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	REPLY BRIEF ON BEHALF OF APPELLANT 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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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
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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?

Law and Argument

Appellant originally intended to plead guilty, but after his pleas were refused and he was compelled into a contested trial,[1] he resolved to maintain his innocence. This was his right, as was his right under *McCoy v. Louisiana* to have counsel that worked *towards* this objective. 138 S. Ct. 1500, 1508 (2018). But defense counsels' proposed strategy would have undermined Appellant's objectives, and as

[1] *See* Issues Presented IV and V discussing the errors related to prohibiting Appellant from pleading guilty in a capital case.

a result, Appellant's "choice" between proceeding *pro se* and proceeding with assigned counsel was no choice at all. *See Maynard v. Meachum*, 545 F.2d 273, 278 (1st Cir. 1976) (a waiver of counsel may be involuntary where appointed counsel is "constitutionally offensive"). The Government's argument to the contrary is unpersuasive.

A. Defense counsels' strategy would have violated Appellant's right to autonomy.

The Government attempts to distinguish *McCoy* on three flawed grounds. First, as the Government sees it, Appellant "did not wish to maintain his innocence," but instead intended only to pursue self-defense that conceded the act, and which "failed" as a matter of law. (Gov. Br. at 23). This draws a false distinction between factual innocence and legal justification. "On a practical level, a defendant who claims that no crime occurred is in the same position as a defendant who claims that he or she did not commit the crime that occurred: both assert innocence and, if true, neither is more culpable than the other." *Commonwealth v. Williams*, 119 N.E.3d 1171, 1179-80 (Mass. 2019). Furthermore, despite the Government's contention, the availability of self-defense is immaterial. Appellant's strategy may have turned on the availability, but Appellant's *objective* to maintain innocence did not. *McCoy*, 138 S. Ct. at 1503-04 (an accused's desire to maintain innocence may be to achieve objectives separate from an acquittal).

Second, and relatedly, [redacted] (Gov. Br. at 24-25). For the same reason that factual innocence and self-defense are not practically distinguishable, *McCoy* cannot be cabined so narrowly, and no post-*McCoy* case the Government cites calls for such a treatment. Indeed, courts have found *McCoy* violations where the accused and counsel both desired to admit the *actus reus*. *See e.g.*, *United States v. Read*, 918 F.3d 712 (9th Cir. 2019); *State v. Horn*, 251 So. 3d 1069, 1072 (La. 2018).

Contrary to the Government's claim, such an intractable disagreement existed here. Appellant ultimately maintained absolute innocence. Conversely, [redacted] (JA 3123) (Sealed). This is clear *from the record* when defense counsel advised Appellant [redacted] (JA 3121) (Sealed) (emphasis added). Thus, not only did defense counsel plan to concede guilt, but Appellant, who is deeply religious, faced "grave, personal implications" in a strategy that degraded his sincerely held beliefs. *See Read*, 918 F.3d at 719. Such a proposed defense

was—and remains—deeply offensive to Appellant's religious tenets, no matter how sound of a legal strategy it may have been.[2]

Third, and finally, the Government asserts that unlike *McCoy* "[t]here is simply nothing in the record that supports that Appellant's [redacted] fundamentally conflicted with his counsel's planned defense." (Gov. Br. at 27) (Sealed). This claim is baseless. Not only is Appellant's fundamental disagreement evident from his decision to terminate representation by going *pro se*, but as Appellant later informed the military judge:

> My standby counsel aren't going to like this, […] but I am a Mujahid—I'm proud of that. I won't hide that fact. It is a matter of principle. […] [W]e, the Mujahideen, are imperfect Muslims, trying to establish the perfect religion of Almighty Allah as supreme on the land."
>
> […]

[2] Relying on *United States v. Rosemond*, 958 F.3d 111 (2nd Cir. 2020), the Government argues that "even if this strategy may have exposed Appellant to criminal liability for a lesser included offense it would not have violated Appellant's right to control the objective of his defense." (Gov. Br. at 26, n.5). *Rosemond* does not have the reach the Government purports it does. More specifically, *Rosemond* concerned conceding an element of the crime, not conceding a lesser included offense. *Id*. at 123. There, the Second Circuit explicitly noted that the concession did not expose Rosemond to criminal liability. *Id*. Moreover, the court noted that Rosemond desired to concede wrongdoing to a crime, just not the one his counsel argued, and that "[h]ad Rosemond asserted his right to autonomy to prevent his attorney from conceding *any* crime because of the 'opprobrium' that accompanies such an admission, *McCoy*, 138 S. Ct. at 1508, his argument might [have] carr[ied] more weight." *Id.* at 124. By contrast, courts have found *McCoy* violations where counsel conceded lesser included offenses. *See e.g.*, *State v. Horn*, 251 So. 3d 1069, 1072 (La. 2018).

> The whole principle ma'am, is the last [three] years, I feel like—it is just a matter of principle. I don't need to hide that I'm Mujahid[.] […] Just because defense counsel—their job, in my specific case, is for eye towards getting death off the table, *that doesn't mean I need to compromise my principles to do that, and that's what I feel like is occurring*.

(JA 1503-04) (emphasis added).

True, unlike *McCoy*, Appellant did not explicitly object to defense counsels' strategy, (Gov. Br. at 26), but that is not dispositive here. For one, while an objection may be necessary to find a *McCoy* violation, *compare McCoy*, 138 S. Ct. at 1508 *with Florida v. Nixon*, 543 U.S. 175, 192 (2004) (no violation where accused was "unresponsive" to counsel's concession strategy), Appellant is not alleging that a *McCoy* violation *occurred*. Rather, *McCoy* explains the "Hobson's choice" Appellant faced in deciding to proceed *pro se*. *See e.g.*, *United States v. Wright*, 923 F.3d 183, 189 (D.C. Cir. 2019).

For another, the record suggests that Appellant did not realize an objection was even possible. [redacted] (JA 3124) (Sealed). Appellant then went *pro se*, and, as discussed above, informed the military judge of his dissatisfaction with counsels' strategy.[3] (JA 1503-04).

[3] It also apparent that any objection would have been an exercise in futility as the military judge repeatedly emphasized her view that any conflict was only one of

In any event, even in the absence of an explicit objection, the military judge had a responsibility here to investigate Appellant's dissatisfaction with counsel during the waiver of counsel colloquy that occurred on the eve of trial. *See United States v. Peppers*, 302 F.3d 120, 132-33 (3rd Cir. 2002); *Buhl v. Cooksey*, 233 F.3d 783, 798 (3rd Cir. 2000). And even if there was no duty then, there was a duty to reopen the waiver colloquy when the conflict later became readily apparent. (JA 373, 380-81, 386-88, 394, 729-39, 1503-04); (JA 3120-21) (Sealed). *See Garcia v. Burnell*, 33 F.3d 1193, 1199 (9th Cir. 1994) (trial courts "have a duty of inquiry *whenever* they know or reasonably should know that a particular conflict may exist.") (emphasis added) (citing *Wood v. Georgia,* 450 U.S. 261, 272-73 & n.18 (1981) and *Cuyler v. Sullivan,* 446 U.S. 335, 347 (1984)).[4]

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strategy. (JA 1510). This is compounded by the fact that Appellant's trial occurred prior to *McCoy*, which commentators have suggested created a significant change in the law. Alberto Bernabe, *A Tale of Two Cases: The Supreme Court's Uneasy Position on the Proper Allocation of Authority to Decide Whether to Concede a Client's Guilt in a Criminal Case*, 43 J. Legal Prof. 53, 64 (2018).

[4] The Government insists there was no duty to investigate because Appellant only desired counsel to present self-defense and no attorney could have helped this defense. (Gov. Br. at 29). Presuming that was Appellant's only desire, the Government's assertion overlooks three critical points. Appellant had a right to testify on his own behalf about self-defense, *Rock v. Arkansas*, 483 U.S. 44, 49 (1987); he had a right to the guiding hand of counsel to assist him with testifying on self-defense, *Brooks v. Tennessee*, 406 U.S. 605, 612 (1972); and he had the right to present self-defense at his sentencing proceeding. Yet, nothing in the record suggests he knew this, and the military judge's ruling does nothing to clarify these points.

B. <u>The requirements for substitute counsel were satisfied</u>.

As defense counsels' strategy would have endangered Appellant's constitutional autonomy, the Government's argument that substitute counsel was not required must necessarily fail. *See McCoy*, 138 S. Ct. at 1515 (Alito, J., dissenting) (if an accused is faced with counsel who insist on conceding guilt over his objections, a court will most likely appoint substitute counsel, and any decision not to appoint such counsel will be "vulnerable" on appeal). Accordingly, Appellant's waiver was not voluntary. *See e.g.*, *Maynard*, 545 F.2d at 278 ("whether Maynard's decision [to waive counsel] was voluntary will turn on whether his objections to his appointed counsel were such that he had a right to a new appointed counsel.").

C. <u>Conclusion</u>.

Appellant's waiver of counsel was involuntary. Therefore, this Court must set aside Appellant's convictions.

II.

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

Law and Argument[5]

A. The military judge clearly erred by failing to comply with *Waller* before ordering a total closure of court.

The public trial right under both the Sixth Amendment and Rule for Courts-Martial [R.C.M.] 806 requires the military judge to satisfy all four prongs of the *Waller* standard *before* a total closure occurs. *Waller v. Georgia*, 467 U.S. 39, 43 (1984);[6] R.C.M. 806(b)(2). The Government baldly asserts "[t]he military judge

[5] Both parties cite *United States v. Ortiz* for the proposition that this error is reviewed for an abuse of discretion. 66 M.J. 334, 339 (C.A.A.F. 2008). However, other courts have reviewed this error de novo. *See States v. Barronette*, 46 F.4th 177, 191-92 (4th Cir. 2022) (public trial violation reviewed de novo); *United States v. Allen*, 34 F.4th 789, 794 (9th Cir. 2022) (same); *United States v. Cervantes*, 706 F.3d 603, 612 (5th Cir. 2013) (same). However, Appellant prevails under either standard.

[6] Under the four-part test, a closure must meet all four prongs:

> [(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.

Waller, 467 U.S. at 43.

correctly applied the four-part *Waller* test to the facts before her." (Gov. Br. at 35). This conclusion is neither supported by law nor the record.

1. There was no likelihood that an overriding interest would be prejudiced.

According to the Government, the first prong is met by the military judge's concerns that Appellant or standby counsel may inadvertently disclose attorney-client or work-product privilege. (Gov. Br. at 35). While the protection of a privilege may serve as an overriding interest in *some* cases, that is not *this* case. Here, the military judge ordered a total closure over Appellant's objections presumably to protect privilege, but it was a privilege that Appellant had already affirmatively waived. Therefore, there was no "overriding interest likely to be prejudiced" because there was no privilege left to protect.

The Government, however, contends Appellant's waiver was not "effective" because "the military judge stated that she didn't know what Appellant was 'planning on going into' and Appellant himself suggested that [her] understanding of what he might say was misinformed." (Gov. Br. at 37). The Government further contends that Appellant's interjection of standby counsel's exchange with the military judge shows "Appellant had not, in fact, waived 'any privilege' [. . .] knowingly and intelligently." (Gov. Br. at 37-38).

The Government is mistaken on waiver. "Waiver has never turned on anything more than the requirement set forth in [Military Rule of Evidence] 510(a)

that the privilege holder 'voluntarily [. . .] consents to disclosure of any significant part of the matter or communication.'" *United States v. Jasper*, 72 M.J. 276, 280 (C.A.A.F. 2013) (quoting Military Rule of Evidence [Mil. R. Evid.] 510(a)) (alterations added). Contrary to the Government's concern that appellant's waiver be "knowing," (Gov. Br. at 35-36, 38, 40-41), "[the rule] does not require that a waiver of privilege be made 'knowingly' or 'intelligently.'" *Id*. at 281 (quoting *Miranda v. Arizona*, 384 U.S. 436, 475 (1966)) (alterations added). Once Appellant consented to disclosure, saying he was "specifically waiving any privileges," and advised the military judge that he arrived at his decision freely, (JA 740), he waived attorney-client privilege and work-product immunity.[7] Any other result would turn waiver on its head.[8]

[7] *See In re Advance Transp. Co.*, 288 B.R. 208, 214 (E.D. Wis. 2002) (the client may waive work-product immunity). Notably, standby counsels' motion may have already waived any work-product immunity, regardless of Appellant's waiver. *See United States v. Sammina Corp.*, 968 F.3d 1107, 1125 (9th Cir. 2020) (waiver of work-product immunity occurs when there is "disclosure to an adversary or conduct that is inconsistent with the maintenance of secrecy against its adversary").

[8] Generally, a party must properly *invoke* a privilege or else the information subsequently disclosed is waived. *See Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981) ("If the client feels the need to keep his communications with his attorney confidential, he is free to do so under the traditional rule by consistently asserting the privilege."); *see also In re Foster*, 188 F.3d 1259, 1264 (10th Cir. 1999) ("A party claiming the attorney-client privilege must prove its applicability, which is narrowly construed.").

However, even assuming *arguendo* there was no "effective" waiver when the closure occurred, the same outcome remains—on this record, any privilege would not have *likely* been prejudiced by open proceedings.[9] The military judge closed the court "to listen to Appellant's objections" without ever asking him if he needed—or otherwise intended—to disclose privileged information. (Gov. Br. at 43). In fact, she rebuffed his attempt to inform her that what he wanted to say (and later did say) was *not* privileged. (JA 740) ("I don't think it is what you think it is, ma'am"). This is akin to closures for witness safety that failed *Waller*'s first prong because the trial court never asked whether the witness was, in fact, afraid to testify or how the witness's testimony would be impacted. *See Guzman v. Scully*, 80 F.3d 772, 776-77 (2nd Cir. 1996); *State v. Turrietta*, 308 P.3d 964, 971 (N.M. 2013); *People v. Ramos*, 90 N.Y. 2d 490, 498 (N.Y. 1997). Without more, any prejudice to privilege was only a "mere possibility" rather than a "likely" probability. *Turrietta*, 308 P.3d at 971; *Ramos*, 90 N.Y. 2d at 498.

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[9] Post-*Waller*, the Supreme Court seemingly modified *Waller*'s first prong to require a "substantial probability" that an overriding interest will be prejudiced. *See Ayala v. Speckard*, 131 F.3d 62, 69 (2nd Cir. 1997) (after *Waller*, "the [Supreme] Court further refined the first factor to require '*a substantial probability* that the [overriding interest] will be prejudiced by publicity that closure would prevent.") (quoting *Press-Enterprise Co. v Superior Court of Cal., County of Riverside,* 478 U.S. 1, 14 (1986) [*Press-Enterprise II*])) (emphasis in original) (alterations added); *see also* R.C.M. 806(b)(2) (incorporating *Press-Enterprise II*'s "substantial probability" language). The Supreme Court has not yet applied "substantial probability" in a Sixth Amendment context, nor has this Court, although the Government concedes its applicability here. (Gov. Br. at 35, n.6).

2. The closure was not narrowly tailored.

Here, the Government argues the closure was only "partial" and thus "narrow." (Gov. Br. at 39). This wholly misses the mark.

For one, this closure was total, not partial. Nearly every federal circuit that draws a distinction between a "partial" and a "total" closure considers the complete exclusion of all members of the public—as was the case here—to be a "total" closure.[10] *See also* R.C.M. 806(b)(2), *Discussion* ("a court-martial session is 'closed' when no member of the public is permitted to attend.").

The Government's reliance on *United States v. Hershey*, 20 M.J. 433 (C.M.A. 1985), and *United States v. Ortiz*, 66 M.J. 334 (C.A.A.F. 2008), to argue otherwise is misplaced. In both decisions, the type of closure related not to whether the military judge satisfied *Waller*'s test, but rather to whether there was deprivation of the public trial right *following* a *Waller* violation. *Hershey*, 20 M.J.

[10] *See United States v. Allen*, 34 F.4th 789, 797 (9th Cir. 2022) ("a total closure of the courtroom means that all persons other than witnesses, court personnel, the parties and their lawyers are excluded for the duration of the hearing") (internal quotations and citations omitted); *United States v. Laureano-Perez*, 797 F.3d 45, 77 (1st Cir. 2015) (a total closure occurs where all members of the public are excluded from *some* portion of trial) (citations omitted) (emphasis added); *United States v. Thompson*, 713 F.3d 388, 395 (8th Cir. 2013) ("[w]hether a closure is total or partial . . . depends not on how long a trial is closed, but rather who is excluded") (first alteration added); *see also United States v. Simmons*, 797 F.3d 409, 413 (6th Cir. 2015); *Judd v. Haley*, 250 F.3d 1308, 1316 (11th Cir. 2001); *United States v. Osborne*, 68 F.3d 94, 98 (5th Cir. 1995); *Davis v. Reynolds*, 890 F.2d 1105, 1110 (10th Cir. 1989).

at 437; *Ortiz,* 66 M.J. at 340. Moreover, *Ortiz* repudiated *Hershey* in so much as *Hershey* relied on duration to find a partial closure—an argument the Government unsuccessfully advanced in *Ortiz*, *see Ortiz*, 66 M.J. at 341, and continues to advance here. In finding a total closure, *Ortiz* distinguished *Hershey* on the grounds of *who* was excluded from the courtroom.[11] *Id*. at 341-42. Thus, *Ortiz* is in step with the majority of federal circuits in what constitutes a "total" closure.

For another, and more importantly, the Government's argument misses the mark because whether the closure was "partial" or "total" is irrelevant to this prong of *Waller*. The question is whether the closure was "broader than necessary." *Waller*, 467 U.S. at 48. Here, it certainly was.

Putting aside that there can generally be no compliance with the second *Waller* prong if there was not compliance with the first, *see Scully*, 80 F.3d at 776 (where "the [overriding] interest is alleged but not established, there could be no compliance with [*Waller*'s] second requirement"), the military judge failed to satisfy *Waller*'s second prong even under the Government's own reading of the facts. If the closure was "to prevent Appellant from disclosing privileged information before *first* knowingly waiving the privilege[,]" (Gov. Br. at 40) (emphasis added), then it was unnecessary for the closure to go any further than

[11] In both decisions, the closure pertained to a child victim's testimony regarding sex offenses. *United States v. Hershey*, 20 M.J. 433, 435 (C.M.A. 1985); *United States v. Ortiz*, 66 M.J. 334, 335-36 (C.A.A.F. 2008).

obtaining Appellant's waiver. Indeed, the military judge reengaged Appellant about waiver *during* the closure, and Appellant reaffirmed his decision to waive privilege. (JA 1508). Yet, instead of reopening the hearing following Appellant's affirmative waiver, standby counsels' entire motion was litigated behind closed doors, as was standby counsels' unauthorized disclosure of privileged materials.

3. The military judge failed to consider reasonable alternatives.

The Government's claim that there were no reasonable alternatives must be categorically rejected. There were at least two reasonable alternatives.

One reasonable alternative was for the military judge to determine, at the outset and with the parties' input, the necessity, if any, of disclosing privileged information to resolve standby counsels' motion, and to bifurcate the proceedings accordingly. *See United States v. Ali*, 398 F.Supp.3d 1200, 1226 (C.M.C.R 2019). The Government claims the military judge "attempted to do just that," but she reasonably feared that Appellant, "who had no legal training" would unknowingly disclose privilege and "based off [his] responses, . . . the risk of inadvertent disclosure was too high." (Gov. Br. at 41). This claim fails.

Nothing prevented the military judge from asking Appellant if he intended to disclose privileged information and then tailoring the closure, if any, to his response. *See Waller*, 467 U.S. at 48 (the court failed to consider directing the Government "to provide more detail about its need for closure [. . .] and closing

only those parts of the hearing that jeopardized the interests advanced.") (alterations added). And nothing the Government can point to changes the calculus. Notably, the Government fails to identify any of Appellant's "responses" from which the military judge could have concluded that the "risk" of disclosure was "too high."[12] Furthermore, as for the concern of Appellant's "legal training," courts have dismissed similar claims. *See e.g.*, *Ali*, 398 F.Supp.3d at 1226 (where a witness is expected to testify to classified matters, a finding that closure for the entirety of the testimony was necessary on the basis that the witness "lacked the technical skill to ensure his or her answers remain unclassified" was insufficient).

Publishing the transcript after the closed hearing was also a reasonable alternative the military judge failed to consider. *Press-Enterprise. Co. v. Superior Court*, 464 U.S. 501, 512 (1984) [*Press-Enterprise I*]; *see also Ctr. for Constitutional Rights v. United States*, 72 M.J. 126, 134 (C.A.A.F. 2013) (Cox, J., dissenting) (a military judge's authority to regulate transcripts is provided by R.C.M. 801(a)). This was not possible, the Government claims, because the

[12] The Government, earlier in its argument, references two statements made by Appellant, though it is not clear if the Government is relying on those two "responses" here. Regardless, neither statement benefits the Government. The first statement—"I don't think it is what you think it is, ma'am," (JA 740)—cuts against the Government's claim as it demonstrates Appellant's intent *not* to disclose his communications with standby counsel or standby counsels' work-product. The second statement—Appellant's interjection during standby counsels' exchange with the military judge, (JA 1508)—occurred during the closure, thus it would have no bearing on the military judge's decision prior to closure.

military judge determined that the transcript contained "privileged communications," and the Army Court "agreed with her finding." (Gov. Br. at 41).

But what were these "privileged communications"? The military judge never provided any analysis on the record or in the sealing order. (JA 832-34). Likewise, the Army Court *never* provided any analysis, despite repeated requests for it to do so. (JA 45-47). And the Government provides no analysis here. The military judge, the Army Court, and the government did not—and cannot—provide such analysis because no such privileged communications were revealed in the closed hearing. *See* Mil. R. Evid. 502; *see also Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1423 (3d Cir. 1991) ("[b]ecause the attorney-client privilege obstructs the truth-finding process, it is construed narrowly."). Thus, it was clear error to seal it.[13] *See Newsday LLC v. County of Nassau*, 730 F.3d 156, 165 (2nd Cir. 2013) ("[t]he transcript of a proceeding is so closely related to the ability to attend the proceeding itself that maintaining secrecy is appropriate only if closing the courtroom was appropriate.").

[13] Even if this Court disagrees, there was still no cause to seal the transcript *in toto*, especially the statements Appellant wanted to say publicly about his faith. (JA 1503, 1514).

4. The military judge failed to make adequate findings.

The Government defends the military judge's conclusory findings as sufficient to "facilitate appellate review." (Gov. Br. at 44). The findings, however, must be "specific enough that a reviewing court can determine whether the closure order was properly entered," *see Ortiz*, 66 M.J. at 339 (quoting *Press-Enterprise I*, 464 U.S. at 510), and the failure to address Appellant's waiver is, alone, grounds to reject the incomplete findings.

Indeed, the Government's argument rests on the supposition that "it was reasonable for the military judge to 'determine' that Appellant had not, in fact, waived 'any privilege'"). (Gov. Br. at 37-38). But the military judge never, in fact, determined this; the Government, instead, *assumes* it. Critically, this Court cannot discount the very real and distinct possibility that the military judge refused Appellant's otherwise valid waiver. Given this, the findings fail *Waller*. *See English v. Artuz*, 164 F.3d 105, 109-10 (2nd Cir. 1998) (court's findings did not support total closure for witness safety where the trial judge failed to address the witness' statement that he would have been willing to testify in front of English's family members and the state's argument to the contrary would require the appellate court to disregard witness' statement).

B. <u>The military judge denied Appellant a public trial</u>.

Relying on *United States v. Gottesfeld*, 18 F.4th 1 (1st Cir. 2021), the Government contends that, even if the military judge erred, the public trial right does not apply to motions to withdraw. (Gov. Br. at 45). *Gottesfeld* is unpersuasive authority.

Gottesfeld is at odds with *Applications of National Broadcasting Co*. [*NBC*], where the Sixth Circuit held that the First Amendment right of access applied to proceedings relating to a counsel's conflict of interest in joint representation cases. 828 F.2d 340, 345 (6th Cir. 1987). Observing that open proceedings were the "traditional method" of resolving attorney conflicts of interest, the Sixth Circuit concluded:

> [T]here is a significant positive role to be played by having such proceedings conducted in open court. From such proceedings the public is informed of the seriousness with which the Sixth Amendment right to counsel is treated and of the meticulous inquiries that are undertaken by the court to be certain that defendants understand their right to independent counsel with undivided loyalty to the client's cause.
>
> Thus […] proceedings inquiring into conflicts of interest by attorneys meet and satisfy the requirements of a qualified First Amendment right of access. Although not 'like a trial,' in the sense of a preliminary hearing such as the court considered in *Press-Enterprise II*, both proceedings do require the court to make factual determinations and to apply settled legal principles in order to rule. In addition, resolution of the issues presented in both types of proceedings, has a significant bearing on all subsequent proceedings in a case, particularly on the trial itself.

Id.

Other cases have relied on, and extended, *NBC*. For example, in *United States v. Dimasi*, a case not concerning joint representation, the U.S. District Court for Massachusetts ordered a motion relating to attorney disqualification unsealed, with appropriate redactions, and further ordered that "proceedings concerning the Motion should be open to the public." 2009 U.S. Dist. LEXIS 68417, *2 (D. Mass. 2009). The court noted that "public monitoring of the judicial system fosters important values of quality, honesty, and respect for our legal system," *id.* at *5 (quoting *Siedle v. Putnam Investments Inc*., 147 F.3d 7, 10 (1st Cir. 1998)), and that these considerations apply to motions to disqualify counsel, "permit[ting] the public to observe and evaluate the performance of [. . .] the court in this matter." *Id*. at *5 (alterations added); *see also Tradewinds Airlines*, *Inc v. Soros*, 2009 U.S. Dist. LEXIS 42854, *2 (May 20, 2009) (S.D.N.Y. 2009) ("[a] federal court's decision whether to disqualify counsel in order to preserve the integrity of the adversary process is an important part of the judicial function.").

This Court should follow *NBC*'s reasoning and reject *Gottesfeld*. Indeed, unlike *NBC*, *Gottesfeld* never considered the most relevant *Waller* value—"ensuring that judg[es] and prosecuto[rs] carry out their duties responsibly." *Waller*, 467 U.S. at 46 (alterations added). Moreover, *Gottesfeld* is internally inconsistent. Indeed, while rejecting Gottesfeld's Sixth Amendment claim, the

court exposed the flawed logic in the opinion, suggesting that the public had a right to attend his proceedings under the First Amendment, *Gottesfeld*, 18 F.4th at 15, n.7, but also finding "there can be little doubt that [Gottesfeld's] explicit Sixth Amendment right [wa]s no less protective [. . .] than the implicit First Amendment right of the press and public."[14] *Waller*, 467 U.S. at 46 (alterations added). Most significantly, *Gottesfeld* runs counter to the Court's clear command in *Presley v. Georgia*: "*Waller* provided standards for courts to apply before excluding the public from *any* stage of a criminal trial." 558 U.S. 209, 213 (2010) (emphasis added).

Three additional considerations compel the conclusion that this Court should reject *Gottesfeld* and find that the constitutional public trial right applies. First, unlike *Gottesfeld*, this proceeding occurred during trial and in a capital case. Given that the public trial right "embodies a view […] 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) (alterations added), this guarantee is most essential in capital proceedings,

[14] *See also Presley v. Georgia*, 558 U.S. 209, 213 (2010) (*per curiam*) (whether based on the First or Sixth Amendment, decisions uniformly recognize that the public-trial guarantee is for the accused, and "[t]here could be no explanation for barring the accused from raising a constitutional right that is unmistakably for his or her benefit.")

which must "be policed at all stages by an especially vigilant concern for procedural fairness." *Strickland v. Washington*, 466 U.S. 668, 704 (1984) (Brennan, J., concurring in part and dissenting in part) (emphasis added); *see also Barefoot v. Estelle*, 463 U.S. 880, 913 (1983) (Marshall, J., dissenting) ("time and again the Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case."). Certainly, the conduct of appointed standby counsel, at cross-purposes with the accused, should be subjected to the public's "vigilant concern for procedural fairness."

Second, this case not only involves a conflict on the part of counsel, which itself is distinguishable from *Gottesfeld* where the client's conduct was the issue,[15] but it also involves the resolution of standby counsels' purposeful disclosure of purportedly privileged materials to the Government. Indeed, the military judge asked Appellant whether he wanted "remedial action," (JA 1507), and obtained his waiver to "any issues regarding the release of the motion." (JA 1508). This exchange occurred during closure, and only during closure. *See Centauri Shipping Ltd. v. Western Bulk Carriers KS*, 528 F.Supp.2d 197, 205 (S.D.N.Y. 2007) (proceedings relating to sanctions deserve a "strong presumption of openness" as they are "the essential purpose of permitting this Court to perform its

[15] More specifically, the cause of the "conflict" in *Gottesfeld* was appellant's publicly disparaging online remarks and allegations about his counsel, which the trial court described as "frivolous and cockamamy." *Gottesfeld*, 18 F.4th at 11-12.

Article III duties of deterring abuses of the judicial process and imposing sanctions to achieve that end, if necessary."); *Daily Gazette Co. v. Committee on Legal Ethics of the W. Va. State Bar*, 174 W. Va. 359, 367 (W. Va. 1984) (sanctions against an attorney is "public business and should not be disposed of in any other than a public manner.") (citations omitted). It is difficult to overstate the public's interest in government-provided counsel protecting the accused's constitutional, statutory, and regulatory rights.

Third, contrary to the Government's characterization of the proceedings as "even more collateral" than in *Gottesfeld*, (Gov. Br. at 45), standby counsels' actions threatened to undermine Appellant's constitutional right to proceed *pro se*, *see McKaskle v. Wiggins*, 465 U.S. 168, 179 (1984), and the military judge had an affirmative duty to supervise and safeguard that right. *Id*. Additionally, the disclosure placed Appellant's case in jeopardy, implicating the military judge's *sua sponte* duty to ensure that an accused received a fair trial.[16] *See United States v. Andrews*, 77 M.J. 393, 403 (C.A.A.F. 2018) (citations omitted). Surely, public presence would have ensured the military judge performed her duties "conscientiously," *see Gannett Co., Inc., v. DePasquale*, 443 U.S. 368, 383

[16] Standby counsels' disclosure could have reasonably been grounds for mistrial. *See* R.C.M. 915(a).

(1979), on decisions that had a "significant bearing on all subsequent proceedings."[17] *NBC*, 828 F.2d at 345.

C. <u>There was a deprivation of the right to a public trial</u>.

Finally, relying on *Hershey*, the Government asks this Court not to find a deprivation of the public trial right based on the duration and "ancillary" nature of the proceedings. (Gov. Br. at 45-46). This argument, too, fails.

Hershey is inapposite. *Hershey* determined that only a partial closure occurred. *Hershey*, 20 M.J. at 437. The cases *Hershey* relied on to find no constitutional violation were partial closure cases. *Id*. (citing *Douglas v. Wainwright,* 739 F.2d 531 (11th Cir. 1984); *Aaron v. Capps,* 507 F.2d 685 (5th Cir. 1975)). In contrast, a total closure occurred here, which critically affects the analysis. "[*Waller*'s core] values are only moderately burdened when the courtroom is partially closed to the public, as certain spectators remain and are able

[17] The Government consolidates the constitutional and regulatory analysis for the right to a public trial. (Gov. Br. at 35, n.6). For the reasons stated in Appellant's opening brief, the right to a public trial under R.C.M. 806 still applies even if this Court finds that the constitutional right does not. Specifically, the rule provides that all proceedings "*shall* be open to the public" unless otherwise provided in this rule. R.C.M. 806(a) (emphasis added). The Analysis makes clear that the only time proceedings may be closed without the consent of the accused are proceedings under Military Rule of Evidence [Mil. R. Evid.] 505(i), 505(j), 506(i), and 412(c). Manual for Courts-Martial [M.C.M.], Analysis of the Rules for Courts-Martial, App. 21, pp. 21-48 (2008 ed.). As the closure did not implicate any of these rules, and was over Appellant's explicit objection, R.C.M. 806(a) mandated that the proceeding remain open.

to subject the proceedings to some degree of public scrutiny." *Judd*, 250 F.3d at 1315-16 (alterations added). But a totally closed courtroom, even temporarily, diminishes the role the public can have in holding public officials to account, and "create[s] a public perception that the defendant is not being treated fairly." *Id.* at 1316.

That said, *some* federal circuits apply a "triviality exception" even for total closures, asking "whether the conduct at issue 'subverts the values the drafters of the Sixth Amendment sought to protect.'" *Gibbons v. Savage*, 555 F.3d 112, 121 (2nd Cir. 2009) (quoting *Smith v. Hollins*, 448 F.3d 553, 540 (2nd Cir. 2006)). This "triviality" exception, however, fails to comport with *Waller* and *Presley* and has been sharply criticized as a "surreptitious redefinition" of prejudice.[18] Importantly, even circuits applying this exception have required more than mere brevity to find a closure "trivial." *See e.g., United States v. Rivera*, 682 F.3d 1223,

[18] *See Constant v. Pa. Dep't of Corr.*, 912 F.Supp.2d 279, 306 (W.D.Pa. 2012) (post-*Presley*, "[t]he continued viability of this exception is currently in question in the Second Circuit where the Court of Appeals has quite recently reconsidered and, at a minimum, significantly narrowed its reach.") (citing *United States v. Gupta*, 699 F.3d 682, 688-89 (2nd Cir. 2011) (vacating previous decision based on triviality exception)); *State v. Schierman*, 192 Wn.2d 577, 612 (2018) ("[t]he temptation created by [the triviality] approach, to excuse procedural violations as harmless after the fact, leads predictably to the result that procedural rights become entirely unenforceable. . . . [T]his outcome poses unacceptable risks to our system of justice[.]"); Kristin Saetveit, *Close Calls: Defining Courtroom Closures Under the Sixth Amendment*, 68 Stan. L. Rev. 897, 921 (2016) (the triviality exception is a "'surreptitious [] redefinition' of the underlying [public trial] right") (citations omitted) (first alteration in original).

1231-32 (9th Cir. 2012) (thirty-five-minute closure was nontrivial); *United States v. Ivester*, 316 F.3d 955, 960 (9th Cir. 2003) (momentary closure was "too trivial" because it pertained to administrative matters); *Peterson v. Williams*, 85 F.3d 39, 42-44 (2nd Cir. 1996) (brief closure was "too trivial" as it was inadvertent); *United States v. Al-Smadi*, 15 F.3d 153, 154-55 (10th Cir. 1994) (same). By comparison, the closure in this case was not "trivial."

This conclusion is bolstered by the consequences that flowed from the closure. The failure of the military judge to consider "publication" as a reasonable alternative led to a trial transcript that erroneously remained sealed for nearly ten years. Irrespective of Appellant's role, appellate defense counsel had a right (as did the public) to access the non-privileged transcript, and despite repeated requests, the Army Court refused counsel and the public access and conducted its Article 66, UCMJ, review anyway. *See United States v. Hasan*, 80 M.J. 682, 719-20 (A. Ct. Crim. App. 2020). The Government now lauds the transcript's unsealing as somehow vindicating of the public trial right. (Gov. Br. at 42). But precisely the opposite is true, especially in this capital case that has been the subject of intensive media coverage.

D. Conclusion.

The military judge erred, and the error was structural.[19] *See Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017). Therefore, this Court should set aside the conviction.

III.

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

Law and Argument

A. The challenge is not waived.

Previous decisions of this Court have reviewed a failure to challenge a member for plain error. *See 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). Contrary to the Government's argument, plain error is appropriate here.

1. Plain error remains the appropriate standard.

In *Strand*, this Court first discussed a military's judge's *sua sponte* duty in the context of plain error. *Strand*, 59 M.J. at 460. ("Since the judge did not abuse his discretion, there was no plain error."). Subsequently, in *Akbar*, this Court

[19] For the reasons stated in the Appellant's Brief, the violation of the right to a public trial under R.C.M. 806 results in structural error even if this Court does not find a constitutional violation.

reviewed a military judge's decision not to *sua sponte* excuse a member in the interests of justice for an abuse of discretion. 74 M.J. 364, 395-96 (C.A.A.F. 2015). While not explicitly stating plain error applied, *Akbar* cited to *Strand* approvingly. *Id*. Post-*Akbar* decisions have continued to employ this standard or have otherwise reviewed for plain error. *See e.g., United States v. Mendoza*, 2020 CCA LEXIS 200, *4 (A. Ct. Crim. App. Jun. 5, 2020); *United States v. Sellers*, 2017 CCA LEXIS 271, *6 (A. Ct. Crim. App. Apr. 20, 2017); *United States v. Marsh*, 2016 CCA LEXIS 244, *12-13 (A.F. Ct. Crim. App. Apr. 16, 2016); *see also United States v. Covitz*, 2022 CCA LEXIS 563, *24 (A.F. Ct. Crim. App. Sep. 30, 2022); *United States v. Witt*, 2021 CCA LEXIS 625 *42, 65-67 (A.F. Ct. Crim. App. Nov. 19, 2021).

As *Strand* suggests, whether a military judge abuses her discretion by not exercising her authority *in the interests of justice* is "plain error" review by another name. "In the interests of justice" and "plain error" speak to the same thing—clear and obvious error. In this way, cases specifying plain error, including pre-*Strand* decisions, *see e.g., United States v. Velez*, 48 M.J. 220, 225 (C.A.A.F. 1998), and cases specifying abuse of discretion "in the interests of justice" may be reconciled. *See VS2, LLC v. United States*, 155 Fed. Cl. 738, 755 (2021) (a court should read its decisions in harmony as best as possible); *see also United States v. Jessie*, 79

M.J. 437, 443-44 (C.A.A.F. 2020) (reconciling precedent). In short, *Strand* employed plain error, and *Akbar* may be viewed the same.

The Government asks this Court to overturn its plain error precedent because R.C.M. 912(f)(4) states "waiver." (Gov. Br. at 51). This, however, is not enough. *See Andrews*, 77 M.J. at 398-400 (declining to abandon precedent applying "forfeiture" where the rule clearly said "waiver"), and the cases the Government offers applying waiver do not compel this Court to depart from *Strand* or similar decisions. (Gov. Br. at 52-53). Whatever the precise standard may be, recent decisions have declined waiver and reviewed for error, and this Court defers to its more recent precedent to resolve any conflicts in its decisions. *See United States v. Hardy*, 77 M.J. 438, 441, n.5 (C.A.A.F. 2018).

Simply put, even presuming the rule means what it says,[20] the Government must show—and has failed to show—how *Strand* or similar decisions are not only wrong, but unworkable. *See Andrews*, 77 M.J. at 400 ("Although the United States

[20] The cases cited in the rule's analysis, and by the Government here, are not necessarily dispositive on the meaning of "waiver." *United States v. Beer*, the primary case cited in the rule's analysis, *see* M.C.M., Analysis of the Rules for Courts-Martial, App. 21, pp. 21-63 (2008 ed.), relies on 31 Am. Jur., Jury, § 119 for "waiver." 19 C.M.R. 306, 309 (1955). Importantly, the last quoted line is, "*and it does not appear on the whole case that injustice resulted . . .*" *Id*. (quoting 31 Am. Jur., Jury, § 119) (emphasis added). This arguably signals plain error review. *See also United States v. Wilson*, 21 M.J. 193, 197 (C.M.A. 1986) (comparing waiver rule for challenges of panel members with Mil. R. Evid. 103(d) plain error and suggesting it permitted review where there was specific prejudice or a miscarriage of justice).

Supreme Court has 'from time to time . . . overruled governing decisions that are unworkable or are badly reasoned, [it has] [. . .] declined to do so where the petitioning party has failed to establish unworkability.") (quoting *United States v. International Business Machines Corp.*, 517 U.S. 843, 856 (1996) (internal quotation marks omitted) (citations omitted)) (last alteration added). To the contrary, reviewing for plain error fully accords with the rule's clear mandate that a member "*shall* be excused . . . *whenever it appears*" the member is biased. R.C.M. 912(f)(1) (emphasis added). While this mandate pertains to "challenges," *see* R.C.M. 912(f), it is not contingent on a challenge *by a party*, and as early decisions from which the rule is based make clear, the military judge's *sua sponte* action to remove a member is the judge's own "challenge." *See United States v. Jones*, 22 C.M.R. 73, 75-76 (1956) ("We conclude, therefore, that the law officer is authorized to *challenge* a court member for cause on his motion") (emphasis added); *United States v. Seabrooks*, 48 C.M.R. 471, 472 (N.M.C.R. 1974) ("Although the military judge in this case did not use the word 'challenge', it is apparent that he 'challenged' that member").

Finally, the Government's reliance on *United States v. McFadden*, 74 M.J. 87 (C.A.A.F. 2015), as an "intervening event" is misplaced. (Gov. Br. at 55). *McFadden*—a pre-*Akbar* decision—did not find waiver. *Id*. at 90. It did not repudiate plain error. *Id*. at 90. And its holding was specifically limited to

whether the military judge had a duty with respect to a particular panel member. *Id*. at 90 ("We hold that the military judge did not have a duty to *sua sponte* excuse Major Cereste."). *McFadden* does not have as expansive a reach as the Government suggests.

2. There was no affirmative waiver.

The Government contends Appellant affirmatively waived his challenge when he answered, "yes, ma'am," to the military judge's question, "are you specifically waiving any challenges for cause [. . .]?" (Gov. Br. at 50-51). This is not so.

This Court has not addressed what constitutes an affirmative waiver of a challenge for cause, especially in a capital case. Importantly, the right at stake necessarily defines the waiver—"whether certain procedures are required for waiver [] and whether the defendant's choice must be particularly informed or voluntary[.]" *United States v. Olano*, 507 U.S. 725, 733 (1993) (citations omitted).

The cases the Government relies on finding affirmative waiver are factually distinguishable. (Gov. Br. at 50-51). Those cases involved instructional error on elements, *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020), evidentiary error, *United States v. Ahern,* 76 M.J. 194 (C.A.A.F. 2017), and an unreasonable multiplication of charges. *United States v. Gladue,* 67 M.J. 311 (C.A.A.F. 2009). By contrast, the right here is the right to a fair trial through the removal of a biased

member in a capital case who will make the "highly subjective, unique, individualized judgment" regarding imposition of the death penalty, *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)), and this right must "be more carefully safeguarded." *King v. Lynaugh*, 828 F.2d 257, 259 (5th Cir. 1987); *see also United States v. ex rel. De Vita v. McCorkle*, 248 F.2d 1, 8 (6th Cir. 1957) (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."). The Government's comparisons are not apt.

Here, there was no affirmative waiver. There was no on-the-record discussion of LTC Garwold's bias specifically. Appellant made no independent challenge of any panel member, and he joined in—or otherwise abstained from—every prosecution challenge, irrespective of the reason why. His wholesale *acquiescence* to the prosecution is not an affirmative waiver, especially not one in a capital case. *Cf. United States v. Smith*, 50 M.J. 451, 457 (C.A.A.F. 1999) (Gierke, J. dissenting) (collecting cases) (discussing precedent that has looked for "an affirmative, calculated, and designed course of action by a defense counsel" on the entire record to find waiver); *see also United States v. Raney*, 842 F.3d 1041, 1044 (7th Cir. 2016) ("a purposeful decision to object to some but not all

conditions is the 'touchstone of waiver' because it indicates 'a knowing and intentional decision.'") (citations omitted).

3. This Court should relax waiver in this death penalty case.

Death is different. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Assuming *arguendo* there was waiver, this Court should relax waiver in this instance similar to other jurisdictions in death penalty cases.[21]

Because death is different, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Id*. Accordingly, this Court's "scrutiny of cases [should be] correspondingly heightened." *Simmons v. State*, 805 So. 2d 452, 548 (Miss. 2001); *see also Ake v. Oklahoma*, 470 U.S. 68, 87 (1985) (Burger, C. J., concurring) ("In capital cases the finality of the sentence imposed warrants protections that may or

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[21] *See e.g.*, *State v. Broom*, 40 Ohio St. 277, 281 (Oh. 1988) (courts will utilize the doctrine of waiver where applicable, "yet the court *must* also retain power to *sua sponte* consider particular errors under exceptional circumstances") (emphasis added); *Simmons v. State*, 805 So. 2d 452, 548 (Miss. 2001) ("We have in death penalty cases the prerogative of relaxing out contemporaneous objection and plain error rules when the interest of justice so requires. Because the death penalty is a different sort of punishment with more severe consequences than other sentences, this Court's scrutiny of such cases is correspondingly heightened. In capital cases, the procedural bar is sometimes relaxed because of the nature of the right asserted."); *People v. Bugs*, 112 Ill. 2d 284, 290-91 (Ill. 1986) (permitting exception to waiver in capital case where the error concerns the right to a jury); *State v. White,* 307 N.C. 42, 296 S.E.2d 267 (1982) (an exception to the general rule of non-reviewability for failure to make the appropriate objection or motion occurs in capital cases because of the severity and irrevocability of the death sentence); *State v. List*, 771 N.W.2d 644, 646 (N.D. 2009).

may not be required in other cases."). That this Court must review *the entire record* in death penalty cases—and only in death penalty cases—supports this heightened scrutiny, and supports its authority to relax waiver. Article 67(a)(1), (c) UCMJ.

Additionally, Article 45(b), UCMJ, is also informative to the extent this Court upholds it.[22] This provision, and the requirements of Article 16(b), UCMJ, mandated a contested panel trial for every capital case at the time of Appellant's trial. If reliability laid behind Congress' purpose, surely a biased panel undermined its statutory design. The prohibition on trial waivers necessarily signaled a heightened scrutiny of the trial and its members.

Ultimately, this Court cannot affirm a death penalty conviction where a biased panel member voted for death.[23]

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[22] *See* Issue Presented IV.

[23] Even if this Court finds waiver, it should still review this error to determine whether the Army Court properly discharged its mandatory duty to approve only those findings and sentence that "should be approved." Article 66, UCMJ. Focusing on Lieutenant Colonel (LTC) Garwold's bumper sticker, the Army Court concluded that there was no bias. *United States v. Hasan*, 80 M.J. 682, 709-10 (A. Ct. Crim. App. 2020). This was error. Consequently, the Army Court did not appropriately consider whether the death sentence "should be approved" given LTC Garwold's bias. *See United States v. Chin*, 75 M.J. 220, 223 (C.A.A.F. 2016); *see also United States v. Gay*, 75 M.J. 264, 267-69 (C.A.A.F. 2015) (the "should be approved" language of Article 66 requires legal deficiency).

B. <u>There was bias</u>.

No reasonable military jurist would have ever sat Lieutenant Colonel (LTC) Garwold in this case. He provided *alarming* responses in his original questionnaire, (JA 2387-2437) (Sealed), [redacted] (JA 1570) (Sealed). [redacted] (JA 1558) (Sealed). The Government admits "the military judge had access to LTC [Garwold's] questionnaires," (Gov. Br. at 66), the record shows she did, in fact, review questionnaires, (JA 700), and [redacted] (JA 1517-71) (Sealed). Still, she did nothing.

The Government relies on LTC Garwold's mere "yes" and "no" declarations in voir dire as some talisman of impartiality. (Gov. Br. at 62-66). Yet, mere "assurances that [one] is equal to [the] task cannot be dispositive of the accused's rights[.]" *Murphy v. Florida*, 421 U.S. 794, 800 (1975); *see also United States v. Albaaj*, 65 M.J. 167, 170-71 (C.A.A.F. 2007). Here, LTC Garwold's mere assurances do not dispel bias.

1. [redacted]

Prior to trial, [redacted] (JA 2434) (Sealed). [redacted]

[redacted][24] (Gov. Br. at 65) (Sealed). [redacted] (JA 1570) (Sealed) (emphasis added). [redacted] *Compare* (JA 1566) (Sealed) *with* (JA 2434) (Sealed).

[redacted] *See Irvin v. Dowd*, 366 U.S. 717, 727 (1961); *see also Commonwealth v. Williams*, 116 N.E.3d 609, 615 (Mass. 2019) (where a prospective juror has expressed an opinion, the court "must satisfy [itself] that the prospective juror will set aside that opinion"); *cf. Skilling v. United States*, 561 U.S. 358, 396 (2010) (finding no bias where *specific inquiry* in voir dire sufficiently established juror could set aside the opinion from the questionnaire);

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[24] [redacted] (Gov. Br. at 65-66) (Sealed) (emphasis and alterations included). [redacted] (JA 2434) (Sealed).

United States v. Schlamer, 52 M.J. 80, 93-94 (C.A.A.F. 1999) (finding no bias where questionnaire responses were troubling, but the accused provided thoughtful and *forthright* responses to the military judge's questions).

2. [redacted] (JA 2426) (Sealed), [redacted] (JA 1570) (Sealed), [redacted] (JA 1558) (Sealed). [redacted]

Critically, LTC Garwold never disclosed his concerns to the military judge. This was so despite being warned that he was required to disclose "any matter that [he *felt*] *might* affect [his] impartiality," (JA 449) (emphasis added), and despite being asked whether he "*believe[ed]*, *for any reason*, [he] could not fairly and impartially decide this case." (JA 487) (emphasis added). *See Albaaj*, 65 M.J. at 169, 171 (the selection process demands "complete candor," and a venireman's "duty to disclose" does not turn on "the [his] own evaluation of [. . .] the information or his ability to sit in judgment."). These statements and his failure to be fully candid—whether purposeful or not—cut against a claim of impartiality.

Id. at 169; *United States v. Commisso*, 76 M.J. 315, 322 (C.A.A.F. 2017) ("the test for member dishonesty [. . .] is whether they gave objectively correct answers") (citing *Albaaj*, 65 M.J. at 170) (alterations added); *see also 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.").

3. Lieutenant Colonel Garwold was not forthright on his exposure to pretrial publicity by even the Government's account.

Lieutenant Colonel Garwold was very familiar with this case—

[redacted][25] (JA 2426, 2437) (Sealed). To the military judge, however, LTC Garwold characterized his exposure to publicity as "general notifications" and "headlines." (JA 563–64). As the Government ostensibly concedes, some of the information he knew would not have been "well known and included in the media coverage." (Gov. Br. at 63).

[25] The Government contests that LTC Garwold's knowledge did not far exceed every other panel member. (Gov. Br. at 63). [redacted] (Gov. Br. at 63) (Sealed), [redacted] (JA 2426, 2437) (Sealed). [redacted]

Still, the Government contends that neither LTC Garwold's knowledge of Appellant's case nor his voir dire responses were of any concern because [redacted] (Gov. Br. at 65) (Sealed), and agreed to set publicity aside. (Gov. Br. at 63). Not only does this impermissibly excuse LTC Garwold's evasive responses, which are, alone, concerning,[26] *see Albaaj*, 65 M.J. at 170, but it also incorrectly presumes that his extensive case knowledge, including highly prejudicial information later excluded from trial, was not disqualifying so long as he, himself, said as much. That is simply not the law.[27]

4. Lieutenant Colonel Garwold's prior service as a panel member undermines his assurance that he would follow the law.

Lieutenant Colonel Garwold described—in alarming fashion—his previous service on a panel [redacted]

[26] Lieutenant Colonel Garwold also provided a misleading response to whether he discussed publicity in any way, with anyone else. The Government suggests this response is taken out of context, and that "in context it is clear that [he] was answering the question of whether he had discussed the media coverage after being notified that he was a panel member." (Gov. Br. at 65). Notably, however, the line of inquiry began by asking LTC Garwold to discuss publicity in terms of *both* pre-notification and post-notification, (JA 563), and the immediately preceding questions concern exposure to *all* publicity. (JA 564).

[27] *See e.g., 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); *see also People v. Taylor*, 101 Ill. 2d 377, 391 (Ill. 1984) (exposure to highly prejudicial information in a case can be enough to disqualify a juror despite the juror's claim of impartiality).

[redacted][28] (JA 2395) (Sealed). This statement alone should have resulted in his immediate dismissal, but the Government contends these responses are "*easily explained*" [redacted] and were "inconsistent with LTC [Garwold's] repeated assertions during general voir dire that he could follow the military judge's instructions." (Gov. Br. at 69) (Sealed).

The Government's position is unsound. Stress may have caused responses that were *unthoughtful*, not *untruthful*, and like his opinion on the case, the responses here were never repudiated. Furthermore, LTC Garwold's "repeated assertions" that he could follow the instructions hold no weight since his candid comments place substantial doubt as to whether he did so in another proceeding.

5. [redacted]

The Government does not argue that this response would not be disqualifying, only that LTC Garwold "misread" the question considering the "marked shift in tone and tenor" of his second questionnaire. (Gov. Br. at 68-69). The Government faces a problem either way.

If the response was an honest reflection, it was disqualifying even in the absence of any rehabilitation. *United States v. Woods,* 74 M.J. 238, 244 (C.A.A.F.

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[28] [redacted] (JA 2395) (Sealed).

2015). Notably, this response was given after time to reflect and accords with his other response [redacted] (JA 1558) (Sealed).

Alternatively, if his response was a mistake, his "marked shift in tone and tenor" only makes his second questionnaire even more suspect. This response was the one response to be more indicative of bias, as he modified many other responses, to include, *but not limited to*, [redacted] (JA 2434, 1566) (Sealed), [redacted] (JA 2427, 1559) (Sealed), [redacted] (JA 2426, 1558) (Sealed). The Government's contention that his response concerning an accused's rights must be an oversight since it was out of step with how he changed other responses cuts *against* the Government. Indeed, the dubious nature of his second questionnaire, submitted without prompting, was alone sufficient to remove LTC Garwold.

C. <u>Conclusion</u>.

The military judge erred by failing to excuse LTC Garwold for bias, and this Court must set aside Appellant's convictions. However, if this Court finds waiver, it should remand to the Army Court to determine whether Appellant's death sentence "should be approved" given this bias. *See United States v. Chin*, 75 M.J. 220, 223 (C.A.A.F. 2016).

IV.

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

Law and Argument

The Government contends that it is "well within the authority of Congress to prohibit an accused from pleading guilty" and that "[t]his Court has held as much every time it has considered the question[.]" (Gov. Br. at 75-76). According to the Government, there is no cause to disturb this precedent. (Gov. Br. at 76). For the reasons below, this Court should overturn *United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983), and its progeny, and find Article 45(b)'s prohibition unconstitutional.

When this Court's predecessor, the Court of Military Appeals (COMA), first addressed the question of Article 45(b)'s constitutionality in *Matthews*, its analysis was succinct: "in light of the special treatment given to capital cases by courts and legislatures and the irreversible effect of executing a capital sentence, we do not believe that Congress acted arbitrarily by providing in the Uniform Code that an accused cannot plead guilty to a capital charge." *Matthews*, 16 M.J. at 362-63. Presumably, then, *Matthews* was decided on Due Process Clause grounds. *See e.g.*, *Hillcrest Prop. LLP v. Pasco City*, 915 F.3d 1292, 1299 (11th Cir. 2019) ("the Due Process Clause generally protects that person from arbitrary and irrational

government action.") (citing *Palko v. Connecticut*, 302 U.S. 319, 327 (1937) ("the legislative judgment, if oppressive and arbitrary, may be overridden by the courts.")).

Two important decisions have since followed. First, more than ten years after *Matthews*, the Supreme Court decided *Weiss v. United States*, in which it held that the appropriate standard for Due Process Clause challenges in the military is whether "the factors militating in favor [of the right] are so extraordinarily weighty as to overcome the balance struck by Congress." 510 U.S. 163, 177 (1994). *Weiss* concerned whether the lack of tenured military judges violated the Due Process Clause. *Id*. at 165. In finding no violation, the Court turned to historical practice and the applicable statutory and regulatory provisions that protected the right at stake—the independence of military judges. *Id*. at 178-81.

Second, the Court recently decided *McCoy*, discussed above and in the opening brief. While the Government seeks to cabin *McCoy* strictly to its facts—that an attorney may not override a client's autonomy to assert innocence, (Gov. Br. at 77)—the Court relied on the autonomy principles that were dispositive of the right to proceed *pro se*—namely, that an accused must be allowed to make his own choices about the way to protect his liberty and does not need his interests dictated by the State. 138 S. Ct. at 1508. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but

also those portions of the opinion necessary to that result by which [courts] are bound.") (alterations added).

Matthews is out of step with *Weiss*, and the analysis underpinning its holding cannot be squared with *Weiss*. *Matthews* only answered whether Congress acted arbitrarily. *Matthews*, 16 M.J. at 362-63. *Matthews* did not examine the factors *Weiss* found dispositive. Nor has any decision since *Matthews* done so. *See e.g.*, *United States v. Loving*, 41 M.J. 213, 292 (C.A.A.F. 1994); *United States v. Gray*, 51 M.J. 1, 49 (C.A.A.F. 1999). Moreover, *Matthews* did not have the benefit of *McCoy*.

Applying *Weiss*, Article 45's prohibition cannot survive. For the reasons identified in the opening brief, the factors militating in favor of the right are extraordinarily weighty.[29] And unlike *Weiss*, the historical practice of guilty pleas,

[29] For one, a plea of guilty may save an accused's 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). Apart from this weighty consideration, 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." *United States v. Jackson*, 390 U.S. 570, 584 (1968); *see also Brady v. United*

even in capital cases, cuts in favor of a right to plead guilty, as permitting guilty pleas was the historical practice in courts-martial. 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, 245-50 (2014).

Also unlike *Weiss*, Congress has not provided any statutory provisions that protect the interests at stake, and arguably, as discussed in the opening brief, a full-dress trial may hinder those interests. *Nixon*, 543 U.S. at 191-92. Perhaps most illustrative of this is the fact that Article 45 was designed, in part, to stop the very strategy that is heralded today. The provision was "originally intended to cover a case like […] in Chicago, the Loeb case, where the defendants pleaded guilty and threw themselves on the mercy of the court," presumably referring to the Leopold and Loeb case. *Kostik*, 220 Mil. L. Rev. at 253 (quoting *Uniform Code of Military Justice: Hearing on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services,* 81st Cong. 1056-57 (1949)) (alterations added). Yet, fifty years after the

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States, 397 U.S. 742, 750 (1970) (evidence may convince an accused that a trial is "not worth the agony and expense"). As the Court has observed, 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. Lastly, under *McCoy* and *Faretta*, a guilty plea accords respect for individual choice. *McCoy,* 138 S. Ct. at 1508; *Faretta v. California*, 422 U.S. 806, 832 (1975). It is the accused, not counsel *or the State*, that will bear the consequences of his decisions. *Faretta*, 422 U.S. at 832.

passage of Article 45(b), the Supreme Court exalted the strategy in that case. *Nixon*, 543 U.S. at 192 ("Renowned advocate Clarence Darrow, we note, famously employed a similar strategy as counsel for the youthful, cold-blooded killers Richard Loeb and Nathan Leopold.").

Accordingly, this Court should overturn *Matthews* and find Article 45(b) unconstitutional. Even if *McCoy*, itself, does not provide a right to plead guilty, *McCoy*'s right of autonomy weighs heavily under *Weiss*' Due Process analysis.

V.

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

Law and Argument

Even if Article 45(b) is constitutional, its plain text proscribes only formal guilty pleas, and to the extent that the decision in *United States v. Dock*, holding that Article 45(b) also prohibits *de facto* guilty pleas based on a record's "four corners," 28 M.J. 117, 119 (C.M.A. 1989), controls, this Court should overturn it. The Government's arguments to the contrary are meritless.

A. This Court should not give stare decisis effect to *United States v. Dock.*

1. Article 45(b) does not pertain to *de facto* guilty pleas: *United States v. Dock* is poorly reasoned and unworkable.

Article 45(b) prohibits guilty pleas to capital offenses, but what is a "plea of guilty"? The Government offers a familiar definition—a "confession of guilt in open court." (Gov. Br. at 84). Curiously, the Government stops there. But a "confession" is an "*acknowledgment* of guilt [. . .] not a "a statement of incriminating facts [. . .] from which guilt might be *inferred*." 2 Wharton's Criminal Evidence, § 622 at 1266 vol. 3 (10th ed.) (emphasis and alterations added); *see also* William P. Richardson, *The Law of Evidence* §394 at 268 (3rd ed. 1928); Wigmore, *Law of Evidence,* § 25 (3rd ed. 1940); *McCormick* on *Evidence,* § 185 (2nd ed. 1972); Jerome Prince, *Richardson on Evidence* § 540 at 533 (10th ed. 1973). There was no acknowledgement of guilt in *Dock*. *United States v. Dock*, 26 M.J. 620, 631 (A.C.M.R. 1988) (DeGiulio, S.J., Carmichael, J., Robblee, J., dissenting) ("at no time before the court members did [Dock] concede any link between the robbery and the murder.") (alterations added). Instead, the majority relied on how the military judge instructed the panel. *Id*. at 623. Therefore, *Dock* contravenes the plain meaning of the statute.

This conclusion is unmistakable when one considers that a "plea of guilty" is, itself, a conviction. *See e.g.*, *Kercheval v. United States*, 274 U.S. 220, 223 (1927). To this point, not even a "confessional stipulation," which admits all the

elements of an offense and relieves the prosecution of its burden, *see* R.C.M. 811(c), *Discussion*, is treated as a "plea of guilty" in federal courts. *See United States v. Davis*, 50 M.J. 426, 434 (C.A.A.F. 1999) (Crawford, J., concurring) (observing that no federal circuit equates a "confessional stipulation" to a guilty plea); *see also United States v. Watruba*, 35 M.J. 488, 490-91 (C.M.A. 1992) (discussing differences between "confessional stipulations" and guilty pleas). What occurred in *Dock* was far short of even a confessional stipulation, much less an acknowledgment that sufficed as a conviction.

Eschewing the plain meaning, the Government claims Article 45 is concerned with "the greater guilty plea, including the underlying factual basis for the plea[,]" and that Article 45(b)'s prohibition must be read consistent with Article 45(a) and the tenets of *United States v. Care*, 18 U.S.C.M.A 535 (1969). (Gov. Br. at 85). The Government is misguided.

Care did not address what the statutory language in Article 45(a) *required*. Instead, *Care* was issued pursuant to the COMA's supervisory authority, establishing procedures for trial courts in future cases to ensure guilty pleas were made knowingly and intelligently.[30] Thus, what *Care* required for future cases is

[30] In *Care*, Care's guilty plea colloquy did not involve a description of the elements or the law officer's determination as to the factual basis for the plea. *United States v. Care*, 18 U.S.C.M.A 535, 537 (1969). *Care* noted that, despite its "recommendation" in *United States v. Chancelor*, 36 C.M.R. 453 (1966), for a more searching plea inquiry, the recommendation "received less than satisfactory

not relevant to what Article 45 did, in fact, require. To whatever extent Article 45 is concerned with a "factual basis," its text notably never once refers to "facts" of any kind. *See Watruba*, 35 M.J. at 494 (Crawford, J., dissenting) ("Article 45 on its face does not require a rejection of *Alford* [*v. North Carolina*, 400 U.S. 25 (1970)]").

But even assuming *Care*'s applicability and Article 45's greater concern for a plea's factual basis, the Government's interpretation creates an intolerable inconsistency. That is, if a guilty plea to a lesser included offense may necessarily prove the greater offense, and, thus, constitute a *de facto* guilty plea to the greater offense, why is this so only where the greater offense is capital? For example, in a desertion case where the accused pleads guilty to absence without leave, and where the duration makes the greater offense a foregone conclusion, are Article 45 and *Care* necessarily triggered as to the greater offense to which the accused is pleading not guilty? After all, as the Government correctly states, Article 45(a)

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implementation," *id* at 538, though it was not "an inflexible requirement." *Id*. at 540. The Court of Military Appeals (COMA) affirmed Care's conviction. *Id.* at 541. However, for all trials convened more than thirty days after the decision's date, *Care* required what is now referred to as the *Care* inquiry. *Id*. at 541. Given this, *Care* was issued under COMA's supervisory authority. If, as the Government suggests, *Care* was part of Article 45's statutory scheme, Care's plea was then a *statutory* violation, and his conviction could not have been affirmed. *See also United States v. Williamson*, 42 M.J. 613, 626, n.2 (N-M. Ct. Crim. App. 1995) (Welch, J., dissenting) ("*Care*, I add, was an exercise of the Court of Military Appeals supervisory authority").

and (b) should be read together. (Gov. Br. at 85). The answer is certainly no, and this Court has never held as such.

The inconsistencies with the Government's approach are not isolated to this example. Article 45(b) explicitly permits a finding of guilt on a "plea of guilty" to be "entered immediately without vote." Presuming Congress intended a "plea of guilty" to have the same meaning throughout Article 45, *see Robers v. United States*, 572 U.S. 639, 643 (2014), importing a *de facto* guilty plea meaning in this instance would be legally impermissible. *Watruba*, 35 M.J. at 490-91. 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." (emphasis added). Importing a *de facto* guilty plea meaning in this instance would render Congress' command to enter a not guilty plea wholly unnecessary as a "not guilty" plea has already been entered. *See Young v. UPS,* 575 U.S. 206, 226 (2015). Notably, these inconsistencies were identified in Appellant's Brief but never addressed by the Government.

Still, even if the Government could overcome the plain meaning *and* overcome the inconsistencies, it cannot overcome the absurd result of its interpretation. The consequence of conceding guilt, no matter how sincere and voluntary, in a capital trial is . . . a new trial? Not only is such a result bizarre, *see e.g.*, *In re Kaiser Aluminum Corp.,* 456 F.3d 328, 338 (3d Cir. 2006) ("courts

should interpret a law to avoid absurd or bizarre results"), it is surely one "that all mankind would, without hesitation, unite in rejecting[.]" Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Text*, 237 (2012) (quoting 1 Joseph Story, *Commentaries on the Constitution of the United States* §427, at 303 (2d ed. 1858)).

Finally, it is not the case that Appellant's "narrow interpretation [. . .] would eviscerate the purpose of Article 45(b)." (Gov. Br. at 86) (alterations added). The safeguards of *Care* would have arguably effectuated its purpose.[31] In any regard, "[i]nvocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself […] prevents the effectuation of congressional intent." *See Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp*., 474 U.S. 361, 374 (1986).

In sum, defining a "plea of guilty" to be only a formal plea accords with the statute's text, provides statutory harmony, and avoids absurd results, and as stated in Appellant's Brief, comports with the legislative history and avoids constitutional concerns regarding a right to a *complete* defense. *Dock*'s holding to the contrary is plainly wrong and unworkable.[32]

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[31] The Government never identifies the "purpose" of Article 45(b). *But see generally* Kostik, 220 Mil. L. Rev. 242.

[32] The Government does not specifically address Appellant's argument that *United States v. Dock*, 28 M.J. 117 (C.M.A. 1989), is unworkable. Appellant stands on his brief with respect to that issue.

2. *McCoy v. Louisiana* represents an intervening event.

As discussed above and in the opening brief, *McCoy*'s right of autonomy provides additional support for overturning *Dock*.

3. *United States v. Dock* is not consistent with reasonable expectations of servicemembers.

The Government mistakenly claims that Appellant has not provided "sufficient justification for abandoning sixty-five years of precedent." (Gov. Br. at 87-88). But in those sixty-five years, only *two* cases from this Court—*United States v. McFarlane*, 23 C.M.R. 320 (1957), and *Dock*—have concerned *de facto* guilty pleas under Article 45(b). The remaining cases the Government cites concern formal pleas to capital offenses and, therefore, are not applicable. Appellant is aware of only one other lower court case that has applied *Dock* to find a *de facto* guilty plea—*United States v. Simoy*, 46 M.J. 592 (A.F. Ct. Crim. App. 1996), and as the Government argued at trial, *Simoy* is "an anomaly in Article 45(b) jurisprudence" and "has little precedential value." (SSJA 66). That *Dock* has provided a "predictable and consistent standard" is specious.

Moreover, as for predictability, other decisions from this Court are seemingly at odds with *Dock*. *See e.g.*, *Dock*, 26 M.J. at 630 (DeGiulio, S.J., Carmichael, J., Robblee, J., dissenting) ("we believe the Court of Military Appeals provides ample support in [*Matthews*] for our position that no violation occurred."); *see also*, *Watruba*, 35 M.J. at 490-91; *United States v. Larson*, 66 M.J.

212, 218, n.3 (C.A.A.F. 2008) (conceding guilt in argument is not analogous to a plea of guilty).

Lastly, the Government curiously points to Appellant's lack of "dispute" as to whether *Dock* applies to demonstrate *Dock*'s "predictable and consistent standard." (Gov. Br. at 88). For one, Appellant has not conceded this point.[33] For another, it is not clear why this is relevant. However, to the extent the parties' previous positions are relevant to *Dock*'s "predictable and consistent standard," *the Government* at trial argued that *Dock* did not apply. (SSJA 69-70). That the Government has now ostensibly changed its position on *Dock* while claiming *Dock* provides "predictability" is certainly peculiar.

B. If *Dock* warrants stare decisis, this Court should cabin *Dock* to its facts and find error.

If this Court decides that *Dock* warrants stare decisis, this Court should cabin *Dock* to its facts for the reasons previously raised by Appellant and find error.[34]

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[33] Appellant raised the issue of on appeal before the Army Court and has not conceded it here. (JA 50; SSJA 49-52).

[34] *Dock* concerned felony murder. *Dock*, 26 M.J. 620, 622 (A.C.M.R. 1988) (distinguishing *United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983), because there, "the two pieces, felony and murder, would not 'add up' to an offense for which the death penalty could have been adjudged since that offense had not been charged."). Unlike in *Dock*, the offenses here would not have "added up" to a capital offense. *Dock* is further distinguishable because the decision relied on what occurred during trial to find a *de facto* guilty plea. *Dock*, 28 M.J. at 188-89. Moreover, *Dock,* unlike this case, may be viewed as an instructional error case. *Dock*, 26 M.J. at 123 ("The members were in essence instructed that the accused had pled guilty to felony murder.").

C. <u>There was prejudice</u>.

For the reasons stated in Appellant's brief, the error is structural. However, to the extent that this Court tests this error for prejudice, the appropriate standard is harmless beyond a reasonable doubt as Appellant's guilty pleas would have truncated the prosecution's sentencing evidence. *See Clemmons v. Mississippi*, 494 U.S. 738, 753-54 (1990) (for errors of improper aggravation in capital sentencing, the proper standard is harmless beyond a reasonable doubt). The Government does not address prejudice, nor can it meet its burden. Critically, the prejudice here extends beyond the formal pleas as *Dock* impermissibly curtailed the parties' ability to stipulate. Indeed, Appellant attempted to stipulate to additional facts, to include "identification of the victims, that they're dead, and the cause and manner of death," but the Government refused over Article 45(b) concerns. (SSJA 54-55). For the reasons discussed above, Article 45(b) did not prohibit stipulations, even confessional stipulations to premeditated murder. Thus, Appellant was denied not only his right to plead guilty, but the opportunity to stipulate.

D. <u>Conclusion</u>.

For these reasons, this Court should set aside the findings and sentence. Alternatively, this Court should set aside the sentence. However, if this Court finds error but no prejudice, this Court should remand to the Army Court for a

proper consideration of the Army Court's duty to ensure the sentence "should be approved." Article 66, UCMJ. The Army Court refused to consider this error. (JA 50). Thus, this court "cannot be confident that the court below took into account 'all the facts and circumstances reflected in the record.'" *United States v. Bodkins*, 60 M.J. 322, 324 (C.A.A.F. 2002) (remanding where the circumstances were unclear whether the Army Court properly considered the facts and circumstances in order to discharge its duty to approve only what "should be approved").

VI.

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

Law and Argument

Appellant stands on his brief except for the following considerations. First, the Government's argument rests on the faulty premise that "it was not error to admit [Private First Class (PFC)] FV's final words, which carried with them the inference she was pregnant, because this showed Appellant's premeditation for murder." (Gov. Br. at 96, n.21). The Government overlooks that most of the *nine* witnesses who testified to hearing PFC FV's screams did not provide any testimony that would make premeditation any more or less probable. (JA 747,

751-53, 755, 759).[35] Similarly, the Government fails to address how her first sergeant's testimony about her pregnancy, (JA 745), or the medical examiner's testimony that confirmed PFC FV was pregnant, (JA 765), were relevant to premeditation. Even still, why was PFC FV the only victim to have a second witness testify in sentencing to "military character," which discussed, not surprisingly, her pregnancy? (JA 776). In isolation "a single bullet—two lives lost" may have been permissible. But in context, this was the final act of a concerted effort to impermissibly inflame the passions of the panel by consistently reminding them Appellant killed an unborn child. This was error.

Second, the Government analyzes the error under the wrong prejudice standard. (Gov. Br. at 102-03). In a capital case in which an improper argument invites or influences the sentence authority to depart from objectivity, the correct test is harmless beyond a reasonable doubt. *See e.g., Gregg* v. *Georgia*, 428 U.S. 153, 188-89 (1976); *Booth v. Maryland*, 107 S. Ct. 2529, 2532 (1987) ("a jury must make an '*individualized* determination' of whether the defendant in question should be executed, based on 'the character of the individual and the circumstances of the crime'") (quoting *Stephens*, 462 U.S at 879 (emphasis in original)). Here, the Government cannot meet its burden.

[35] As discussed in Appellant's opening brief, one witness even contradicted the Government's proffer. (Appellant's Br. at 118). The brief mistakenly cites this at JA 756-58. The correct citation is JA 752.

To cure the injury to Appellant from the Government's improper argument, this Court must set aside the sentence and order a sentence rehearing.

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?

Law and Argument

The Government claims that the years it forcibly shaved Appellant in violation of the Religious Freedoms Restoration Act (RFRA), Article 55, and the Eighth Amendment is of no moment, because the Government has since granted Appellant an accommodation, and allows Appellant to grow a short beard. (Gov. Br. at 106). But the Government cannot be absolved for violating the law for years just because it is no longer violating the law.

The Government also errs in arguing that RFRA applies only in equity, and once the Government finally ceases violating it, nothing remains in controversy and the case is moot. The Supreme Court has rejected such a mootness claim. In *Tanin v. Tanvir*, the plaintiffs were practicing Muslims who claimed the government placed them on the No-Fly List, in violation of RFRA. 141 S. Ct. 486, 489 (2020). They asked to be removed from the No-Fly List, and to receive money damages from the government agents who were responsible for their placement on

the list. *Id.* The Department of Homeland Security, after years of litigation, eventually removed them from the No-Fly List, and the district court dismissed their cause of action under RFRA, finding that their removal from the list mooted their RFRA claim. *Id.*

A unanimous Supreme Court disagreed, finding that RFRA allowed the case to go forward and also allowed the plaintiffs to seek money damages. *Id.* at 493. The Court noted that when the government unlawfully burdens a person's exercise of religion, that person "may 'obtain appropriate relief from the government.'" *Id.* at 490, quoting RFRA, 42 U.S.C. § 2000bb-1. The plaintiffs' RFRA suit was not mooted by their removal from the No-Fly List. 146 S. Ct. at 490.

The Court next turned to the meaning of "appropriate" under RFRA. *Id.* at 491. The Court looked to the ordinary meaning of the word at the time of RFRA's enactment, and found it meant "[s]pecifically fitted or suited, proper." *Id.* The Court found in the context of their improper inclusion on the No-Fly List, money damages against the officials responsible for that inclusion might be appropriate. *Id.*

It was for the Army Court to determine an appropriate remedy. In the context of Appellant's case, his religious freedom has been unlawfully burdened for years, merely because, in the view of the Government, Appellant, a death row inmate, apparently deserved less religious freedom. The alternative is that

Government officials believed, because of the nature of Appellant's offense, he deserved less religious freedom. Under either scenario, the motive was improper, and Appellant has suffered years of religious deprivation, being denied a tenet of his faith, growing a beard.

The Government claims Appellant has failed to establish an Eighth Amendment claim or a violation of Article 55. In claiming that no court has interpreted the Eighth Amendment to apply to the deprivation of religious liberty (Gov. Br. at 116), the Government supposes that no deprivation of religious liberty will violate the Eighth Amendment. But the cases the government relies on for that proposition simply do not support it. Instead, those cases establish that the plaintiffs in those cases failed to establish an Eighth Amendment violation. Nothing more.

For six years, the Government denied Appellant the exercise of his faith, doing so (in the light most favorable to the Government) on the flawed premise that a death row inmate should be denied the freedom to grow a beard in observance of faith. Appellant asked the Army Court to consider that deprivation of religious liberty in determining whether Appellant was subjected to cruel and unusual punishment, and in deciding an appropriate sentence. Any reading of the Army Court's opinion and orders in Appellant's case shows that the Army Court

refused to do so. This Court should return this case to the Army for consideration of Appellant's religious freedom claims in arriving at an appropriate sentence.

Religious freedom is a right guaranteed to all Americans by the United States Constitution and the Religious Freedoms Restoration Act, including those on death row. *See Ramirez v. Collier*, 142 S. Ct. 1264, 1280-281 (2022) (denying death row inmate spiritual advisor during execution violated the religious freedom of prisoner). The Government violated that bedrock freedom, and in doing so violated RFRA, Article 55, and the Eighth Amendment. This Court should return this case to the Army Court to determine an appropriate remedy.

VIII.

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

Law and Argument

To meet its burden that Appellant knowingly waived counsel for post-trial, the Government relies on Appellant's three-and-a-half year-old standard post-trial advisement form and his acknowledgment a year-and-a-half later that he had received the post-trial advice. (Gov. Br. at 124). This cannot suffice, and neither does the fact that he went *pro se* at trial, as post-trial was a wholly different stage of the proceeding than the trial, itself. *See Allen v. Daker*, 311 Ga. 485, 495 (Ga. 2021).

The Government mainly contends, "[m]ilitary precedent supports that Appellant's waiver of counsel was effective and the convening authority and SJA acted appropriately." (Gov. Br. at 125). However, *United States v. Knight*, where the accused informed his military counsel that he no longer desired his services and would "take care of clemency himself," suggests otherwise. 53 M.J. 340, 341 (C.A.A.F. 2000). There, this Court did not find waiver because, once the staff judge advocate (SJA) was alerted to Knight's desire to sever his relationship, it was incumbent on the SJA to resolve the problem. *Id*. at 342. Here, despite the Government's contention that the SJA was doing just that by inquiring about the "status of his representation," the record shows that SJA was only inquiring about what counsel and Appellant were submitting for the convening authority. (JA 76). Indeed, the SJA continued to interact with Appellant's civilian defense counsel as though he was still representing Appellant. (JA 77) ("After conferring *with your client*, you requested to withdraw from the Convening…"). Moreover, the record is relatively silent as to any direct interaction between the SJA and Lieutenant Colonel (LTC) Marc Washburn, the detailed military counsel.

There are other reasons to require more than a stale post-trial advisement and reaffirmance to find waiver in this case. This includes determining Appellant's access to resources while in confinement nearly four years after trial. Notably, in another argument (Issue Presented XI), the Government faults

Appellant for not discovering certain information without first considering what resources Appellant, in fact, had while confined at the U.S. Army Disciplinary Barracks. (Gov. Br. at 153).

The correct course of action was to request a post-trial Article 39(a) session to obtain Appellant's waiver, or, at the very least, execute a new post-trial advisement form with a formal waiver. Here, this was not done, and therefore, Appellant proceeded pro se without a valid waiver. Accordingly, this Court should remand Appellant's case for new post-trial action.

IX.

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

Law and Argument

Appellant stands on his brief except for the following considerations. First, the Government hangs its hat on the fact that Appellant "offers no authority where any court found an [sic] SJA disqualified in circumstances remotely similar to these." (Gov. Br. at 131-32). However, there is nothing "telling" about this other than this is a case of first impression.

Second, the most disqualifying fact is that then-Colonel (COL) Risch's subordinate, Captain (CPT) NF, was there during the shooting.[36] The Government downplays CPT NF's involvement as "mere presence," (Gov. Br. at 135), yet his statement indicates rounds were fired in his direction, and he was only approximately twenty-five feet from Appellant. (JA 1349). The Government claims CPT NF was not a target, but in Appellant's own words, every soldier was a target. (SSJA 72). The Government concludes that this relationship simply did not create a disqualifying personal connection. (Gov. Br. at 135). This is simply wrong when one considers not only this context, but also the fact that then-COL Risch visited the gruesome crime scene that night with the deceased victims still present, and witnessed what his own officer had been able to escape.

Third, as to prejudice, the Government states that then-COL Risch "merely summarized the recommendations of the subordinate commanders […] and the preliminary hearing officer […] and provided his legal advice based on the law controlling capital referral." (Gov. Br. at 138). This is misleading. Then-Colonel Risch specifically recommended to refer this case capital, (JA 868), and it was the recommendations of then-COL Risch that the convening authority approved. (JA

[36] The Government suggests that Captain NF's affidavit is hearsay. However, military rules of evidence do not apply to these proceedings. It is unclear why the Government rests so heavily on what is appropriately a trial objection, not an appellate objection.

870). *Compare United States v. Nix*, 40 M.J. 6 (C.M.A. 1994) (reversing conviction where subordinate commander who had other than official interest provided recommendation).

Fourth, the Government frames its response solely through the lens of Article 34, UCMJ. However, then-COL Risch did far more than provide pretrial advice. He performed other vital functions to include, among others, having panel excusal authority. (JA 183-230).

Lastly, the Government states, "[i]t is hard to conceive of a case more deserving of a capital referral than here." (Gov. Br. at 138). Putting aside an "ends justify the means" philosophy that is repugnant to any modern sense of justice, Appellant asserts that it is hard to conceive of case more warranting of the due care necessary to ensure that the public has all the confidence in its outcome.

Since then-COL Risch was disqualified from participating in Appellant's case, this Court must set aside Appellant's convictions.

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?

Law and Argument

Appellant stands on his brief except for the following considerations. First, the Government contends that there is no conflict because the Army Court was not asked to review MG Risch's legal analysis. (Gov. Br. at 145). This draws an irrelevant distinction between the content of MG Risch's work and his participation in the case. It is unclear why such a distinction matters here. Ultimately, the Army Court was called upon to decide whether its supervisor caused an error in a high-profile, death penalty case.

Second, while the Government asserts that "the only motions Appellant filed that related to MG Risch were motions for the Army Court judges to recuse themselves," (Gov. Br. at 147), this is simply not true. The Army Court denied a motion for an appellate fact investigator where appellant defense counsel identified MG Risch's involvement in the case as part of its justification. (SSJA 8-9). The Army Court denied a motion to put a litigation hold on MG Risch's email account. (JA 174-76). And the Army Court denied a motion for expert funding for a

national survey that would ask whether the public would have viewed MG Risch's participation in this case as appropriate. (JA 166-73). The Army Court did all this while MG Risch served as the court's rater before he was removed as the court's rater.

Third, and finally, the Government contends that there is no risk to the public confidence because this Court is also reviewing the error. (Gov. Br. at 149-50). This rationale, however, would remove any teeth to an appellant's right to an impartial judge who is free from appearance of bias so long as a higher court reviews the same error. Moreover, this ignores the fact that despite Appellant's repeated requests, (SSJA 12-13), the Army Court refused to provide its justification for not recusing itself, even after declaring that it "would provide the basis for [its] ruling in conjunction with [its] decision on appellant's assigned errors." (SSJA 13).

Since the judges of the Army Court failed to recuse themselves, Appellant was denied his right to an impartial review. Accordingly, this Court should vacate the Army Court's decision.

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?

Law and Argument

Contrary to the Government's claim, Appellant did not waive the issue of disqualification of the convening authority. This Court declines to apply waiver where "an appellant was unaware of the ground for disqualification." *United States v. Gudmundson*, 57 M.J. 493, 495 (C.A.A.F. 2002) (citing *United States v. Fisher*, 45 M.J. 159, 163 (C.A.A.F. 1996)). In *Gudmundson*, this Court held Gudmundson waived the issue of disqualification where the convening authority testified at a suppression hearing because Gudmundson was aware of the convening authority's participation and he did not raise it at trial or in his post-trial submission. *Id*. Gudmundson's knowledge of the issue was apparent, because he was present during the testimony of the convening authority.

The Government suggests Appellant must affirmatively establish he was unaware of the ground for disqualification to avoid waiver. (Gov. Br. at 153-54). But in *Fisher*, this Court declined to invoke waiver where there was "no evidence or other indication that appellant, herself, was aware of [the convening authority's] statement and made a knowing and intelligent waiver of her right to contest his

qualifications to take the action on her court-martial." *Fisher*, 45 M.J. at 163. Similarly, no evidence exists that Appellant knew Lieutenant General [LTG] MacFarland presented Purple Hearts to victims of Appellant's attack and thus made a knowing and intelligent waiver of the issue prior to LTG MacFarland's taking action in Appellant's case. The Government assertion that the issue was publicized and well-known in no way establishes Appellant was aware of the awarding of medals. After all, Appellant was on death row in the U.S. Disciplinary Barracks at the time LTG McFarland presented the medals. Nothing in this record even remotely suggests appellant actually knew of the medal ceremony and intelligently waived LTG McFarland's continued participation in Appellant's case. Lieutenant General MacFarland's taking action in Appellant's case after awarding Purple Hearts to Appellant's victims both denied appellant an objective review and cast a shadow on the integrity of the military justice system.

The Government suggests "a reasonable person would conclude" presenting the Purple Hearts and LTG MacFarland's statements "were appropriate." (Gov. Br. at 158). Curiously, the government does not reconcile its current stance with its own earlier position that issuing the Purple Hearts would fundamentally compromise the fairness and due process of the proceeding. (JA 1407-08). Either the government advanced an "unreasonable" position to Congress in opposing the

awarding of Purple Hearts, or it is now espousing a different position for litigation purposes.

Further, LTG MacFarland's statements were not mere "expressions of condolence, respect, and appreciation." (Gov. Br. at 159). From LTG McFarland's perspective, Appellant would have killed more people except for the valorous acts and sacrifice of Appellant's victims, some of whom were receiving medals from LTG McFarland. Lieutenant General MacFarland also viewed issuing Purple Hearts as a form of closure. He clearly possessed preconceived views about the findings and sentence in appellant's case, and publicly pronounced those views prior to taking action.

The government mistakenly relies on *United States v. Voorhees*, 50 M.J. 494 (C.A.A.F. 1999). In *Voorhees*, the convening authority was directly involved in the pretrial negotiations with the accused. Voorhees elected to plead guilty and indicated on the record that he waived any claim that the convening authority's conduct created an issue in his case. 50 M.J. at 499. This Court found no plain error and observed that Voorhees "without expressed reservation, actively sought clemency from this convening authority by means of letters from himself and his counsel." *Id.* at 500. But in Appellant's case, nothing suggests Appellant even knew of the awarding of Purple Hearts, let alone the disqualification of LTG McFarland.

Finally, Appellant was prejudiced. "By definition, assessments of prejudice during the clemency process are inherently speculative. Prejudice, in a case involving clemency, can only address possibilities in the context of an inherently discretionary act." *United States v. Taylor*, 60 M.J. 190, 195 (C.A.A.F. 2004) (quoting *United States v. Lowe*, 58 M.J. 261, 263 (C.A.A.F. 2003)). The error in appellant's case involves disqualification of the convening authority in a contested, capital trial. This is not a case involving the disqualification of a legal advisor or some other functionary in the post-trial process. This is a disqualification of the ultimate decision-maker.

The government incorrectly suggests an appellant must request relief and provide a specific basis in order to be prejudiced. (Gov. Br. at 159). A convening authority has an independent duty to provide an objective, individualized review of the findings and sentence in a case, independent of any request on the part of an accused. In Appellant's case, LTG MacFarland publicly demonstrated both an actual and an apparent "inflexible attitude toward the proper fulfillment of post-trial responsibilities." *United States v. Davis*, 58 M.J. 100, 103 (C.A.A.F. 2003). This Court should set aside the convening authority action to ensure not only that Appellant receives an objective review, but also to protect the integrity of the military justice system.

Conclusion

Wherefore, Appellant respectfully requests this Honorable Court grant meaningful relief.

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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 January 3, 2023.

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