [The military judge] permitted CPT Huet-Vaughn to present evidence of her concerns about deploying 'weapons of mass destruction' and its possible 'catastrophic consequence,' and her belief that obeying the deployment orders 'would have been immoral.'" 43 M.J. at 113. She was also permitted to testify that her purpose was not to avoid hazardous duty but instead to "'educate and expose the nature of what was happening.'" *Id.* She presented so much evidence that Judge Sullivan, who dissented from this Court's reasoning and believed all the evidence was relevant to establish a defense, nevertheless found the military judge's error harmless beyond a reasonable doubt. 43 M.J. at 116-17.

In contrast, MAJ Hasan was not allowed to present evidence of the reasons for his actions. Such a void, especially in a capital case, cannot be sanctioned.

Appellant's case is also distinguishable from *United States v. New*, 55 M.J. 95 (C.A.A.F. 2001). New was an enlisted Soldier that refused to comply with an order to wear his U.S. Army uniform modified with UN accoutrements. New did so because he questioned the lawfulness of the President's decision to deploy troops to the Former Yugoslavian Republic of Macedonia (FYROM). 55 M.J. at 107. According to this Court, this did not provide a valid defense to a failure to obey a lawful order charge because "[w]hile the military judge determined that the order to wear the U.N. insignia was lawful, he properly declined to rule on the constitutionality of the President's decision to deploy the Armed Forces in FYROM as a nonjusticiable political question." *Id.* at 109. *New* further held that a soldier is not allowed to disobey an order because he believes it to be palpably illegal. *Id.* 108.

Appellant's case is different from *New* because it is not merely that MAJ Hasan *believes* the war in Afghanistan and the killing of Taliban and other Muslims illegal, it is, as previously discussed, illegal. Appellant's case is further distinguished from *New* in that New was alleging that the military judge erred in removing an element from the panel's consideration, specifically the order to New

to don United Nations garb. 55 M.J. at 104. Conversely, here, the military judge stripped appellant from presenting an entire defense to his charges.

Lastly, the military judge's reliance on *United States v. Rockwood*, 52 M.J. 98 (C.A.A.F. 1998) is misplaced. The military judge cited *Rockwood* for the proposition that appellant was "a uniformed U.S. Soldier who [did] not have a justification or legal duty to fight for the Taliban or against fellow U.S. Soldiers." (JA 1327). In *Rockwood*, the appellant was an Army captain deployed to Haiti that decided to inspect a local penitentiary without command authorization. 52 M.J. at 101. After being convicted for conduct unbecoming an officer in violation of Art. 133, UCMJ, Rockwood argued that he should have received a duress instruction that did not include the language "of normal strength and courage." *Id.* at 113.

The military judge erroneously relied on *Rockwood* because Rockwood actually received "what was functionally a necessity instruction," whereas appellant did not. *Id.* at 113-14. That is considerably different than the situation presented here, where appellant was unable to present his defense *in toto.*

3. Assuming arguendo that the defense fails, appellant still maintained a constitutional right to tell his version of events

The Constitution guarantees an accused "a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (citations omitted). This includes the right for an accused to present his version of

events. In *Rock v. Arkansas*, 483 U.S. 44 (1987), the accused, Vickie Rock, sought to introduce evidence she remembered after undergoing hypnosis. 483 U.S. at 47. Lower courts and the Arkansas Supreme Court found the testimony, with the Arkansas Supreme Court holding hypnotically refreshed testimony was per se inadmissible. *Id.* at 49.

The Supreme Court reversed. *Id.* at 62. The Court found such a rule violated the Sixth Amendment, restricting the right of Rock to present her defense, indeed "[i]t virtually prevented her from describing any events that occurred on the day of the shooting. . . ." *Id.* at 57.

Similarly, in *United States v. Kohlbeck*, 78 M.J. 326 (C.A.A.F. 2019), this court found a military judge's prohibiting Kohlbeck from even mentioning that he had even taken a polygraph was error 78 M.J. at 329. Such an interpretation was arbitrary and disproportionate to the purposes of the rules and court precedent. *Id.* at 332.

The same is true here. Here, the military judge prohibited appellant from providing his version of events. This was error, regardless of whether the defense of others were permissible, because appellant's motive and reasoning for the actions were certainly relevant to the case. This error is structural, stripping appellant of the right to present a defense, and also stripping him of the ability to

present his story to those who would sit in judgment of his legal guilt and ultimately of his life.

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Hasan, Crim. App. Dkt. No. 20130781, USCA Dkt. No. 21-0193/AR was electronically filed with the Court and the Government Appellate Division on May 4, 2022.

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