OCTOBER TERM 2017

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RONALD GRAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari or Mandamus to the
United States Court of Appeals for the Armed Forces

APPENDIX TO PETITION FOR WRIT OF CERTIORARI OR MANDAMUS

-- CAPITAL CASE --

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Dated: February 9, 2018

APPENDIX CONTENTS

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES
Appellee

v.

Ronald A. Gray, Private
United States Army, Appellant

No. 17-0525
Crim. App. No. 20160775

Military Judge: Raymond C. McRorie

Decided November 13, 2017

For Appellant: *Jonathan Jeffress*, Esq., *Timothy Kane*, Esq., and *Shawn Nolan*, Esq.

For Appellee: *Lieutenant Colonel Eric K. Stafford* and *Captain Samuel E. Landes*.

PER CURIAM:*

Appellant seeks extraordinary relief in the form of a writ of error coram nobis. This Court lacks jurisdiction to provide him with his requested relief, and we dismiss the writ-appeal petition with prejudice.

I. Procedural History

Contrary to his pleas, Appellant was convicted of premeditated murder (two specifications), attempted premeditated murder, rape (three specifications), robbery (two specifications), forcible sodomy (two specifications), burglary, and larceny. In April 1988, a general court-martial sentenced him to death, a dishonorable discharge, forfeiture of all pay and allowance, and reduction to E-1. In July 1988, the convening authority approved the sentence.

The United States Army Court of Military Review (ACMR) denied a petition for a new trial and affirmed the findings and the sentence. *United States v. Gray*, 37 M.J. 730, 749 (A.C.M.R. 1992). After granting a motion to file supplemental assignment of errors, the

* Judge Ohlson is recused and did not participate in this case.

ACMR again affirmed the findings and the sentence. *United States v. Gray*, 37 M.J. 751, 761 (A.C.M.R. 1993).

This Court heard oral argument twice before affirming the lower court's decision. *United States v. Gray*, 51 M.J. 1, 64 (C.A.A.F. 1999). The United States Supreme Court denied a petition for certiorari, without dissent. *Gray v. United States*, 532 U.S. 919 (2001).

Between 2001 and 2008, there was no appellate litigation in this case. In July 2008, under Article 71(a), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 871(a), the President approved the death sentence. The Secretary of the Army set the execution date for December 10, 2008, but the United States District Court for the District of Kansas stayed that order. *Gray v. Gray*, No. 08-3289-RDR (D. Kan. Nov. 26, 2008) (order). In April 2009, Appellant filed a petition for habeas corpus with that court.

After Appellant filed two petitions for coram nobis with the United States Army Court of Criminal Appeals, which that court and this Court denied, the district court dismissed the habeas petition without prejudice. *Gray v. Belcher*, No. 5:08-cv-03289-JTM, 2016 U.S. Dist. LEXIS 149574 (D. Kan. Oct. 26, 2016) (memorandum and order) (dismissing without prejudice to afford Appellant opportunity to exhaust claims in military courts).

Appellant returned to the Army court in December 2016 and filed a third petition for coram nobis, with an alternative prayer for habeas. The court concluded that it had jurisdiction to review six of the seven claims. The seventh claim alleged constitutional violations, arguing that the President approved the death sentence based on confidential reports from the Judge Advocate General, the Secretary of the Army, and the Secretary of Defense that were not disclosed to Appellant. The Army court dismissed that claim for want of jurisdiction and denied all of the others. *Gray v. United States*, 76 M.J. 579, 594 (A. Ct. Crim. App. 2017) (en banc). Appealing that decision, Appellant comes to this Court for the third time seeking a writ of coram nobis.

II. Discussion

The threshold question is whether this Court has jurisdiction to entertain a request for coram nobis in a case that is final in all respects under the UCMJ. We hold that we do not.

Direct review of this capital case is done. The Army court has completed its review under Article 66, UCMJ, 10 U.S.C. § 866, and

this Court has completed its review under Article 67, UCMJ, 10 U.S.C. § 867. Under Article 67a, UCMJ, the U.S. Supreme Court has denied certiorari. The President has approved the sentence and an execution date was set. Therefore, there is a final judgment as to the legality of the proceedings under Article 71(c)(1), UCMJ, and the case is final under Article 76, UCMJ, 10 U.S.C. § 876. Appellant has exhausted all of his remedies in the military justice system. In the absence of any statutory authority to provide extraordinary relief for a capital case that is final for all purposes under the UCMJ, we lack jurisdiction to hear Appellant's writ-appeal petition for coram nobis.

Even assuming that this Court has jurisdiction to issue the requested writ, Appellant fails to show that he is entitled to extraordinary relief. He has a remedy other than coram nobis to rectify the consequences of the alleged errors, namely a writ of habeas corpus in the Article III courts: "an extraordinary remedy [such as coram nobis] may not issue when alternative remedies, such as habeas corpus, are available." *United States v. Denedo*, 556 U.S. 904, 911 (2009). Moreover, where Appellant is still in confinement, coram nobis relief is unavailable. *Loving v. United States*, 62 M.J. 235, 254 (C.A.A.F. 2005).

III. Judgment

Accordingly, in light of the lack of jurisdiction, the writ-appeal is dismissed with prejudice.

United States Court of Appeals
for the Armed Forces
Washington, D.C.

Ronald A. Gray,
Appellant

USCA Dkt. No. 17-0525/AR
Crim.App. No. 20160775

v.

JUDGMENT

United States,
Appellee

This cause came before the Court on appeal from the United States Army Court of Criminal Appeals and was taken under advisement by the Court on October 5, 2017. On consideration thereof, it is, by the Court, this 13th day of November, 2017,

ORDERED:

That the writ-appeal is hereby dismissed **with** prejudice in accordance with the opinion filed herein this date.

For the Court,*

/s/ Joseph R. Perlak
Clerk of the Court

*Judge Ohlson is recused and did not participate in this case.

C O R R E C T E D C O P Y

United States Court of Appeals
for the Armed Forces
Washington, D.C.

Ronald Gray,
Appellant

USCA Dkt. No. **17-0525**/AR
Crim.App. No. 20160775

v.

DOCKETING NOTICE

United States,
Appellee

Notice is hereby given that a writ-appeal petition for review of the decision of the United States Army Court of Criminal Appeals on application for extraordinary relief was filed under Rule 27(b) on this 18th day of September, 2017.

For the Court,

/s/ Joseph R. Perlak
Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (Nolan)
Appellate Government Counsel

C O R R E C T E D N O T I C E

United States Court of Appeals
for the Armed Forces
Washington, D.C.

Ronald Gray,
Appellant

v.

United States,
Appellee

USCA Dkt. No. 17-0525/AR
Crim.App. No. 20160775

O R D ER

On consideration of Appellee's motion to consolidate Docket No. 17-0502/AR with Docket No. 17-0525/AR, to construe the overlength petition for extraordinary relief in coram nobis in Docket No. 17-0502/AR as a writ-appeal petition, and to extend time to file an answer to the consolidated petitions in Docket Nos. 17-0502/AR and 17-0525/AR, of Appellant's writ-appeal petition in Docket No. 17-0525/AR and Appellee's answer to said writ-appeal petition, and of Appellant's motion for leave to file an overlength petition in Docket No. 17-0502/AR, it is, by the Court, this 6th day of September, 2017,

ORDERED:

That the motion to consolidate Docket No. 17-0502/AR and Docket No. 17-0525/AR is hereby granted. Docket No. 17-0502/AR is removed from this case and will not be used on any other case. Henceforth, Docket No. 17-0525/AR will be used on all future documents filed in this case;

That the motion to construe the overlength petition for extraordinary relief in coram nobis in Docket No. 17-0502/AR as a writ-appeal petition, having now been consolidated with the writ-appeal in Docket No. 17-0525/AR, is hereby granted.

That the Court will not consider the current writ-appeal filed in Docket No. 17-0525/AR;

That the motion to file an overlength petition in Docket No. 17-0502/AR is hereby denied and the Court will not consider that pleading. This denial is limited to the length, not the merits of the overlength pleading and is therefore without prejudice to Appellant refiling a single, consolidated writ-appeal petition in Docket No. 17-0525/AR that complies with Rule 24(b) of the Court's Rule of Practice and Procedure; and

That the motion for an extension of time to file an answer is hereby denied as moot.

Appellant shall file a consolidated writ-appeal petition not later than 10 days from the date of this order. Appellee may file an answer within 10 days after the filing of the writ-appeal petition. Appellant may file a reply within 5 days after the filing of Appellee's answer.

For the Court,*

/s/ Joseph R. Perlak
Clerk of the Court

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*Judge Ohlson is recused and did not participate in this case.

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (Nolan)
Appellate Government Counsel (Landes)

United States Court of Appeals
for the Armed Forces
Washington, D.C.

Ronald Gray,
Appellant

v.

United States,
Appellee

USCA Dkt. No. 17-0525/AR
Crim.App. No. 20160775

DOCKETING NOTICE

Notice is hereby given that a pleading styled as "Notice of Mandatory Review," which this Court construes as a writ-appeal petition of the decision of the United States Army Court of Criminal Appeals on a petition for extraordinary relief in the nature of a writ of error coram nobis, was filed on July 12, 2017, and placed on the docket this 25th day of July, 2017.

Appellee shall file an answer no later than 10 days from the date of this notice. Appellant may file a reply no later than 5 days thereafter.

Additionally, counsel for Appellant filed a motion with the Court on July 12, 2017, to appear Pro Hac Vice. That motion bears the docketing number assigned to another motion docketed that date, (USCA No. 17-0502/AR), but the substance of the motion will be considered applicable to all matters filed by Appellant on

July 12, 2017. That motion has been also placed on the docket this 25th day of July, 2017.

For the Court,*

/s/ Joseph R. Perlak
Clerk of the Court

*Judge Ohlson is recused and did not participate in this case.

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (Nolan)
Appellate Government Counsel

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before the Court Sitting En Banc[1]

Private RONALD GRAY,
United States Army, Petitioner
v.
UNITED STATES, Respondent[2]

ARMY MISC 20160775

For Petitioner: Mr. Shawn Nolan, Esquire; Mr. Timothy Kane, Esquire; Mr. Jonathan Jeffress, Esquire (on brief and reply brief).

For Respondent: Colonel Mark H. Sydenham, JA; Lieutenant Colonel A.G. Courie III, JA; Lieutenant Colonel Karen J. Borgerding, JA; Major Michael E. Korte, JA; Captain Samuel E. Landes (on brief).

9 May 2017

OPINION OF THE COURT AND ACTION ON PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF *CORAM NOBIS*

PENLAND, Judge:

Ronald Gray (Petitioner) is confined and awaiting imposition of a death sentence adjudged by a general court-martial on 12 April 1988, approved by the convening authority on 29 July 1988, affirmed by this court and our superior

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[1] Senior Judge MULLIGAN is taking no part in this case as a result of his disqualification.

[2] Petitioner named the Commandant of Fort Leavenworth's Disciplinary Barracks as respondent, but the parties to this case are the United States and Ronald Gray. His petition for *coram nobis* relief is "a step in the criminal case and not, like habeas corpus where relief is sought in a separate case and record, the beginning of a separate [] proceeding." *United States v. Denedo*, 556 U.S. 904, 912 (2009) (*Denedo II*) (quoting *United States v. Morgan*, 346 U.S. 502, 505, n.4 (1954)).

appellate court on 15 December 1992,[3] 9 June 1993,[4] and 28 May 1999,[5] respectively, and approved by the President on 28 July 2008. In *Gray v. Belcher*, 70 M.J. 646 (Army Ct. Crim. App. 2012), we denied *coram nobis* relief, in light of petitioner's concurrent pursuit of habeas relief in an Article III court. However, that Article III court ultimately dismissed the habeas petition, reasoning petitioner had not exhausted his military-specific claims within the military justice system. *Gray v. Belcher*, No. 5:08-cv-03289-JTM (D. Kan. 26 Oct. 2016) (memorandum and order dismissing without prejudice). Petitioner returns to us again,[6] enumerating seven claims that, in his view, justify *coram nobis* relief in the form of vacating the findings and sentence.[7]

Petitioner alternatively seeks a writ of habeas corpus. We will not evaluate the petition in this alternative manner. In *United States v. Loving*, 68 M.J. 1, 4 (C.A.A.F. 2009) (*Loving III*), our superior court considered a petition for such a writ, noting:

> While the case remained pending *within the military justice system*, [petitioner] had a number of options, including filing a habeas petition in our court or awaiting action by the president before seeking judicial review. He elected to file a petition for writ of habeas corpus in our court.

(citing *Loving v. United States*, 64 M.J. 132, 134 (C.A.A.F. 2006) (*Loving II*) (emphasis added).

For the reasons below, we consider the instant petition as one seeking *coram nobis* relief. However, this case has departed the military justice system as

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[3] *United States v. Gray*, 37 M.J. 730 (A.C.M.R. 1992) (*Gray ACCA I*).

[4] *United States v. Gray*, 37 M.J. 751, 761 (Army Ct. Crim. App. 1993), (*Gray ACCA II*)

[5] *United States v. Gray*, 51 M.J. 1 (C.A.A.F. 1999) (*Gray CAAF*) (cert. denied).

[6] In 2016, petitioner sought *coram nobis* relief from us for the second time, but we dismissed his petition without prejudice, pending federal district court action on his habeas petition. *United States v. Gray*, ARMY MISC 20160086 (Army Ct. Crim. App. 10 May 2016)(order).

[7] Petitioner also requests "appropriate discovery and [] a *Dubay* hearing at which proof may be offered concerning the allegations contained in [his] Petition." (Pet'r Br. 120).

described in *Loving v United States*, 62 M.J. 235, 240 (C.A.A.F. 2005) (*Loving I*) and *Loving II*. Therefore, following the majority's logic[8] in those cases, we lack jurisdiction to grant a writ of habeas corpus.

BACKGROUND

Previous opinions of this court and our superior court have ably summarized the facts that led to petitioner's general court-martial; we need not restate them. However, given the issues raised in this petition, it is appropriate to summarize certain events from the case's pretrial, trial, and direct appellate history.

A large part of this petition involves petitioner's competency during trial and during direct appellate review. Based on their interactions with petitioner, trial defense counsel sought a professional assessment of his capacity to stand trial. *See* Rule for Courts-Martial [hereinafter R.C.M.] 909.[9] Dr. Selwyn Rose addressed the

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[8] Judge Ryan's dissent in *Loving II* is also informative, for it addresses the different jurisdictional considerations regarding *coram nobis* and habeas corpus relief. *Loving II*, 68 M.J. at 25 ("unlike a writ of *coram nobis*, habeas corpus is not a 'belated extension' of the original court-martial proceeding.") (quoting *Denedo II*, 556 U.S. at 912-13).

[9] In the *Manual for Courts-Martial, United States* (1984 ed.) [hereinafter *MCM*, 1984], R.C.M. 909 was shorter than the current version; it stated:

> (a) *In general.* No person may be brought to trial by court-martial unless that person possesses sufficient mental capacity to understand the nature of the proceedings against that person and to conduct or cooperate intelligently in the defense of the case.
>
> (b) *Presumption of capacity.* A person is presumed to have the capacity to stand trial unless the contrary appears.
>
> (c) *Determination at trial.*
>
> > (1) *Nature of the issue.* The mental capacity of the accused is an interlocutory question of fact.
> >
> > (2) *Standard.* When the issue of the accused's capacity to stand trial is raised, trial may not

(continued . . .)

matter of "competence" in a 4 November 1987 letter to Captain (CPT) MPB, trial defense counsel, reporting his assessment after examining petitioner three days earlier:

> Throughout the interview, [petitioner] was posturing, staring, darting his eyes from place to place, and he maintained a suspicious, paranoid look. He responded slowly, often repeating questions and seemed to be lost in his own thoughts which were not in contact with what was being discussed.
>
> Religious ideation pervaded all of his comments. He announced that he could walk out of the jail if God wanted him to. He refused to discuss the criminal charges with me. He talked about his "visions" as a child and recent ones, which were religious in nature and dealt with powerful lights and movement through space. He interpreted these visions to mean that "the Lord is coming."
>
> He referred to the night he came here (to jail) and was "hearing" things, "like a hand touching and going through my skin." He believes that God pulled his soul out. He claims to have made a joke that the space shuttle would blow up either saw himself as prescient or believed that his statement had caused the disaster. He talked a great deal about the meaning of the number seven since there were seven people in the space shuttle.
>
> When I led the discussion back to the killings with which he is charged, he talked about a "gathering" and not a

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(. . . continued)

> proceed unless it is established by a preponderance of the evidence that the accused possesses sufficient mental capacity to understand the nature of the proceedings against the accused and to conduct or cooperate intelligently in the defense of the case.

R.C.M. 909, *MCM*, 1984. The current rule is worded slightly differently and also addresses determinations of mental competence before and after referral, incompetence determination hearings in more depth, and hospitalization of the accused. R.C.M. 909, *MCM*, 2016.

> "hating." His comments had autistic meanings that were unclear to me.
>
> It is my opinion that Mr. Gray is not presently mentally competent to stand trial. I can't determine whether he knows the nature of the charges against him, but I am convinced he is unable to cooperate with counsel in a rational manner. My present diagnosis is Schizophrenia, Paranoid type. I think it would be important that the [petitioner] be treated with major tranquilizers, but he will not cooperate in the jail and take the medication.
>
> I am unable to proceed with my evaluation because of the severity of his present mental illness and my inability to force treatment. Mr. Gray needs to be in a psychiatric setting where he can be observed over a period of time and given appropriate chemotherapy to see if his competence can be restored.

On 10 November 1987, CPT MPB requested the convening authority direct a sanity board under R.C.M. 706. Petitioner's mental capacity was one of the numerous matters trial defense counsel requested the board evaluate: "Does SP4 Gray have sufficient mental capacity to understand the nature of the proceedings and to conduct and/or cooperate intelligently in his defense?"

On 23 November 1987, the convening authority granted the defense request and according to the trial defense team during a 21 December 1987 Article 39a, Uniform Code of Military Justice, 10 U.S.C. § 839a [hereinafter UCMJ], session, "appointed a board with Colonel Armitage, who is a forensic psychiatrist, as head of that board." At a later pretrial session on 8 February 1988, government counsel informed the military judge that the board had found petitioner "competent to stand trial," and trial defense counsel acknowledged "that's the preliminary indication that we got." The military judge then addressed a defense motion to employ Dr. Rose as a forensic psychiatrist. The motion averred, inter alia:

> As set forth in the defense motion for an inquiry[10] into the mental capacity and mental responsibility of the accused under the provisions of R.C.M. 706, there is substantial reason to believe that the accused lacked mental *responsibility* at the time of the alleged offenses (R.C.M.

[10] There is no separate "motion" in the record of trial; defense counsel may have been referring to their 10 November 1987 request to the convening authority.

> 916(k)) and lacks *capacity* to stand trial at this time (R.C.M. 909).

(App. Ex. XXI at 1) (emphasis added).

Defense counsel told the military judge "Dr. Rose would certainly come in and testify that [] in his opinion, this accused is not capable of standing trial . . . . But our problem is we have no money to get him into this courtroom since we have an indigent accused." Defense counsel continued, "[O]ur preparation is really stymied with respect to mental responsibility, capacity, and partial mental responsibility until we can get a psychiatrist to help us prepare that defense." Defense counsel also provided the military judge with Dr. Rose's 4 November 1987 assessment, which opined petitioner was not "presently competent to stand trial." (App. Ex. XXIII at 1).

On 14 March 1988, after the panel had been sworn, the military judge sought to resolve any outstanding preliminary matters in an Article 39a session. Counsel for both sides confirmed "the defense request for a forensic psychiatrist has been granted." The military judge also reviewed the results of petitioner's sanity board, which stated the following:

> SP4 Gray presently suffers from a mental disease or defict [sic] but it does not render him mentally incompetent to the extent that he is unable to understand the nature of the proceedings or to conduct or cooperate intelligently in his defense.

(App. Ex. XXXIII at 2).

On 6 April 1988, the military judge advised petitioner of his rights to submit matters if the trial moved to a sentencing phase, including his rights to offer evidence in extenuation and mitigation, and to testify or make an unsworn statement. Petitioner responded, "I understand." The panel announced findings on 7 April 1988.

Trial defense counsel called numerous sentencing witnesses, including DF, the chief jailor for Cumberland County Jail, where petitioner was confined before his court-martial. DF described petitioner as "very hostile" and "very distant" when he initially arrived on 7 January 1987. After a three-month stay in isolated confinement, imposed as a result of his near-rage, petitioner was housed with others charged with first-degree murder. DF testified about petitioner's behavior for the "nine to ten months" thereafter:

DC: During that time did you have conversations with him also?

A. Several times.

DC: Any recurrence of rage? Any attitude problems or anything?

A: No. Like I said, after -- after the initial episode and his stay in isolation, it seemed like he just resolved himself to where he was at and was going to go along with the program, not fight the problem.

[. . .]

DC: What's Ronald's reputation been among the other jailors, the other inmates, as far as being cooperative, being pleasant, things like that?

A: Now, that -- that I can't address. I didn't ask anybody's opinion.

DC: Okay. You receive incident reports if anything negative happens, is that correct?

A: Correct.

DC: All right. Had you received ----

A: Anything out of the ordinary would require an incident report.

DC: What kind of incident reports did you receive on Specialist Gray then?

A: There haven't been any incident reports on him.

DC: Has Specialist Gray been cooperative since he's been in E-block?

A: Yes.

DC: Been able to talk to him? Any problem?

A: I've been able to communicate fine with him.

Trial defense counsel also called Dr. Rose as a sentencing witness, and he described his evaluation of petitioner:

> His thinking is very strange at times, it seems -- psychotic, to be delusional, caught up in these false beliefs that have no basis in fact. At other times it seems quite realistic and he switches back and forth, and I can't predict when he's going to switch. I think it's important that, as Doctor Armitage says, when he told him, "I want to talk about a certain thing," and he nailed him down -- that Ron can do that. That is under a given set of restrictions. He can hold his thinking together. But when you let him go on his own, he tends to drift in a lot of -- a lot of different unique directions, separate directions.
>
> DC: What's your opinion of Specialist Gray's ability to follow directions, to respect authority, things like that?
>
> A: Generally, quite good. Certainly, in his service career, [] during his childhood [he] followed directions, did what was expected of him. So generally, it's quite good. And even when Colonel Armitage meets with him and says, "This is what I'd like to talk about," he focuses real well. So he's capable of following commands.

Later, the military judge specifically asked Dr. Rose about petitioner's competence:

> MJ: [A]s [petitioner] sits before you today, by the defense, sitting by the defense counsels, in your considered opinion, does he have the mental capacity to understand the nature of these proceedings and conduct or cooperate intelligently in that defense?
>
> A: Yes, he does.

After the panel announced its sentence, the military judge advised petitioner of his post-trial and appellate rights. Asked if he had any questions regarding them, petitioner said, "No, sir."

On 22 December 1989, with his case on direct appeal, petitioner's three appellate defense counsel, CPT MJB, CPT CGW, and CPT JJF, moved this court to:

> direct the convening of a sanity board to inquire into appellant's mental responsibility at the time of his offenses and his mental capacity to assist in his defense at his court-martial; further to inquire into the present capacity of appellant to understand the nature of or to cooperate intelligently in these proceedings.

Appellate defense counsel criticized Dr. Armitage's and Dr. Rose's previous evaluations, describing them as "cursory," "inaccura[te] and inadequa[te]." Included with the motion was a psychological evaluation prepared by CPT William Kea, Ph.D., a clinical psychologist (Dr. Kea). Dr. Kea wrote that petitioner "was referred for a psychological evaluation at the request of Mr. [JL], and inmate's Appellate Defense Attorney, CPT [JS]."[11] After "a clinical interview conducted over a period of five days,"[12] Dr. Kea issued a fourteen-page report, which concluded:

> [. . . A]t the time of the alleged criminal conduct, the accused did have a severe mental disease or defect.
>
> [. . .]
>
> [. . . T]he accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, was unable to appreciate the nature and quality or wrongfulness of his conduct.
>
> [. . . T]he accused, at the time of trial in 1988, did not have sufficient mental capacity . . . to cooperate intelligently in the defense.
>
> [. . . T]he accused does not now have sufficient mental capacity . . . to cooperate intelligently in the defense.

(Internal line markings omitted; ellipses in original).

Presented with this development, on 13 February 1990, this court directed a sanity board to inquire "into the appellant's mental responsibility at the time of the offenses, [his] mental capacity at the time of his court-martial, and [his] present

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[11] Captain JS was petitioner's initial appellate defense counsel. The evaluation refers to CPT JS's 8 August 1989 written request.

[12] 23, 25, 28 and 29 August 1989, and 1 September 1989.

mental capacity. . . ." *United States v. Gray*, ARMY 8800807 (A.C.M.R. 13 Feb. 1990) (order). We specifically directed findings regarding:

> whether [petitioner] had sufficient mental capacity to understand the nature of the court-martial proceedings and to conduct or cooperate intelligently in his defense at the time of trial;
>
> [petitioner's] present clinical diagnosis; and,
>
> whether [petitioner] presently possesses sufficient mental capacity to understand the nature of the pending appellate proceedings and to conduct or cooperate intelligently in his appeal.

Id. (internal line markings omitted).

On 3 August 1990, this court received the results of this evaluation, which was conducted "between 03 April and 29 June 1990." The board consisted of Dr. Kea, CPT Sandra Edwards, M.D. (Dr. Edwards), and CPT Michael Marceau, M.D. (Dr. Marceau). The board included, *inter alia*, "a review of available psychological reports."

The board found:

> [. . . T]he appellant has sufficient mental capacity to understand the nature of the court-martial proceedings and to conduct or cooperate intelligently in his defense at the time of trial.
>
> For appellant's present clinical psychiatric diagnosis refer to Section 11-3.
>
> [. . .T]he appellant presently possesses sufficient mental capacity to understand the nature of the pending appellate proceedings and to conduct or cooperate intelligently in his appeal.

Memorandum, Subject: Findings of a psychiatric evaluation of Ronald A. Gray, SSN [] Reg. #73786; ACMR 8800807 (30 Jun. 1990) (internal line markings omitted).

The "available psychological reports," to which the board referred and appended to its report, consisted of two evaluations. The first, bearing the signature

blocks of Dr. Kea and Dr. Marceau but only Dr. Kea's signature, was virtually identical to the one previously requested by CPT JS, but unlike the report that appellate defense counsel submitted with their motion, it did not include findings regarding petitioner's mental responsibility or competence.[13] The second report, again prepared by Dr. Kea who described it as a supplemental report based on "comprehensive neuropsychological testing conducted between 19 and 22 June 1990," concluded:

> The results of the examination suggest that the patient suffers from some diffuse and undifferentiated brain damage that could possibly be of a long standing nature. Although the find[ing]s are positive, they do not appear to account for the magnitude that would compromise any legal/criminal responsibility.

Memorandum, Subject: Medical Consultation Report Neuropsychological Evaluation (undated).

Despite this result, petitioner's appellate defense counsel continued to press for resources in order to evaluate his mental condition.[14] On 31 December 1991, appellate defense counsel filed with this court a motion to compel additional medical and neurological testing of petitioner. Appellate defense counsel wrote, "the mental evaluations that have been performed on appellant to date have been fundamentally defective in several ways."

This court granted the motion and directed four additional tests: 1) a Magnetic Resonance Imaging (MRI) scan of petitioner's brain; 2) a twenty-channel, scalp electrode, sleep-deprived electroencephalogram (EEG); 3) a positron emission tomography (PET) scan, or if impossible to perform, a single-photon emission computed tomography (SPECT) scan of petitioner's brain; and, 4) a complete battery

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[13] The appellate record before this court also contains yet another version of the report requested by CPT JS, this time signed by both Dr. Kea and Dr. Marceau. This version stated "further evaluation is necessary" to determine whether petitioner lacked mental responsibility for his crimes and continued, "[i]t is unclear whether the accused, at the time of trial in 1988, did not have sufficient mental capacity . . . to cooperate intelligently in the defense." (Ellipses in original). This version of the report concluded, "[t]he results of the neurological examination will be useful to determine whether the accused now has sufficient mental capacity . . . to cooperate intelligently in the defense." (Ellipses in original).

[14] For an able summary of some of appellate defense counsel's efforts, *see United States v. Gray*, ARMY 8800807 (A.C.M.R. 12 Nov. 1991) (order).

of intellectual, neuropsychological, academic, psychological, and personality tests performed by a fully qualified and credentialed neuropsychologist to determine the presence and/or extent of intellectual or neuropsychological deficits and any psychological or personality disorder.[15]

In a 23 March 1992 affidavit, Major (MAJ) Fred Brown, Ph.D. (Dr. Brown), a clinical neuropsychologist, described his evaluation of petitioner.

> In January, 1992 the Chief of Psychology [] at the United States Disciplinary Barracks, Fort Leavenworth, Kansas, contacted me regarding a court ordered neuropsychological evaluation on [petitioner]. I agreed to perform the evaluation which took place during the week of 27 January, 1992 through 1 February, 1992. I was introduced to [petitioner] on 27 January, 1992 [] but did not initiate the evaluation until following a joint meeting with [petitioner], his [appellate defense counsel], and myself. Including the time spent interviewing, testing, and interpreting I spent a total of about 30 hours with [petitioner].

(Gov't App. Ex. 1 at 2).

Dr. Brown indicated petitioner possessed an "organic brain syndrome" that resulted in "only mild inefficiency of brain functioning." (Gov't App. Ex. 1 at 4). He wrote that, at the time of his evaluation, petitioner was "able to fully appreciate the nature and quality or the wrongfulness of his acts." (Gov't App. Ex. 1 at 4). He further wrote, "If, at the time of his offenses, Mr. Gray's brain functioning was the same as it is currently, I believe that he would have possessed mental responsibility as defined above." (Gov't App. Ex. 1 at 4).

This court affirmed the findings and sentence on 15 December 1992, *Gray ACCA I*, 37 M.J. at 749, again affirmed them on 9 June 1993, *Gray ACCA II*, 37 M.J. at 761),[16] and denied petitioner's motion for reconsideration. The case was docketed

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[15] For more detailed description of ordered testing, *see United States v. Gray*, ARMY 8800807 (A.C.M.R. 31 Dec. 1991) (order).

[16] Appellate defense counsel filed a motion to abate the proceedings on direct appeal following petitioner's drug overdose, asserting petitioner was unable to assist in his appeal as a result. This court denied the motion on 30 December 1992. *Gray ACCA II*, 37 M.J. at 753.

with the Court of Appeals for the Armed Forces[17] (CAAF) on 2 July 1993. *United States v. Gray*, 38 M.J. 305 (C.M.A. 2 Jul. 1993). The CAAF affirmed this court's decision on 28 May 1999 (*Gray CAAF*), and denied two petitions for reconsideration, the later of the two on 26 June 2000.[18] The United States Supreme Court denied a petition for a writ of certiorari and petition for rehearing on 19 March 2001 and 14 May 2001, respectively. [19]

On 4 August 2008, approximately one week after the President approved the death sentence in this case, the Chief, Defense Appellate Division, United States Army Legal Services Agency, requested via memorandum that The Judge Advocate General appoint him and additional counsel as necessary to assist petitioner "with his pending habeas corpus action." The memorandum explained:

> [Petitioner] is currently represented by civilian counsel; however, the Defense Appellate Division has represented [petitioner], along with civilian counsel, since his original court-martial.

On 14 August 2008, The Judge Advocate General signed a memorandum appointing the Chief, Defense Appellate Division, and "such additional or other military counsel as you deem necessary, to represent [petitioner] in filing post-conviction habeas corpus petitions in Federal civilian courts."

LAW AND ANALYSIS

Part I - Jurisdiction to Issue and Requirements for a Writ of Coram Nobis

Article 66, UCMJ, confers our jurisdiction to consider all but one of petitioner's claims[20] and issue a writ of *coram nobis* if necessary and appropriate in

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[17] Formerly the United States Court of Military Appeals (name change effective 5 October 1994; *see* Act of Oct. 5, 1994, Pub. L. No. 103-337, § 924(a)(c)(1), (2), (4)(B), 108 Stat. 2831, 32 (1994) (Amending provisions of the UCMJ to rename the United States Court of Military Appeals as the United States Court of Appeals for the Armed Forces).

[18] *United States v. Gray*, ARMY 8800807, 2000 CAAF LEXIS 358 (6 Apr. 2000); *United States v. Gray*, ARMY 8800807, 2000 CAAF LEXIS 677 (26 Jun. 2000).

[19] *Gray v. United States*, 532 U.S. 919 (2001); *Gray v. United States*, 532 U.S. 1035 (2001).

[20] *See* Part III (Claim 3), *infra*.

aid thereof. *See United States v. Denedo*, 66 M.J. 114, 123 (C.A.A.F. 2008) (*Denedo I*); *Denedo II*, 556 U.S. at 917; 28 U.S.C. § 1651(a) (All Writs Act). The All Writs Act does not expand our underlying jurisdiction to consider "the findings and sentence as approved by the convening authority." UCMJ, art. 66(c); *Denedo I*, 66 M.J. at 120; *Denedo II*, 556 U.S. at 914.

The United States Supreme Court established the landscape of our inquiry in *Denedo II*. "Because *coram nobis* is but an extraordinary tool to correct a legal or factual error, an application for the writ is properly viewed as a belated extension of the original proceeding during which the error allegedly transpired." *Denedo II*, 556 U.S. at 912-13.

In *Denedo I*, which involved a post-conviction attack after the petitioner had served his sentence, our superior court established six prerequisites for a meritorious *coram nobis* claim:

> (1) the alleged error[21] is of the most fundamental character;
>
> (2) no remedy other than coram nobis is available to rectify the consequences of the error;
>
> (3) valid reasons exist for not seeking relief earlier;
>
> (4) the new information presented in the petition could not have been discovered through the exercise of reasonable diligence prior to the original judgment;
>
> (5) the writ does not seek to reevaluate previously considered evidence or legal issues; and
>
> (6) the sentence has been served, but the consequences of the erroneous conviction persist.

Denedo I, 66 M.J. at 126 (citing *Morgan*, 346 U.S. at 512-13; *United States v. Loving I*, 62 M.J. at 252-53) (remaining citations omitted).

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[21] Because the standard for granting extraordinary relief requires a petitioner to establish that issuance of the requested writ is "necessary and appropriate," we interpret this first prerequisite to mean a petitioner must do more than merely *allege* error. *See* 28 U.S.C. § 1651(a); *Denedo I*, 66 M.J. at 126. He has the burden to establish the error occurred.

Part II - Petitioner's Claims Generally

Before analyzing the claims more specifically, we consider whether the second, third and sixth *Denedo I* factors control the claims identically.

The second *Denedo I* factor requires us to assess whether an alternate remedy is available. As stated above, we lack jurisdiction to grant habeas relief in this post-finality case; therefore no remedy other than *coram nobis* is available to petitioner in *this court*. We decline to conclude whether, as a matter of law, an alternative remedy is available to petitioner in a civilian federal court, for to make such a conclusion—one way or the other—would require us to consider, *inter alia*, another court's jurisdictional reach. We shall not stray into such an assessment. We do note, however, that Department of Justice counsel argued with persuasive effect in the United States District Court for the District of Kansas that petitioner should have litigated the instant claims in the military justice system before raising them in a habeas corpus action in an Article III court. In an interesting turn of advocacy within the executive branch, the Army's government appellate counsel now insist we should "dismiss the petition with prejudice" because "whether or not any Article III litigation is currently pending, it is available to [petitioner]." The United States cannot have it both ways, at least not in the context of this petition, and create a "Catch-22" that avoids matters properly before us.

We resolve the third *Denedo I* factor against petitioner, for we perceive no valid reason for his failure to seek relief earlier. Each of petitioner's claims over which we have jurisdiction was ripe for his complaint as soon as the Supreme Court denied his petition for certiorari sixteen years ago.[22] Petitioner's counsel urge that conflict-of-interest considerations render it unreasonable to expect previous appellate defense counsel to raise ineffective appellate assistance issues against themselves. This argument is meritless, for petitioner makes no showing and—based on the record before us can make none—that his appellate defense counsel before this court on direct appeal continued to represent him afterward. In other words, after this court rendered its decisions on direct appeal, petitioner's new appellate and post-conviction relief counsel were not burdened by any conflict-of-interest considerations that would have hampered criticism of their predecessors.

Citing *Loving I*, 62 M.J. at 240, petitioner's counsel also address the Supreme Court's certiorari denial: "At the time, the law recognized no mechanism for post-conviction review pending presidential approval of a military death sentence." (Pet'r Reply Br. 29). This passage causes us to recall our superior court's

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[22] It would have been inappropriate for this court to consider, much less grant, *coram nobis* relief while our superior court was in the midst of its own mandatory review, or while his certiorari petition was under advisement at the Supreme Court.

observation regarding jurisdiction to consider a petition for a writ of *coram nobis* after completion of Article 67(a), UCMJ, review but before finality under Article 76, UCMJ.

> This issue invites the Court to consider two questions of *first impression*: (1) when a capital case becomes final in the military justice system and (2) what impact finality has on this Court's jurisdiction.

Loving I, 62 M.J. at 240 (emphasis added).

Because such petition for review opened *new* questions about military appellate jurisdiction, it follows that no jurisdictional obstacle prevented petitioner from bringing the instant claims before *Loving I* was decided in 2005. It also follows that the jurisdictional question was *settled* for over five years—only to be cemented by *Denedo I* and *Denedo II* during that period—before petitioner filed his first *coram nobis* petition with this court on 11 February 2011.[23]

We also resolve the sixth *Denedo I* factor against petitioner with respect to all of his claims over which we have jurisdiction, for his sentence has not been served. From our plain reading of *Denedo I*—including its reliance on *Loving*, a capital case—we conclude the sixth factor applies in all cases, including those involving a sentence to death. Petitioner correctly notes that, in *Denedo II*, the United States Supreme Court did not specifically adopt the six-factor test established by the CAAF. However, the Supreme Court also did not disturb the six-factor test in affirming our superior court; both decisions jointly and *severally* bind us.

Beyond the claim-transcendent and dispositive third and sixth factors, it is also appropriate to more specifically address petitioner's claims. With respect to each of his claims that we possess jurisdiction to consider—and for reasons specific to each—we find petitioner has failed to establish the existence of error.

Part III - Petitioner's Claims Specifically

1.[24] PETITIONER WAS DENIED HIS RIGHTS UNDER THE SIXTH AND EIGHTH AMENDMENTS WHEN HE WAS TRIED WHILE INCOMPETENT TO PROCEED AND WHEN HE WAS INCOMPETENT DURING PORTIONS OF THE APPELLATE PROCEEDINGS; THE TRIAL COURT AND THE APPELLATE COURTS ERRED IN NOT CONDUCTING COMPETENCY PROCEEDINGS; AND

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[23] *Gray v. Belcher*, 70 M.J. at 647.

[24] Numbers adopted from instant petition.

PRIOR COUNSEL WERE INEFFECTIVE FOR FAILING TO LITIGATE PETITIONER'S INCOMPETENCE.[25]

The United States Supreme Court established the temporal landscape of our current inquiry in *Denedo II* as "a belated extension of the original proceeding during which the error allegedly transpired." *Denedo II*, 556 U.S. at 913. With this view in mind, we shall only address relevant aspects of the previous proceedings *at this court and below*. We shall not assess appellate defense counsel's effectiveness at our superior court and beyond, for doing so would exceed our limited statutory jurisdiction.

The Sixth Amendment guarantees the effective assistance of counsel at trial. *Strickland v. Washington*, 466 U.S. 668, 685 (1984) ("The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled."); R.C.M. 506 (Accused's Rights to Counsel). Our superior court has also held that the UCMJ provides a military accused with the right to effective assistance of counsel on appeal. *United States v. Palenius*, 2 M.J. 86, 90 (C.M.A. 1977); *see also Evitts v. Lucey*, 469 U.S. 387, 392 (1985) (the Due Process Clause of the Fourteenth Amendment entitles a criminal appellant to effective assistance of counsel during an appeal of right).

Applying this legal framework against the facts above and matters currently averred by petitioner, we find petitioner's counsel at trial and on direct appeal before this court competently, diligently, and zealously sought to determine whether he possessed the necessary capacity to participate in the defense and appeal of his case. Trial defense counsel obtained a determination of the question from a sanity board. Beyond this, the military judge asked a defense expert whether petitioner was competent and was told yes. Then, on multiple occasions, appellate defense counsel sought, and ultimately received, the same conclusion from a sanity board composed of different members. Finally, appellate defense counsel prevailed in obtaining a separate neuropsychological examination, which yielded no conclusions to undermine the previous competence determinations.

Petitioner's counsel aver, *inter alia*, "[t]rial and appellate counsel were ineffective for failing to challenge the erroneous conclusions of the boards that Petitioner was competent." (Pet'r Reply Br. 29). Beyond our conclusion that

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[25] Based on our review of petitioner's instant submissions, the trial record, and the appellate record before this court, his multiple claims of ineffective assistance of counsel are demonstrably improbable, which enables us to resolve them without an evidentiary hearing. *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997).

defense counsel at trial and on direct appeal before this court did not "fail" and that they instead were competent, diligent, and zealous, we additionally note that this quoted passage asserts facts that are only partly accurate. As described previously in the background section, the record makes it abundantly clear that appellate defense counsel conveyed, through tenacious advocacy, their dissatisfaction with the trial-and-appellate-level evaluations.

We find no deficiency in trial and appellate counsel's not seeking the "adversarial" competency hearing petitioner's counsel now urge was indicated, for a viable basis to do so simply did not exist.

2. PETITIONER WAS DENIED DUE PROCESS WHEN MILITARY AUTHORITIES FAILED TO DISCLOSE EVIDENCE REGARDING PETITIONER'S INCOMPETENCY DURING APPELLATE PROCEEDINGS.

Of this claim, petitioner's counsel write:

> Citing *Brady v. Maryland*, 373 U.S. 83 (1963), and related cases, petitioner argues his constitutional due process rights were violated in the following manner:
>
> the findings by the chief psychologist at the Disciplinary Barracks that petitioner suffered from several mental defects and lacked the mental capacity to assist his counsel;[26]
>
> evidence reflecting how and by whom those formal findings were altered to indicate that they were only "initial draft findings," Answer [government brief] at 13, and;
>
> evidence that military authorities pressured the sanity board to ultimately find petitioner competent despite his actual incompetency.

(Pet'r. Br. 30-34) (internal subparagraph markings omitted).

The petition further alleges that the government's failure to disclose such evidence materially affected the outcome of the appeal, by *inter alia*, causing petitioner to be deemed competent when he was not, and by inducing appellate counsel to rely on inaccurate and misleading information in determining whether to

[26] Dr. Kea's individual evaluation, previously described in the background section.

formally challenge petitioner's competency and in determining the scope of their own mental health investigation. (Pet'r. Br. 30-34).

We addressed the issue of post-trial discovery rights in *United States v. Hawkins*, 73 M.J. 640 (Army Ct. Crim. App. 2014), *pet. den.*, 75 M.J. 319 (C.A.A.F. 2016), but, as that case involved discovery rights before convening authority action, we did not conclude whether an appellant continues to enjoy those rights on direct appeal. We need not decide that question now,[27] because the facts make clear that at least one of petitioner's appellate defense counsel was provided Dr. Kea's initial report. In light of the fact that the initial report was disclosed to petitioner's appellate defense counsel and appended to their motion to this court to order a sanity board, we need not decide whether, under the facts and circumstances of this case, the report was in the prosecution's actual or constructive control. *See United States v. Stellato*, 74 M.J. 473 (C.A.A.F. 2015) and *United States v. Shorts*, 76 M.J. 523 (Army Ct. Crim. App. 2017).

At the request of CPT JS, petitioner's first appellate defense counsel, Dr. Kea performed the initial evaluation. Seizing on CPT JS's 11 December 2009 declaration that he completed his Army service before receiving it, petitioner's counsel conflate that specific fact into a wider-ranging allegation that the evaluation was not provided to "appellate defense counsel." This averment is fundamentally incorrect, for as a matter of fact obvious from the appellate record, Dr. Kea's evaluation, including his individual conclusions regarding petitioner's mental responsibility and competence, *were provided* to CPT MJB, CPT CGW, and CPT JJF, who succeeded CPT JS as petitioner's appellate defense counsel and submitted the same evaluation in support of their motion for another sanity board.

Petitioner also argues his due process rights were violated because Dr. Kea did not provide the initial report to Dr. Edwards, another member of the appellate sanity board. In his 25 November 2009 affidavit, Dr. Kea writes, *inter alia*:

> Prior to the actual convening of the sanity board, Dr. Marceau and I had met to review my findings from my original evaluations of [petitioner], which were in response to the lawyer's [CPT JS's] request for a sanity inquiry. Dr. Marceau would not agree to my findings and insisted that we rewrite the conclusions of my report. His position was that we needed further testing before drawing

[27] The Supreme Court addressed the matter in a civilian criminal case, *District Attorney's Office for Third Judicial District v. Osborne*, 557 U.S. 52 (2009). *See also United States v. Webb*, 66 M.J. 89, 92 (C.A.A.F. 2008) (re-stating constitutional and statutory rights to discovery and disclosure).

> the conclusions that I had drawn - that [petitioner] was incompetent and suffered severe mental defects - from the clinical interviews and testing I had already done. Since Dr. Marceau was a psychiatrist, i.e., a medical doctor, and therefore considered more authoritative in the military setting, I agreed to change the conclusions while we did further evaluations and testing. We changed the report to reflect that "at the time of the alleged criminal conduct, the accused may have had a severe mental disease or defect" and that it was unclear whether [petitioner] was competent to cooperate with the defense. We both signed the report, which was submitted in response to the initial request for a sanity inquiry. Although the history and findings of my initial evaluation were included with the board's final report, the last page of my initial findings was not included.
>
> [....]
>
> We conducted an interview of [petitioner] in the Discipline and Adjustment Board room at the Disciplinary Barracks. Immediately after the interview, he was removed from the room. Dr. Edwards, Dr. Marceau and I began deliberations, which lasted about an hour or so. We basically sat in the room and discussed what our final findings should be. For a sanity board report, it was my understanding at the time that all findings must be unanimous. I still agreed with my original assessments as laid out above. However, I was persuaded to agree with Dr. Marceau's conclusions. I felt pressure to agree to Dr. Marceau's conclusions that [petitioner] did not suffer mental disease or defect at the time of the crimes and that he was competent. Dr. Edwards, who is a medical doctor, played little part in our ultimate conclusions regarding Mr. Gray's mental status. Ultimately, we prepared a final sanity board report that altered the conclusions that I had reached on my own.

In Dr. Edwards's 25 September 2009 affidavit, she writes she was unaware of Dr. Kea's initial individual report regarding petitioner's mental responsibility and competence. She further states, "I would have found it absolutely appropriate to reconsider the final findings at the time in light of the original, undisclosed report of Dr. Kea."

Dr. Kea was clearly able to share his initial report with Dr. Marceau, and he did so. Nothing in his affidavit indicates he was unable to share it with Dr. Edwards once the sanity board convened. We also note that while Dr. Kea did not specifically write whether he verbalized his initial conclusions during the sanity board's deliberations, he did write: "I still agreed with my original assessments []." Finally, contrary to inferences urged by petitioner, nothing from Dr. Kea's affidavit raises concern that he was improperly influenced in his apparent decision not to provide his initial report to Dr. Edwards.

Noting that a sanity board "is a creature not of statute, but of executive order and long-standing military practice," our superior court described their non-judicial nature in *United States v. Best*, 61 M.J. 376, 382 (C.A.A.F. 2005):

> As an administrative board, whose members are typically appointed by a medical commander and not by the convening authority, and whose findings do not bind the court-martial in its determination of either competence (R.C.M. 909(e)) or mental responsibility (R.C.M. 916(k)(3)(C) and 921 (c)(4)), a board convened under R.C.M. 706 cannot be analogized to a court of members. For example, doctors serving on an R.C.M. 706 board would not only be granted access to an appellant's prior medical records, including previous diagnoses by other doctors, but would be encouraged to read those prior records to develop a full picture of an appellant's mental history.

Consistent with the majority in *Best*[28] and similarly mindful of the "important protections afforded by R.C.M. 706," we perceive no constitutional due process right governing the methods with which a sanity board performs its work. Assuming *arguendo* such a right does extend to such administrative evaluations, we perceive no due process violation here. The multiple boards in this case were conducted by neutral and independent professionals, and neither Dr. Kea's nor Dr. Edwards's affidavits disturb our confidence that the sanity board on which they served rendered a fair and impartial assessment of petitioner.

3. PETITIONER WAS DENIED HIS RIGHTS TO DUE PROCESS, TO A FAIR SENTENCING PROCEEDING, TO A PUBLIC TRIAL, AND AGAINST CRUEL AND UNUSUAL PUNISHMENT, AS GUARANTEED BY THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, WHERE THE PRESIDENT, ACTING IN A JUDICIAL ROLE, APPROVED PETITIONER'S DEATH SENTENCE IN

[28] *But see Best*, 61 M.J. at 390 (Baker, J., concurring).

RELIANCE UPON CONFIDENTIAL REPORTS THAT WERE NOT DISCLOSED TO PETITIONER.

As described above, we may only consider *coram nobis* relief based upon alleged errors in the trial of the case and our own previous direct review. *Denedo II*, 556 U.S. at 912-13. Petitioner's complaint here focuses on an event occurring years after this court affirmed the findings and sentence. We lack jurisdiction under Article 66, UCMJ, and authority under The All Writs Act to assess the legal sufficiency of the President's action in this case. 28 U.S.C. § 1651(a). While we are thus precluded from considering what appears to be the *sine qua non* of petitioner's claim—that the President's approval of the death sentence was a judicial action—this characterization further illustrates our jurisdictional limit, for we have no authority to render judgment on a superior court's decision.

4. PETITIONER WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT HIS CAPITAL SENTENCING.

For reasons that this and our superior court have previously provided, petitioner has failed to establish existence of the claimed error. *Gray CAAF*, 51 M.J. at 19; *Gray ACCA I*, 37 M.J. at 745-47. We additionally resolve the fifth *Denedo I* factor against petitioner, for this claim seeks to re-litigate an issue previously decided against him by this and our superior court. *Id.*

5. APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE.

Petitioner's counsel describe this claim as:

> incorporat[ing] the allegations in Claim 4 and provid[ing] an alternate ground for relief - that appellate counsel were ineffective in failing to present the results of a thorough mitigation and mental health investigation to establish defense counsel's ineffectiveness at trial.

Elevating his previously unsuccessful claims of ineffective assistance at trial to ineffective assistance on appeal, petitioner avers his appellate defense counsel were deficient by not providing background biographical information sufficient for his appellate-level R.C.M. 706 board to make a reasoned decision regarding his mental responsibility and capacity. We have fully considered petitioner's submissions, including an affidavit from Dr. Kea, who wrote in 2009, after reviewing matters later provided to him by petitioner's current counsel:

> [M]y original findings were largely correct. Indeed, [petitioner] did suffer from severe mental disease at the time of the criminal conduct. Moreover, it is equally clear

> that, as I stated in my initial report, [petitioner] was unable to appreciate the nature and quality or wrongfulness of his conduct, and did not have the mental capacity to cooperate intelligently with the defense at either the time of trial or at the time of the sanity board and appellate proceedings.

Even assuming Dr. Kea gathered insufficient information to reliably diagnose petitioner, such a shortcoming does not mean appellate defense counsel were deficient—and, we perceive no deficiency otherwise. We additionally note that in the neuropsychological evaluation ordered by this court and conducted by Dr. Brown, appellate counsel appears to have actively facilitated sharing petitioner's life history with the diagnostician in order to obtain a well-informed result.

6. PETITIONER'S DEATH SENTENCE MUST BE REVERSED BECAUSE THE MILITARY DEATH SENTENCING SYSTEM AS APPLIED IS UNCONSTITUTIONAL AND HIS SENTENCE WAS THE RESULT OF RACIAL DISCRIMINATION, IN VIOLATION OF ARTICLE 66 AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

We are keenly aware of our duty to remain vigilant in "eradicat[ing] racial prejudice from our criminal justice system." *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987) (citing *Batson v. Kentucky*, 476 U.S. 79, 85 (1986)). Petitioner relies on *McCleskey*, in which the Supreme Court addressed a habeas claim that petitioner's death sentence was the result of racial discrimination in violation of the Constitution's Equal Protection Clause and Eighth Amendment. The petitioner in that case cited a statistical study led by Professor David Baldus, offering it to show disparities in capital sentencing outcomes based on defendants' and victims' races. Denying relief, the Supreme Court summarized petitioner's effort to meet his burden to establish an equal protection violation:

> [T]o prevail under the Equal Protection Clause, [petitioner] must prove that the decisionmakers in *his* case acted with discriminatory purpose. He offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence. Instead, he relies solely on the Baldus study.

McCleskey, 481 U.S. at 292-93.

Petitioner bears the same burden here, and he too relies upon a study prepared by Professor Baldus—albeit a different one based on selected military justice cases—offered to show disparate outcomes in capital cases based on accuseds' and

victims' races. Assuming *arguendo*[29] the study is statistically sound, it falls far short of proving that "the decisionmakers in his case acted with discriminatory purpose." We find no other support for his claim that his sentence was motivated by racial discrimination and therefore constitutionally or statutorily infirm.

7. THE MILITARY DEATH PENALTY VIOLATES EVOLVING STANDARDS OF DECENCY UNDER THE EIGHTH AMENDMENT.

Petitioner bases this claim upon alleged racial disparities in military capital cases, excessive delays between sentence and execution, and the decreased use of capital punishment nationwide. His claim merits neither additional discussion nor relief. *See United States v. Loving*, 41 M.J. 213 (C.A.A.F. 1994); *United States v. Gray*, 51 M.J. 1, 11 (C.A.A.F. 1999); *United States v. Akbar*, 74 M.J. 364 (C.A.A.F. 2015); and *United States v. Hennis*, 75 M.J. 796 (Army Ct. Crim. App. 2016).

NOW, THEREFORE, IT IS ORDERED:

1. Petitioner's motion for oral argument is DENIED.

2. With respect to Claims 1, 2, 4, 5, 6, and 7, the petition is DENIED.

3. With respect to Claim 3, the petition is DISMISSED for lack of jurisdiction.

4. Respondent's motion to dismiss is DENIED as moot.

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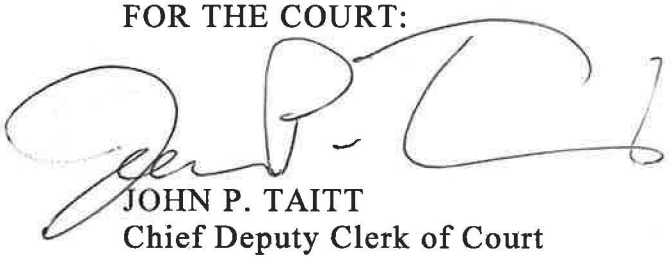
[29] Table 1 of the study provides "Thumbnail Sketches" of "Death Sentenced Accused Listed by Year of Sentence and Type of Offense: United States Armed Forces (1984-2005)." Certain cases are described as "brutal." For reasons unknown to us, petitioner's is not so described. Petitioner raped, forcibly sodomized, and murdered two people, stabbing one multiple times and shooting the other four times. *Gray ACCA I*, 37 M.J. at 736.

The study purports to implement "Criminal Culpability" controls, with no meaningful explanation of their provenance. However, a footnote at Table 12 of the study does offer some insight into the method involved: "The accused culpability levels reflect law student rank order scores based on their evaluation of detailed narrative summaries of the cases."

Chief Judge RISCH, Senior Judge TOZZI, Senior Judge CAMPANELLA, Judge HERRING, Judge CELTNIEKS, Judge FEBBO, Judge BURTON, and Judge WOLFE concur.

FOR THE COURT:



JOHN P. TAITT
Chief Deputy Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

RONALD A. GRAY,

Petitioner,

v. Case No. 5:08-cv-03289-JTM

ERIC BELCHER,

Respondent.

MEMORANDUM AND ORDER

Petitioner Ronald Gray's habeas petition (Dkts. 17, 42) includes both exhausted and unexhausted claims. The court initially denied the exhausted claims with prejudice and dismissed the unexhausted claims without prejudice. Dkt. 91. On appeal, the Tenth Circuit concluded this was erroneous, noting that a district court faced with such a "mixed" petition has four options: (1) dismiss the entire petition without prejudice to refiling after the petitioner exhausts all claims or resubmits the petition to proceed solely on the exhausted claims; (2) deny the entire petition with prejudice if the unexhausted claims are clearly meritless; (3) apply an "anticipatory procedural bar" to the unexhausted claims and deny them with prejudice if the petitioner would now be procedurally barred from raising them in military court and cannot show cause and prejudice to excuse the procedural default; or (4) retain jurisdiction but abate the habeas proceeding to allow the petitioner to exhaust all unexhausted claims. Dkt. 104 at 3.

Following remand, this court vacated its judgment and directed petitioner to "show cause why [the court] should not dismiss his entire petition without prejudice."

Dkt. 105. Petitioner filed a response agreeing that the petition should be dismissed without prejudice in its entirety. Dkt. 106. Respondent, on the other hand, argues the court should dismiss the entire petition with prejudice or, alternatively, should abate the proceeding while petitioner exhausts his unexhausted "coram nobis" claims. Dkt. 107.

The court has considered the parties' arguments and concludes that the better course is to dismiss the petition in its entirety without prejudice. Doing so furthers the strong preference "that the military courts first be given every reasonable opportunity to address the merits of a military prisoner's post-conviction arguments," with the civilian courts reviewing those decisions rather than seeking to substitute their own judgment for that of the military courts. *See* Dkt. 90 at 55. "The policy expressed in [*Burns v. Wilson*, 346 U.S. 137 (1953)] contemplates the orderly presentation of *all* issues to the military courts, and only afterwards [are they] presented by habeas corpus to civilian courts." Dkt. 90 at 55.

Respondent urges the court to deny the unexhausted coram nobis claims as clearly meritless or procedurally barred. But the policies noted above counsel toward allowing the military courts the first opportunity to address these questions. While the additional delay occasioned by a dismissal without prejudice is regrettable, the military courts have traditionally moved expeditiously to address such claims. Moreover, in the face of what are obviously complex procedural rules governing habeas claims, adherence to the preferred order of presentation outlined in *Burns* will avoid injecting unnecessary procedural error that would only further delay final disposition of the case.

As the court indicated in its initial Memorandum and Order, there is arguably room for debate as to the basis upon which the military courts denied petitioner's unexhausted coram nobis claims upon direct review. *See* Dkt. 90 at 55 (noting that by denying the coram nobis claims "without prejudice to raising the issue asserted after the U.S. District Court for the District of Kansas rules on the pending habeas petition," the CAAF seems to have "left open the door for Petitioner to present these claims to the military courts again upon learning what *this* court would do"). In light of this background, the court concludes that the better course is to dismiss the entirety of the habeas petition to allow petitioner to fully exhaust the unexhausted claims or to resubmit the petition without those claims.

IT IS THEREFORE ORDERED this 26th day of October, 2016, that Ronald A. Gray's petition for habeas corpus is DISMISSED WITHOUT PREJUDICE.

s/ J. Thomas Marten
J. THOMAS MARTEN, JUDGE

United States Court of Appeals
for the Armed Forces
Washington, D.C.

Ronald Gray,
Appellant

USCA Dkt. No. 16-0581/AR
Crim.App. No. 20160086

v.

DOCKETING NOTICE

and

O R D E R

Erica Nelson,
Colonel, U.S. Army,
Commandant, U.S. Disciplinary Barracks,
For Leavenworth, Kansas,

and

United States,
Appellees

Notice is hereby given that a pleading styled as "Mandatory Review Case," which this Court construes as a writ-appeal petition of the decision of the United States Army Court of Criminal Appeals on a petition for extraordinary relief in the nature of a writ of error coram nobis, was filed on May 23, 2016, and placed on the docket this 8th day of June, 2016. On consideration thereof, it is, by the Court, this 8th day of June, 2016,

ORDERED:

That said writ-appeal petition is hereby denied without prejudice to re-filing

after the United States District Court for the District of Kansas rules on the pending petition for writ of habeas corpus.

For the Court,*

/s/ William A. DeCicco
Clerk of the Court

---

*Judge Ohlson is recused and did not participate in this case.

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (DePaul)

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
HERRING, PENLAND, and WOLFE
Appellate Military Judges

Private E1 RONALD GRAY, Petitioner
v.
Colonel ERICA NELSON, Commander, Respondent
&
UNITED STATES, Respondent

ARMY MISC 20160086[1]

ORDER

A general court-martial composed of officer and enlisted members convicted petitioner, contrary to his pleas, of attempted murder, premeditated murder (two specifications), rape (three specifications), larceny, robbery (two specifications), sodomy (two specifications) and burglary, in violation of Articles 80, 118, 120, 121, 122, 125, and 129, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 918, 920, 921, 922, 925, and 929. The convening authority approved petitioner's sentence of death, a dishonorable discharge, total forfeitures, and reduction to the grade of E-1.

On 18 February 2016, petitioner filed with this court a Petition for Extraordinary Relief in the Nature of a Writ of Coram Nobis.

Petitioner's coram nobis petition followed a 29 September 2015 decision by the United States District Court for the District of Kansas to deny part of his habeas corpus petition on the merits and dismiss part of his habeas corpus petition, without prejudice, for non-exhaustion of military remedies. *Gray v. Gray*, 2015 U.S. Dist. LEXIS 131345 (D. Kan. 29 Sept. 2015) (memorandum and order).

On 8 April 2016, the United States Court of Appeals for the Tenth Circuit vacated the district court's "hybrid dismissal" and remanded for the district court to order an alternative disposition. *Gray v. Gray*, 2016 U.S. App. LEXIS 6514, at *2 (10th Cir. 8 Apr. 2016) (order and judgment). The district court's decision on remand is pending.

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[1] The docket number for petitioner's direct appeal is ACMR 8800807.

GRAY – ARMY MISC 20160086

On 14 April 2016, government appellate counsel filed a Motion to Dismiss, Deny, or Abate the Petition for a Writ of Coram Nobis. On 21 April 2016, petitioner filed a brief in opposition to the instant motion.

NOW, THEREFORE, IT IS ORDERED:

The instant motion is granted in part and denied, as moot, in part. The Petition for Extraordinary Relief in the Nature of a Writ of Coram Nobis is DISMISSED without prejudice.

DATE: 10 May 2016

FOR THE COURT:

JOHN P. TAITT
Deputy Clerk of Court

CF: JALS-DA JALS-GA
JALS-TJ JALS-CR4
Petitioner Respondent

FILED
United States Court of Appeals
Tenth Circuit

April 8, 2016

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RONALD A. GRAY,

Petitioner - Appellant,

v.

JAMES GRAY, Colonel, United States Army Commandant, USDA - Fort Leavenworth,

Respondent - Appellee.

No. 16-3038
(D.C. No. 5:08-CV-03289-JTM)
(D. Kan.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, and **BRISCOE**, and **MCHUGH,** Circuit Judges.

Petitioner Ronald A. Gray is a military prisoner convicted of multiple murders and related sexual offenses for which he has been sentenced to death. He appeals from the district court's dismissal of his habeas petition under 28 U.S.C. § 2241, which was dismissed in part with prejudice on the merits and in part without prejudice for failure to exhaust available military remedies.

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* After examining the appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

On March 3, 2016, we issued an order to show cause why this court should not summarily reverse the district court's hybrid dismissal of Gray's § 2241 petition, and remand for adoption of one of the alternative dispositions set forth in our order to show cause. On March 24, 2016, the parties filed a joint response to our order to show cause, in which they acknowledge that the district court's hybrid dismissal should be reversed and this matter should be remanded.

As an initial matter, we note that the dismissal of some of Gray's claims without prejudice does not undermine this court's jurisdiction, because the operative defect (lack of exhaustion) cannot be cured by amendment and the resultant dismissal effectively excludes Gray from federal court under present circumstances. *See B. Willis, C.P.A. v. BNSF Ry. Corp.*, 531 F.3d 1282, 1296 n.15 (10th Cir. 2008) (explaining when dismissal of claim without prejudice does not negate finality of disposition); *see also Moore v. Schoeman*, 288 F.3d 1231, 1232 (10th Cir. 2002) (exercising appellate jurisdiction over functionally identical dismissal of habeas petition). In that regard, it is clear that we have jurisdiction to summarily reverse and remand as set forth below.

A prisoner challenging a court martial conviction through 28 U.S.C. § 2241 must exhaust all available military remedies. *Khan v. Hart*, 943 F.2d 1261, 1263 (10th Cir. 1991) (following *Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975)). In this case, the district court determined that several of Gray's claims were unexhausted—claims he had tried to put before the military courts through an extraordinary coram nobis procedure that they deemed inapt when a federal habeas remedy appeared available. Believing the military courts would now consider the claims if it were made clear that habeas review

would be withheld until they did so, the district court dismissed the claims without prejudice while it rejected the rest of the petition on the merits.

The general rules for handling habeas petitions containing a mix of exhausted and unexhausted claims are well-settled. Faced with such a "mixed petition," a district court has several options: (1) dismiss the entire petition without prejudice to re-filing after the petitioner either exhausts all claims or resubmits the petition to proceed solely on the exhausted claims, *see Moore*, 288 F.3d at 1233 (discussing *Rose v. Lundy*, 455 U.S. 509, 510 (1982)); (2) deny the entire petition with prejudice if the unexhausted claims are clearly meritless, *see id.* at 1234 (discussing *Granberry v. Greer*, 481 U.S. 129, 135 (1987)); (3) apply an "anticipatory procedural bar" to the unexhausted claims and deny them with prejudice if the petitioner would now be procedurally barred from exhausting them in state (or, as here, military) court and cannot demonstrate cause and prejudice to excuse the procedural default, *see id.* at 1233 n.3; *see also Roberts v. Callahan*, 321 F.3d 994, 995, 997-98 (10th Cir. 2003) (noting same procedural-bar and cause-and-prejudice principles in habeas review of court martial conviction); or (4) retain jurisdiction but abate the habeas proceeding to allow the petitioner to exhaust all unexhausted claims, *see Rhines v. Weber*, 544 U.S. 269, 273-79 (2005). The one thing the district court may not do is effect a hybrid disposition of the petition, dismissing with prejudice all exhausted claims and dismissing without prejudice the unexhausted claims. *See Moore*, 288 F.3d at 1235-36 (reversing hybrid dismissal and remanding for further proceedings consistent with the above principles); *see also Banks v. United States*, 431 F. App'x 755, 757 (10th Cir. 2011) (noting same principles in habeas review of military conviction).

Based on the foregoing, we REVERSE the district court's hybrid dismissal of Gray's habeas petition, and REMAND to the district court with instructions to vacate its judgment and adopt one of the alternative dispositions set forth above. The Clerk of Court shall issue the mandate forthwith.

Entered for the Court
Per Curiam

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

RONALD A. GRAY,

Petitioner,

vs.

JAMES GRAY, Colonel
United States Army
Commandant, USDA – Fort Leavenworth

Respondent.

Case No. 5:08-CV-3289-JTM

MEMORANDUM AND ORDER

Petitioner Ronald A. Gray brings this petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 (Dkt. 17). Petitioner's case has a lengthy history in the military courts as well as the federal civil courts. Because review of Petitioner's petition and the accompanying court record conclusively shows that he is not entitled to relief, this court denies the motion without an evidentiary hearing.

I. Factual Background

The following factual account is taken from the court-martial record as well as the facts established by the United States Army Court of Criminal Appeals and the United States Court of Appeals for the Armed Forces on appeal. *See United States v. Gray*, 37 M.J. 730 (CMR 1992)

(hereinafter "*Gray I*"); *United States v. Gray*, 37 M.J. 751 (CMR 1993) (hereinafter "*Gray II*"); *United States v. Gray*, 51 M.J. 1 (CAAF 1999) (hereinafter "*Gray III*").

In January 1987, Petitioner, a member of the United States Army, was identified and arrested for the rape of a woman in the vicinity of Fairlane Acres, a trailer park near Fort Bragg, North Carolina. The next day, the body of Kimberly Ann Ruggles was discovered near the same area. "She had received multiple stab wounds and had suffered bruises on her eyebrow . . . [and] her nose, and a laceration on her lip." *Gray III*, 51 M.J. at 10. Ruggles had been raped and anally sodomized. Law enforcement officers discovered evidence in her vehicle and in Petitioner's possession that implicated Petitioner.

Later that same month, the body of Private Laura Lee Vickery-Clay was found. "She had been shot four times (while she was alive), in the neck, forehead, chest, and back of the head. Also, she had suffered blunt force trauma to the right cheek, the left side of her face, around her left eye, her left breast, abdomen, and both legs and arms." *Id*. Like Ruggles, Private Vickery-Clay "had been raped and anally sodomized." *Id*. Evidence in her car and the murder weapon implicated Petitioner.

Subsequent media coverage of Petitioner's arrest produced another victim, Private Mary Ann Lang Nameth, who recognized Petitioner's face from photographs she had seen of him on television and in the newspaper. Private Nameth reported that Petitioner had "raped her, and stabbed her repeatedly in the neck and side," for which she suffered a laceration of her trachea and a collapsed or punctured lung. *Id*. at 11.

II. Procedural History[1]

A. Pre-Trial History

Prior to Petitioner's court-martial, and at Petitioner's request, the military court ordered that Petitioner appear before a Sanity Board[2] to determine if, at the time of the alleged criminal conduct, Petitioner: (1) had a severe mental disease or defect, (2) had a mental disease or defect, (3) as a result of a severe mental disease or defect was unable to appreciate the nature and quality or wrongfulness of his conduct, and (4) as a result of a mental disease or defect lacked substantial capacity to conform to the requirements of the law. Dkt. 20-23, 170-71. The Sanity Board was also ordered to determine if Petitioner presently suffered from a mental disease or

[1] The following procedural history is significantly more detailed than is typically warranted in habeas proceedings. However, given Petitioner's specific arguments, the court finds such detail necessary.

[2] "If the accused's mental capacity becomes an issue at any point before or after referral, to include post-trial, any party . . . can request a mental capacity inquiry. The standard for ordering this inquiry, commonly referred to as a sanity board, is fairly low . . . The sanity board, like the request preceding it, can come at any stage of the court-martial proceedings . . . If the convening authority or military judge orders the sanity board, a board consisting of one or more persons will be convened. Typically, the commander of the medical treatment facility will appoint the members to the board. The members must all be either a physician or a clinical psychologist. At least one member of the board should be a psychiatrist or clinical psychologist. The order for the board must contain the reasons for doubting the mental capacity of the accused or other reasons for the request. The board must specifically answer four questions. The board must then conclude whether or not the subject is presently suffering from a mental disease or defect rendering him incapable of understanding the court-martial proceedings or unable to conduct or cooperate in his defense. The board can, and often does, consist of only one member." Major Timothy P. Hayes, Jr., *Post-Traumatic Stress Disorder on Trial*, 190/191 MIL. L. REV. 67, 81-83 (2006-2007) (internal citations omitted). The four questions that must be answered are:

> (A) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect?
>
> (B) What is the clinical psychiatric diagnosis?
>
> (C) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his or her conduct?
>
> (D) Is the accused presently suffering from a mental disease or defect rendering the accused unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently in the defense?

R.C.M 706(c)(2).

defect that rendered him mentally incompetent to the extent that he was unable to understand the nature of the proceedings or to conduct or cooperate intelligently in his defense. Dkt. 20-23, at 171. The Sanity Board, presided over by Colonel David Armitage, M.D., J.D., diagnosed Petitioner with personality disorder not otherwise specified, with schipotypal [sic], borderline, antisocial and sadistic features; alcohol dependence, mild (currently in remission); voyeurism; and frotteurism and determined:

> d. At the time of the alleged criminal conduct, [Petitioner] was not unable to appreciate the nature and quality or wrongfulness of his conduct and did not have a severe mental disease or defect in the sense that term is generally understood . . .
>
> g. [Petitioner] at the time of his alleged criminal conduct and as a result of the mental disease or defect mention[ed] [above] did not lack substantial capacity to conform his conduct to the requirements of the law . . .
>
> h. [Petitioner] presently suffers from a mental disease or deficit but it does not render him mentally incompetent to the extent that he is unable to understand the nature of the proceedings or to conduct or cooperate intelligently in his defense.

Dkt. 20-23, at 168.

Prior to trial, the government agreed to hire a forensic psychiatrist and was ordered to employ an expert serologist to conduct a forensic fiber analysis. Dkt. 20-4, at 32, 39. Petitioner was denied funds to hire an expert investigator on the ground that the government provided an agent from the Criminal Investigative Division Command to assist the defense. Dkt. 20-4, at 162. The military court also declined to grant Petitioner's requests to find: (1) Rule for Court-Martial ("RCM") 1004(b)(4)(c) unconstitutional because it fails to require the panel members to find that any extenuating or mitigating circumstances are outweighed by any aggravating circumstances beyond a reasonable doubt, (2) that the capital referral of the case is defective because the President of the United States exceeded his constitutional authority by intruding into the exclusive legislative providence of Congress by promulgating the aggravating factors listed in

RCM 1004(c), and (3) aggravating factor RCM 1004(c)(7)(i) unconstitutional as too broad. Dkt. 20-4, at 49-50, 53-54, 145-47.

B. Court-Martial[3]

Petitioner, represented by two detailed military defense attorneys, was tried by a general court-martial comprised of officers and enlisted members at Fort Bragg. Contrary to his pleas, in early April 1988, Petitioner was convicted of the premeditated murder of Ruggles and Private Vickery-Clay, and the attempted premeditated murder of Private Nameth. Petitioner was also found guilty of rape (three specifications), robbery (two specifications), and forcible sodomy (two specifications) with respect to all three victims, as well as burglary and larceny of property of another person, in violation of Articles 120, 122, 125, 121, and 129, Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. §§ 920, 922, 925, 921, and 929, respectively. On April 12, 1988, Petitioner was sentenced to death, a dishonorable discharge, total forfeitures, and reduction to Private E-1. This sentence was approved by the Commanding General of the 82nd Airborne Division on July 29, 1988, and was subsequently forwarded to and received by the United States Army Defense Appellate Division on August 8, 1988. Petitioner's case was forwarded to the Army Court of Military Review for mandatory review pursuant to Article 66, UCMJ, 10 U.S.C. § 866(b).[4]

[3] Prior to his court-martial, on November 2, 1987, Petitioner pleaded guilty in the Cumberland County, North Carolina, Superior Court to two counts of second degree murder, two counts of first degree burglary, five counts of first degree rape, five counts of first degree sexual offense, attempted first degree rape, three counts of second degree kidnapping, two counts of robbery with a dangerous weapon, and assault with a deadly weapon with the intent to kill, and inflicting serious injury. Petitioner was sentenced to three consecutive life terms and five concurrent life terms. These offenses involved different victims and the state proceedings were wholly separate and apart from Petitioner's court-martial. *See Gray I*, 37 M.J. at 733 n.1

[4] A note here about the process of direct military review. Under subchapter IX of the UCMJ, "Post-trial Procedure and Review of Courts-Martial," the convening authority conducts the initial review of courts-martial. Article 60, UCMJ, 10 U.S.C. § 860 (2000). Responsibility for review then transitions to centralized authorities, namely the Army Court of Criminal Appeals, the Court of Appeals for the Armed Forces, and the United States

C. Army Court of Criminal Appeals ("ACCA")[5]

1. Direct Appellate Review

On September 5, 1989, Petitioner's military counsel requested that the ACCA hold its proceedings in abeyance pending a mental evaluation of Petitioner by the Department of Mental Health at the United States Disciplinary Barracks in Fort Leavenworth, Kansas. Dkt. 20-23, at 86-91. Petitioner simultaneously filed his brief raising the following eighteen (18) assignments of error:

I. The military judge violated [Petitioner]'s right to due process by improperly granting the Government challenge for cause against [Master Sergeant] McCormick based upon that member's opposition to the death penalty, where MSG McCormick never indicated that he was "irrevocably committed...to vote against the death penalty regardless of the facts and circumstances..." *See Gray v. Mississippi*, 481 U.S. 648 (1987).

II. The military judge improperly granted the Government['s] challenge for cause against [Command Sergeant Major] Woods.

III. The peremptory challenge procedure in the military justice system, which allows the Government to remove any one juror without cause, constitutes an unconstitutional violation of the Fifth and Eighth Amendments in capital cases, where the prosecutor is free to remove a member whose moral bias against the death penalty does not justify a challenge for cause.

IV. The military judge failed to comply with *Batson v. Kentucky* and *United States v. Moore*, when he refused to have trial counsel, on the record, articulate a race-neutral explanation for the Government's peremptory challenge of one of only two black members on [Petitioner]'s court-martial panel.

Supreme Court, with clemency and parole duties vested with the service secretaries. Articles 66, 67, 67a, and 74, UCMJ, 10 U.S.C. §§ 866, 867, 867a, 874. The ACCA, which is comprised of a three-judge panel, must independently review the entire record of court-martial *de novo* and arrive at a decision that the findings and sentence are correct "in law and fact." The ACCA conducts its review for error regardless of whether error is assigned by the appellant. The CAAF must review the record in all cases in which the sentence, as affirmed by the ACCA, extends to death. Article 67(a)(1), UCMJ, 10 U.S.C. § 867(a)(1).

[5] This court was previously known as the Army Court of Military Review.

V. The military judge failed to properly determine, and the evidence of record fails to conclusively demonstrate, that [Petitioner]'s election as to forum was knowingly and intelligently made.

VI. The military judge erred to the substantial prejudice of [Petitioner] by the admission of gruesome photos of the corpses, including Prosecution Exhibit 214, which is a photograph of a victim's badly decayed face, with a gunshot wound to the eye socket.

VII. The military judge erred to the substantial prejudice of [Petitioner] by allowing the prosecution, during the sentencing portion of a capital case, to engage in improper argument that emphasized victim impact statements in violation of *Booth v. Maryland*, 482 U.S. 496 (1987).

VIII. Due Process requires that trial and intermediate appellate judges in a peacetime military death penalty case have the protection of a fixed term of office.

IX. The military judge erred to the substantial prejudice of [Petitioner] by allowing the Government to use [Petitioner]'s statement made pursuant to a guilty plea in a civilian trial, where (1) civilian authorities thought it unnecessary to advise [Petitioner] of his *Miranda* rights; (2) the parties did not contemplate use of the statement unless [Petitioner] pled guilty at the civilian trial; (3) military defense counsel were not present when the statement was rendered; and (4) civilian defense counsel should have known that military authorities had preferred charges against [Petitioner] with a view toward the death penalty on 5 August 1987.

X. The military judge erred by allowing the Government to make use of [Petitioner]'s statements in violation of a civilian plea agreement.

XI. Civilian defense counsel were ineffective in failing to limit [Petitioner]'s confession made pursuant to a civilian plea agreement, or alternatively, in failing to draft terms limiting the use of such statement to the civilian trial.

XII. The military judge failed to instruct the panel members that the Specification of Charge IV (Larceny) is multiplicious for sentencing purposes with the Specification of Charge VII (Breaking and Entering).

XIII. The military judge failed to instruct the panel that one act cannot be considered as two aggravating factors when determining if aggravating factors substantially outweigh extenuating and mitigating factors.

XIV. The president exceeded his authority under the Constitution and Uniform Code of Military Justice Article 36 in promulgating Rule for Courts-Martial 1004; therefore, the procedures under which [Petitioner] was sentenced to death are invalid.

XV. The imposition of the death penalty violated [Petitioner]'s right to equal protection under the Fifth Amendment because R.C.M. 1004 subjects [Petitioner], as a member of the armed forces, to a penalty which is not otherwise available under the Criminal Code of the United States for identical criminal conduct.

XVI. Rule for Courts-Martial 1004 fails to incorporate congressionally mandated protections to prevent racially motivated imposition of the death penalty in violation of UCMJ Article 55 and the Eighth Amendment to the Constitution.

XVII. The aggravating factor enumerated in R.C.M. 1004(c)(7)(I) fail[s] to sufficiently clarify the factor involved or narrow the class of persons eligible for the death penalty and is therefore invalid under the Fifth and Eighth Amendment[s] to the Constitution.

XVIII. [Petitioner] was tried in a capital case by a court-martial panel (i.e. jury) composed of less than twelve members.

Dkt. 20-23, at 12-57.

In addition to these errors raised by counsel, Petitioner himself raised twenty-six (26) *Grostefon* errors.[6] Dkt. 20-23, at 71-73. The ACCA denied Petitioner's request to hold the appellate proceedings in abeyance. Dkt. 20-23, at 91. On September 15, 1989, Petitioner filed a nearly identical revised brief, with the exception of one additional assignment of error:

XIX. This court's refusal to waive the arbitrary 50-page limit on assignments of error and briefs set forth in this court's internal operating procedure, constitutes a violation of [Petitioner's] right to due process and as established by UCMJ Art. 66(c) and violates [Petitioner's] right to the effective assistance of counsel on this first appeal of right, by preventing detailed counsel from fully presenting [Petitioner's] appeal to this court for the review mandated by Congress.

Dkt. 20-23, at 57.

[6] Pursuant to the holding in *United States v. Grostefon*, 12 M.J. 431, 436 (C.M.A. 1982), a service member has an independent right to personally submit all issues to the military appellate courts through appellate defense counsel, even if not supported by law or fact. In other words, a service member may himself raise legal claims that his counsel has decided not to present to a military appellate court. The purpose of the *Grostefon* rule is to ensure that no service member believes that his attorney, who is usually a military officer detailed to the task, has failed to raise a particular claim because of command influence.

On December 22, 1989, Petitioner requested, *inter alia*, that the ACCA direct a second Sanity Board, which the ACCA did on February 13, 1990. Dkt. 20-22, at 117-18, 132-41. On June 30, 1990, the three-person Sanity Board concluded Petitioner:

> (a) . . . did not suffer[] from a severe mental disease or defect at the time of the offenses for which he has been convicted; (b) . . . was able to appreciate the nature and quality or wrongfulness of his conduct at the time of the alleged criminal conduct; (c) . . . has [sic] sufficient mental capacity to understand the nature of the court-martial proceedings and to conduct or cooperate intelligently in his defense at the time of trial; and (d) . . . presently possesses sufficient mental capacity to understand the nature of the pending appellate proceedings and to conduct or cooperate intelligently in his appeal.

Dkt. 20-22, at 15-21.

2. Extraordinary Relief

In addition to this direct review, on December 27, 1990, Petitioner filed a motion requesting that the ACCA order the United States Government to provide funds in the amount of $15,000 to hire an expert psychiatrist, a death-penalty-qualified attorney, and an investigator. Dkt. 20-21, at 161-92. The ACCA interpreted the motion to be a petition for a writ of extraordinary relief in the form of a writ of mandamus, heard oral argument, and on May 12, 1991, denied the request for funding.[7] Dkt. 20-21, at 122-30.

In April 1991, Petitioner requested time to properly investigate his case and prepare supplemental pleadings. The ACCA denied this motion and scheduled oral argument for July 31, 1991. Just prior to that date, Petitioner requested, and was granted, a continuance. Meanwhile, Petitioner renewed his request for funding for an expert psychiatrist and an

[7] The ACCA also found that Petitioner's appellate counsel was qualified within the meaning of Articles 27 and 70 of the UCMJ to represent Petitioner on appeal in a capital case.

investigator. Dkt. 20-21, at 20-57. This motion was again denied on August 23, 1991. Dkt. 20-21, at 57.

3. Extraordinary Writ Appeal

On September 17, 1991, Petitioner filed a writ appeal petition with the United States Court of Military Appeals seeking review of the ACCA's decision denying his request for funding and for an emergency stay. Dkt. 20-20, at 291-303. The writ appeal petition was denied on October 18, 1991. Dkt. 20-20, at 290.

4. Continued Direct Appeal

Upon return to the ACCA, Petitioner requested that oral argument again be postponed to allow him time to file a brief on the issue of proportionality and to prepare additional assignments of error. The ACCA granted the motion and reset oral argument for November 13, 1991.

On November 7, 1991, appellate defense counsel filed a motion to withdraw from the case, claiming that he was not competent to represent Petitioner. The ACCA denied the request.

On December 16, 1991, Petitioner requested that the ACCA order military authorities to perform additional medical and neuropsychological tests. Dkt. 20-20, at 360-67. The ACCA agreed and, on December 31, 1991, issued an order requiring the requested testing be completed by February 1, 1992.[8] Dkt. 20-20, at 367. On February 18, 1992, Dr. Fred Brown published his Neuropsychological Evaluation Report detailing the tests he performed to evaluate Petitioner's mental health and cognitive skills. Dkt. 20-19, at 105-18. Dr. Brown diagnosed Petitioner

[8] The ordered testing included the following: (1) an MRI of Petitioner's brain; (2) a 20-channel, scalp electrode, sleep deprived EEG; (3) a SPECT scan of Petitioner's brain; and (4) a complete battery of intellectual, neuropsychological, academic, psychological, and personality tests performed by a fully qualified and credentialed neuropsychologist.

primarily with organic brain syndrome (not otherwise specified), characterized by mild information processing and attentional deficits. Dkt. 20-19, at 115. [9]

On February 26, 1992, Petitioner filed a supplementary brief raising the following nine (9) additional assignments of error:

XIX[a]. [Petitioner]'s sentence and conviction should be set aside and the case remanded for a new trial concerning whether and to what extent [Petitioner] may be held criminally responsible in view of newly discovered evidence that [Petitioner] suffers from the mental disease or defect known as organic brain damage.

XX. [Petitioner] was convicted and sentenced to death in violation of the Fifth, Sixth, and Eighth Amendments of the United States Constitution because the sentence and convictions are founded at least in part upon misinformation concerning his mental health.

XXI. [Petitioner] was denied due process of law under the Fifth Amendment to the United States Constitution and was denied military due process when he was denied the investigative resources necessary for a constitutionally adequate defense.

XXII. [Petitioner] was convicted without due process of law because his Constitutional right to competent psychiatric assistance in the evaluation, preparation, and presentation of his case was violated.

XXIII. [Petitioner] was denied his Sixth Amendment right to effective assistance of counsel by trial defense counsel's failure to 1) investigate the mitigating circumstances of [Petitioner]'s traumatic family, social, and medical histories and [Petitioner]'s intoxication at the time of the offenses; 2) challenge the professional competence of the pretrial evaluations of [Petitioner] by the two forensic psychiatrists and to ensure a complete and competent mental health evaluation of [Petitioner] was performed before trial; 3) develop and present an available defense on the merits; and 4) present an adequate case during the sentence hearing.

[9] Dr. Brown also diagnosed Petitioner with alcohol dependence (in full remission, by history); personality disorder, not otherwise specified; tension/migraine headaches (by history); history of mild head injuries with minimal loss of consciousness; extreme severity of psychosocial stressors due to status as a death sentence inmate; and assigned him a Global Assessment of Functioning score of 55, indicating moderate limitations. Dkt. 20-19, at 115.

XXIV. [Petitioner] was denied a fair trial by an impartial court-martial panel in violation of the Fifth, Sixth, and Eighth Amendments because of prejudicial pretrial publicity.

XXV. The military judge improperly denied a defense request for a mistrial based upon trial counsel's comments on [Petitioner]'s silence and courtroom demeanor.

XXVI. The instructions to the court members which purported to define reasonable doubt at [Petitioner]'s trial violated [Petitioner's right] of due process of law by lessening the Government's burden of proof.

XXVII. Proportionality Review. This court should develop a broad-based comparative proportionality review procedure and give [Petitioner] an opportunity to brief the appropriate application of the procedure to this case.

Dkt. 20-20, at 16-157.

Petitioner subsequently filed a Petition for a New Trial based upon an affidavit from neurologist Dr. Jonathan Pincus who, at the request of Petitioner's military counsel, reviewed several neurological reports as well as the findings from both military Sanity Boards and concluded that Petitioner suffered from organic brain damage. Dkt. 20-20, at 218. Dr. Pincus never examined Petitioner. Dkt. 20-20, at 218.

On April 8, 1992, the ACCA heard oral argument on Petitioner's supplemental assignments of error as well as his motion for a new trial. Dkt. 20-18, at 192. Ultimately affirming the findings of guilty and the sentence, the ACCA noted that some of Petitioner's assignments of error had previously been raised and resolved against him, that Petitioner's *Grostefon* matters lacked merit, and that the sentence of death was appropriate. *Gray I*, 37 M.J. at 734. The ACCA also denied the petition for a new trial, finding that the diagnosis of organic brain damage was not "new" evidence and that Petitioner himself conceded that there were "clear indicators of [his] organic brain damage . . . present at the time of trial . . . ." *Gray II*, 37 M.J. at 753.

5. Additional Direct Review

Despite the fact that the ACCA confirmed his sentence of death, Petitioner continued to seek additional relief at this level. On December 30, 1992, Petitioner again filed a motion seeking funding for an expert investigator and behavioral neurologist, citing the fact that such a request had been approved in other cases. Dkt. 20-18, at 165-71. The ACCA denied this request on January 22, 1993. *Gray II*, 37 M.J. at 753. Petitioner subsequently filed a motion for reconsideration, which was denied on January 22, 1993. Dkt. 20-18, at 139-40.

On February 11, 1993, Petitioner asked the ACCA to reconsider *en banc* its denials of his motions to fund an expert investigator and behavioral neurologist. Dkt. 20-18, at 86-94. He also filed a motion for leave to file supplemental assignments of error, raising the following twenty-nine (29) issues:

XXVIII. [Petitioner]'s court-martial lacked jurisdiction because the military judge was designated in violation of the appointments clause of the Constitution. Because this error is jurisdictional, and the record contains no evidence of a knowing waiver, the issue is not waived by a failure to raise it at trial.

XXIX. Uniform Code of Military Justice [A]rticle 18, 10 U.S.C. § 818 (1982)...and [R.C.M.] 201(F)(1)(c)...which require trial by members in a capital case, violates the Fifth and Eighth Amendment[s] Guarantee of Due Process and a reliable verdict.

XXX. [Petitioner] was denied his Fifth Amendment right to a grand jury presentment or indictment.

XXXI. Court-martial procedures denied [Petitioner] his Article III right to a jury trial.

XXXII. The Fifth, Sixth, and Eighth Amendments do not permit, in peacetime, a convening authority to hand-pick military subordinates, whose careers he can directly and immediately affect and control, as members to decide a capital case for offenses that occur on a military base but where there is concurrent jurisdiction with a State authority.

XXXIII. Court-martial procedures denied [Petitioner] his Sixth Amendment right to jury trial and an impartial cross-section of the community.

XXXIV. The peremptory challenge procedure in the military justice system constitutes an unconstitutional violation of the Fifth and Eighth Amendments in capital cases where the prosecutor is free to remove a member whose moral bias against the death penalty does not justify a challenge for cause.

XXXV. The designation of the senior member as the presiding officer for deliberations denied the [Petitioner] due process of law and a fair and impartial members' consideration of the evidence, by establishing the senior member's superiority in and control of the deliberation process.

XXXVI. The military judge committed plain error by failing to instruct the members on sentencing as to the term "substantially outweighed" with regard to the relationship of mitigating circumstances to aggravating factors.

XXXVII. The findings must state explicitly that all members concur that any extenuating or mitigating circumstances are substantially outweighed by the aggravating factors found by the members.

XXXVIII. The military judge's instruction that "you may not adjudge a sentence of death unless you find that any and all extenuating or mitigating circumstances are substantially outweighed by any aggravating factors..." did not sufficiently inform the members that this finding must be unanimous.

XXXIX. Military due process and UCMJ Articles 66 and 67 require the Court of Military Appeals and the Courts of Military Review to review all capital cases *in favorem vitae* since capital litigation is in its infancy in the military justice system and trial and appellate defense counsel lack the training and experience necessary to preserve the record on all issues and prevent application of waiver.

XL. The death penalty sentencing standard requiring aggravating factors to "substantially outweigh" extenuating and mitigating circumstances is in violation of the Fifth and Eighth Amendments in that the only acceptable standard must be "beyond a reasonable doubt[.]"

XLI. The military judge erred in violation of the Fifth and Eighth Amendments in failing to explicitly instruct that even if the members unanimously found one or more aggravating factors and even if the members unanimously determine that the extenuating or mitigating circumstances are substantially outweighed by the aggravating factors, each member still had the absolute discretion to decline to impose the death sentence.

XLII. The military judge erred in violation of the Fifth and Eighth Amendments and UCMJ Article 55 in his failure to instruct the panel members that the only offenses for which [Petitioner] could be sentenced to die were felony murder and

premeditated murder and that [Petitioner] could not be sentenced to die on the basis of the aggregate or cumulative effect of all the offenses.

XLIII. The role of the convening authority in the military justice system denied [Petitioner] a fair and impartial trial by allowing the convening authority to act as a grand jury in referring criminal cases (capital cases) to trial, personally appointing jurors of his choice, holding the ultimate law enforcement function within his command, rating the Staff Judge Advocate who is the functional equivalent to the chief prosecutor, and acting as the first level appeal, thus creating an appearance of impropriety in a perception that he acts as a prosecutor, judge, and jury.

XLIV. [Petitioner] has been denied equal protection under the law in violation of the Fifth Amendment in that all other civilians in the United States are afforded the opportunity to have their cases reviewed by an Article III Court but members of the United States Army by virtue of their status as service members are not.

XLV. This Court does not have the jurisdiction, nor the authority to review the Constitutionality of the Rules for Courts-Martial and the Uniform Code of Military Justice because this Court is an Article I Court, not an Article III Court which has the power to check Congress and the Executive under *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

XLVI. [Petitioner] was denied due process of law in violation of the Fifth and Eighth Amendments because he was tried in a peacetime capital case by a court-martial panel (i.e., Jury) composed of less than twelve members.

XLVII. [Petitioner] was denied his rights under the Fifth and Sixth Amendments because the panel member selection pool in [Petitioner]'s case did not include any females.

XLVIII. There is no meaningful distinction between premeditated and unpremeditated murder allowing differential treatment and sentencing disparity in violation of the Fifth and Eighth Amendments and UCMJ Article 55.

XLIX. The military judge's instructions blurred any distinction between the offenses of premeditated and unpremeditated murder and deleted the required element of "premeditation" from the offense of premeditated murder in violation of the Fifth, Sixth, and Eighth Amendments and UCMJ Article 55.

L. [Petitioner]'s death sentence violates the Eighth Amendment's Prohibition against cruel and unusual punishment.

LI. Rule for Courts-Martial 1004 fails to incorporate Congressionally mandated protections to prevent racially motivated imposition of the death penalty in violation of UCMJ Article 55 and the Eighth Amendment to the Constitution.

LII. The imposition of the death penalty in this case violated [Petitioner]'s right to equal protection under the Fifth Amendment because [R.C.M.] 1004 subjected [Petitioner] to a penalty which is not otherwise available under the Criminal Code of the United States for identical criminal conduct.

LIII. The aggravating factors enumerated in [R.C.M.] 1004(c)(7)(I) fail to sufficiently clarify the factors involved or narrow the class of persons eligible for the death penalty and the rule is therefore invalid under the Fifth and Eighth Amendments.

LIV. Due process requires that trial and intermediate appellate judges in a peacetime military death penalty case have the protection of a fixed term of office.

LV. The system of appointing capital counsel in the United States Army prejudiced [Petitioner] because he is not guaranteed either continuity of counsel or competent counsel under any of the qualifications for capital attorneys in force in any jurisdiction in America.

LVI. The system whereby the Judge Advocate General of the Army appoints trial and appellate judges to serve at his pleasure is unconstitutional as it violates the appointments clause of the Constitution.

Dkt. 20-17, at 178-200; Dkt. 20-18, at 1-84. The ACCA denied Petitioner's request for *en banc* reconsideration (Dkt. 20-17, at 177) but granted his motion for leave to file supplemental assignments of error. Dkt. 20-18, at 84. In its second published opinion, entitled "Opinion of the Court on Supplemental Assignments of Error," the ACCA again affirmed the findings of guilty and Petitioner's death sentence. *Gray II*, 37 M.J. at 761. Petitioner filed a motion for reconsideration on June 28, 1993, which the ACCA summarily denied two days later. Dkt. 20-17, at 104-05.

D. Court of Appeals of the Armed Forces[10]

1. Direct Appellate Review

Petitioner then sought review before the CAAF, pursuant to Article 67(a)(1), UCMJ, 10 U.S.C. § 867(a)(1). On September 10, 1993, Petitioner filed a motion seeking $15,000 for an expert investigator and behavioral neurologist. Dkt. 20-17, at 78-87. The CAAF denied the motion without prejudice on April 25, 1994, noting that such a request required a determination of fact, an improper question for the court. Dkt. 20-18, at 59-60. However, the CAAF noted that, because the ACCA had denied such a request in the court below, it could be reviewed during the ordinary course of appellate review. Dkt. 20-18, at 60.

On June 20, 1994, Petitioner filed his brief, presenting the following sixty-nine (69) assignments of error:

I. Military Due Process and UCMJ Articles 66 and 67 require the Court of Military Appeals and the Courts of Military Review to review all capital cases *in favorem vitae* since capital litigation is in its infancy in the military justice system and trial and appellate defense counsel lack the training and experience necessary to preserve the record on all issues and prevent application of waiver.

II. A fact-finding Court of Military Review must unanimously agree on both findings of guilt and the sentence in a capital case and must apply a policy of *in favorem vitae*.

III. The [ACCA] abused its discretion in denying [Petitioner]'s Petition for New Trial based upon newly discovered evidence of organic brain damage.

IV. [Petitioner] was convicted and sentenced to death in violation of the Fifth, Sixth, and Eighth Amendments of the United States Constitution because the sentence and convictions are founded at least in part upon misinformation of a Constitutional magnitude concerning his mental health.

[10] This court was previously known as the Court of Military Appeals.

V. [Petitioner] was convicted without due process of law because he was denied competent psychiatric assistance in the evaluation, preparation, and presentation of his case.

VI. [Petitioner] was denied his Sixth Amendment right to effective assistance of counsel by trial defense counsel's failure 1) to investigate the mitigating circumstances of [Petitioner]'s traumatic family, social, and medical histories and [Petitioner]'s intoxication at the time of the offenses; 2) to challenge the professional competence of the pretrial evaluations of [Petitioner] by the two forensic psychiatrists and to ensure a complete and competent mental health evaluation of [Petitioner] was performed before trial; 3) to develop and present an available defense on the merits; and 4) to present an adequate case during the sentencing hearing.

VII. The [ACCA] erred by refusing to grant [Petitioner]'s funding motion of August 7, 1991.

VIII. The Judge Advocate General of the Army . . . deprived [Petitioner] of his right to equal protection in violation of the Fifth Amendment to the Constitution because TJAG favorably considered similar funding requests in the Army's two other capital cases, but arbitrarily denied [Petitioner]'s request in a summary manner.

IX. The policy memorandum of the Judge Advocate General of the Army dated December 17, 1992, deprives [Petitioner] of due process of law in violation of the Fifth, Eighth, and Fourteenth Amendments.

X. The military judge erred to the substantial prejudice of [Petitioner] by allowing the Government to use [Petitioner]'s statement made pursuant to a guilty plea in a civilian trial where (1) civilian authorities failed to advise [Petitioner] of his Fifth Amendment right against self-incrimination prior to eliciting incriminating information unrelated to his civilian plea; (2) the parties did not contemplate use of the statement unless [Petitioner] pled guilty at the civilian trial; (3) military defense counsel were not present when the statement was rendered; and (4) civilian defense counsel should have known that military authorities had preferred charges against [Petitioner], with a view toward the death penalty, on August 5, 1987.

XI. The military judge erred by allowing the Government to make use of [Petitioner]'s statements in violation of a civilian plea agreement.

XII. The opinion of the [ACCA] which found that [Petitioner]'s statements did not contribute to the findings and sentence misinterprets and misapplies the facts of record.

XIII. Civilian and military defense counsel were ineffective in failing to limit [Petitioner]'s confession made pursuant to a civilian plea agreement, or alternatively, in failing to draft terms limiting the use of such statement to the civilian trial.

XIV. [Petitioner] was denied a trial by an impartial court-martial panel in violation of the Fifth, Sixth, and Eighth Amendments due to prejudicial pretrial publicity.

XV. The military judge failed to properly determine, and the evidence of record fails to conclusively demonstrate, that [Petitioner]'s election as to forum was knowingly and intelligently made.

XVI. [Petitioner] was denied due process under the Fifth and Fourteenth Amendments to the United States Constitution and military due process necessary to retain expert services in criminal investigation to assist the defense in the evaluation, preparation, and presentation of its defense.

XVII. The military judge violated [Petitioner]'s right to due process by improperly granting the Government['s] challenge for cause against MSG McCormick based upon that member's opposition to the death penalty where MSG McCormick never indicated that he was "irrevocably committed ...to vote against the death penalty regardless of the facts and circumstances..." *See Gray v. Mississippi*, 481 U.S. 648 (1987).

XVIII. The military judge improperly granted the Government challenge for cause of CSM Woods.

XIX. The peremptory challenge procedure in the military justice system constitutes an unconstitutional violation of the Fifth and Eighth Amendments in capital cases where the prosecutor is free to remove a member whose moral bias against the death penalty does not justify a challenge for cause.

XX. The military judge failed to comply with *Batson v. Kentucky*, 476 U.S. 79 (1986), and *United States v. Moore*, 28 M.J. 366 (C.M.A. 1989), when he refused to have trial counsel, on the record, articulate a race-neutral explanation for the Government's peremptory challenge of one of only two black members on [Petitioner]'s court-martial panel.

XXI. The Government erred by using its peremptory challenge to exclude a panel member based upon his scruples about the death penalty.

XXII. The military judge erred to the substantial prejudice of [Petitioner] in a capital case by admitting gruesome photos of the decedents, including Prosecution Exhibit 214, which is a photograph of a victim's badly decayed face with a gunshot wound to the eye socket.

XXIII. The outcome of [Petitioner]'s trial was jeopardized by the errors of the military judge and the prosecution when the prosecution failed to disclose the identity of a registered source in possession of information favorable to the defense and the military judge would not order disclosure.

XXIV. The military judge improperly denied a defense motion for a mistrial based on trial counsel's comments on [Petitioner]'s demeanor and right to remain silent.

XXV. [Petitioner] was sentenced to death in violation of the Eighth Amendment prohibition against cruel and unusual punishment when the military judge precluded the sentencing panel from considering [Petitioner]'s background as a basis for a sentence less than death.

XXVI. The military judge failed to instruct the panel members that the Specification of Charge IV (Larceny) is multiplicious for sentencing purposes with the Specification of Charge VII (Burglary).

XXVII. Whether [Petitioner]'s death sentence violates the Fifth, Sixth, and Eighth Amendments and UCMJ Article 55 in that [Petitioner] was given the death penalty based upon a conglomeration of aggravating factors which inextricably double counted [Petitioner]'s crimes, and the failure of the military judge to instruct the panel that one act cannot be considered as two aggravating factors when determining if aggravating factors substantially outweigh extenuating and mitigating factors.

XXVIII. The military judge committed plain error by failing to instruct the members on sentencing as to the meaning of the term "substantially outweighed" with regard to the relationship of mitigating circumstances to aggravating factors.

XXIX. The findings must state explicitly that all members concur that any extenuating or mitigating circumstances are substantially outweighed by the aggravating factors found by the members.

XXX. The death penalty sentencing standard requiring aggravating factors to "substantially outweigh" extenuating and mitigating circumstances is in violation of the Fifth and Eighth Amendments in that the only acceptable standard must be "beyond a reasonable doubt."

XXXI. The military judge erred in violation of the Fifth and Eighth Amendments in failing to explicitly instruct that even if the members unanimously determined that the extenuating or mitigating circumstances are substantially outweighed by the aggravating factors, each member still had the absolute discretion to decline to impose the death sentence.

XXXII. The aggravating factor stated in R.C.M. 1004(c)(7)(I) is vague, fails to sufficiently clarify the factor involved, and does not narrow the class of persons eligible for the death penalty, and is therefore invalid under the Eighth Amendment to the Constitution.

XXXIII. The military judge committed plain error, affecting substantial rights of [Petitioner], when he allowed the panel to recess prior to arriving at a sentence, determine a sentence while on recess, and reenter the courtroom to announce the sentence without ever closing the court to deliberate on a sentence, such error seriously affected the fairness, integrity and public reputation of [Petitioner]'s court-martial.

XXXIV. The [ACCA] erred by refusing to abate the proceeding in [Petitioner]'s case after [Petitioner] ingested an overdose of doxipin.

XXXV. [Petitioner] was denied his Fifth Amendment right to a grand jury presentment or indictment.

XXXVI. Court-martial procedures denied [Petitioner] his Article III right to a jury trial.

XXXVII. Article 18 of the UCMJ and R.C.M. 201(F)(1)(c), which require trial by members in a capital case, violates the Fifth and Eighth Amendment guarantees of due process and a reliable verdict.

XXXVIII. Assuming arguendo that he desired to plead guilty, R.C.M. 1004's prohibition against guilty pleas in capital cases deprived [Petitioner] of a critical mitigating factor and caused other irreparable prejudice.

XXXIX. Whether [Petitioner] was denied due process of law in violation of the Fifth, Sixth, and Eighth Amendments, and [UCMJ] Article 55, because he was tried in a peacetime capital case by a court-martial panel (i.e. jury) composed of less than twelve members.

XL. [Petitioner] was denied his rights under the Fifth and Sixth Amendments because the panel member selection pool in [Petitioner]'s case did not include any females.

XLI. Article 25(c)(1)'s exclusion from the court-martial service of enlisted members of the same unit as the accused injects an improper criterion (enlisted status) in selecting the members pool.

XLII. [Petitioner] was denied his right to an impartial jury by the accepted practice in the military of allowing panel members to ask questions of witnesses.

XLIII. [Petitioner] was denied due process of law when the military judge improperly abandoned his role of impartiality and became a partisan advocate for the Government.

XLIV. [Petitioner] did not knowingly and intelligently waive his Article 38(b)(2) statutory right to civilian counsel or his Article 38(b)(3)(B) statutory right to military counsel of his own selection where the military failed to advise [Petitioner] of his professional deficiencies (which included no capital experience, no capital training, and no experience in defending a murder charge).

XLV. [Petitioner] did not knowingly and intelligently waive his Article 38(b)(2) statutory right to civilian counsel or his Article 38(b)(3)(B) statutory right to military counsel of his own selection where the military judge misled [Petitioner] by stating that his counsel were "qualified lawyers" and that his lead counsel was a "lawyer of considerable experience," when neither counsel had tried a capital case, tried a murder case, or received any death penalty continuing legal education.

XLVI. Whether due process requires that this court establish minimum standards for trial and appellate defense counsel in [a] capital case.

XLVII. The system of appointing capital counsel in the United States Army prejudices [Petitioner] because he is not guaranteed either continuity of counsel or competent counsel under any of the qualifications for capital attorneys in force in any jurisdiction in America.

XLVIII. [Petitioner] has been denied equal protection under the law in violation of the Fifth Amendment in that all other civilians in the United States are afforded the opportunity to have their cases reviewed by an Article III court, but members of the United States Army by virtue of their status as service members are not.

L. The military judge erred in violation of the Fifth and Eighth Amendments and UCMJ Article 55 in his failure to instruct the panel members that the only offenses for which [Petitioner] could be sentenced to die were felony murder and premeditated murder and that [Petitioner] could not be sentenced to die on the basis of the aggregate or cumulative effect of all the offenses.

LI. There is no meaningful distinction between premeditated and unpremeditated murder in the military, allowing differential treatment and sentencing disparity in violation of the Fifth and Eighth Amendments.

LII. The military judge erred by insufficiently describing the distinction between the offenses of premeditated and unpremeditated murder.

LIII. The predominance of misleading language in the reasonable doubt instructions given by the military judge for findings and sentencing created a higher degree of doubt than is required under the Due Process Clause of the Fifth Amendment.

LIV. The military judge's instructions restricted free consideration of the evidence by requiring the members to vote on the most serious offense first.

LV. The designation of the senior member as the presiding officer for deliberations establishes the senior member's superiority in and control of the deliberation process and denied [Petitioner] due process of law and a fair and impartial consideration of the evidence by the members.

LVI. The military judge's instruction that "you may not adjudge a sentence of death unless you find that any and all extenuating or mitigating circumstances are substantially outweighed by any aggravating factors..." did not sufficiently inform the members that this finding must be unanimous.

LVII. The military death penalty scheme is invalid due to *Furman v. Georgia*, 408 U.S. 238 (1972) and the separation of powers doctrine.

LVIII. Rule for Courts-Martial 1004 fails to incorporate congressionally mandated protections to prevent racially motivated imposition of the death penalty in violation of UCMJ Article 55 and the Eighth Amendment to the Constitution.

LIX. The military judge committed plain error when he failed to sua sponte instruct the panel members that race could not be considered as a factor in the sentencing process.

LX. The imposition of the death penalty in this case violated [Petitioner]'s right to equal protection under the Fifth Amendment because [R.C.M.] 1004 subjected [Petitioner], as a member of the armed forces, to a penalty which is not otherwise available under the criminal code of the United States for identical criminal conduct.

LXI. The Fifth, Sixth, and Eighth Amendments do not permit, in peacetime, a convening authority to hand-pick military subordinates, whose careers he can directly and immediately affect and control, to serve as members in a capital trial for offenses that occur on a military base but where there is concurrent jurisdiction with a state authority.

LXII. The military judge erred to the substantial prejudice of [Petitioner] by allowing the prosecution, during the sentencing portion of a capital case, to engage in improper argument that emphasized victim impact statements in violation of *Booth v. Maryland*, 482 U.S. 496 (1987).

LXIII. Whether due process and fundamental notions of fairness require that each member of the court-martial sign his or her name to the death sentence worksheet or that the condemned accused be afforded the right and opportunity to poll the members.

LXIV. The capital sentencing procedure in the military is unconstitutional because the military judge lacks the power to adjust or suspend a sentence of death that is improperly imposed.

LXV. Court-martial procedures denied [Petitioner] his Sixth Amendment right to jury trial and an impartial cross-section of the community.

LXVI. [Petitioner]'s death sentence violates the Eighth Amendment's prohibition against cruel and unusual punishment.

LXVII. The numerous errors which occurred during [Petitioner]'s court-martial cannot be found harmless beyond a reasonable doubt when considered collectively.

LXVIII. The [ACCA]'s proportionality review in this case was insufficient as a matter of law.

LXIX. The [ACCA] erred in concluding that the death sentence was an appropriate sentence in this case.

Dkt. 20-16, at 7-459. Petitioner himself also submitted thirty-one (31) *Grostefon* matters. Dkt. 20-13, at 228-231.

On October 5, 1995, with permission of the CAAF, Petitioner filed a supplemental assignment of error:

LXX. Whether [Petitioner] was denied due process of law in violation of the Fifth, Sixth, and Eighth Amendments because he was tried by court-martial for capital murder during peacetime.

Dkt. 20-14, at 51-87.

On May 28, 1999, the CAAF issued a lengthy published opinion addressing all seventy (70) assignments of error as well as the additional thirty-one (31) *Grostefon* matters. *Gray III*, 51 M.J. 1. The court affirmed the ACCA's order and all related decisions. *Id*. at 64.

Petitioner filed a motion for reconsideration on August 14, 1999, arguing that: (1) the CAAF misapprehended several facts in finding a "service connection" existed, (2) the CAAF misapprehended the facts and law in holding that sufficient evidence of Petitioner's organic brain damage was presented to the panel, (3) Petitioner was denied due process of law when the CAAF denied his request for funding to hire experts, (4) the CAAF erred by finding Petitioner's pretrial statements were admissible, (5) civilian defense counsel was ineffective, (6) the CAAF erred by holding Defense Exhibit V was cumulative, and (7) the CAAF erred by holding the panel was adequately instructed to consider Petitioner's background as a mitigating factor. Dkt. 20-12, at 141-200 – Dkt. 20-13, at 1-57. The CAAF summarily denied the petition on April 6, 2000. Dkt. 20-12, at 64. On April 18, 2000, Petitioner filed a second motion for reconsideration, which was summarily denied on June 26, 2000. Dkt. 20-12, at 3, 10-49.

E. United States Supreme Court

On September 25, 2000, Petitioner filed a Petition for a Writ of Certiorari with the United States Supreme Court presenting the following three (3) assignments of error:

I. During peacetime, allowing a member of the Armed Forces to be sentenced to death by a court-martial panel of less than twelve, when there is no fixed panel size, promotes unreliability, undermines the right to an impartial fact finder and capital sentencer, and creates an arbitrary factor in the administration of the death penalty under the Uniform Code of Military Justice, in violation of the Fifth, Sixth and Eighth Amendments.

II. In a capital court-martial during peacetime, the convening authority's power to handpick military subordinates -- whose careers he can directly and immediately effect and control -- to serve as court members violates the Fifth and Eighth Amendments.

III. An appellate court cannot assume that the trial judge made a determination as to whether trial counsel's explanation was credible or pretextual pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), without conducting a further hearing on the issue, when the trial judge ruled on Petitioner's *Batson* claim without even requiring the prosecutor to provide a race neutral explanation for the challenge.

Dkt. 20-11, at 91-118. Both the National Institute of Military Justice and the Navy-Marine Corps Appellate Defense Division filed amicus briefs on Petitioner's behalf. Dkt. 20-11, at 58-81. The Supreme Court denied the writ on March 19, 2001. *Gray v. United States*, 532 U.S. 919 (2001). On April 13, 2001, Petitioner filed a request for a rehearing. Dkt. 20-11, at 6-17. The Supreme Court summarily denied the request on April 16, 2001. *Gray v. United States*, 532 U.S. 1035 (2001).

F. Clemency Proceedings

The Supreme Court's March 19th denial of certiorari marked completion of the direct appellate review of Petitioner's capital court-martial. On March 24, 2003, Petitioner's lead counsel was notified, at the direction of The Judge Advocate General of the Army ("TJAG"), that because Petitioner's case had completed direct appellate review, the case was being transferred to the Secretary of the Army. Petitioner's counsel was provided the opportunity to submit any matters he wished for the TJAG to consider and was advised that the TJAG would include those matters with Petitioner's case. Counsel was simultaneously notified of the regulatory right to request the assistance of detailed military defense counsel for pursuing federal habeas review as well as the fact that Petitioner's case would not be held in abeyance beyond May 8, 2003.[11]

On April 23, 2003, Petitioner's lead counsel stated, "I have represented [Petitioner] since 1999 when I gave him my word that I would continue to represent him *pro bono* until his case was finally resolved." Dkt. 20-1, at 33. Counsel requested and received a 30-day extension to submit clemency matters.

[11] At some time prior to this notification, Petitioner's senior army defense counsel submitted a request to delay clemency matters. TJAG denied this request on April 14, 2003.

At some time prior to April 23rd, Petitioner's senior Army defense counsel made a formal request for funding of a mitigation expert. This request was denied by TJAG on April 24, 2003.

On June 9, 2003, the extended deadline to submit clemency matters, Petitioner's lead counsel again provided notice that, "[a]s *pro bono* counsel for [Petitioner], I write to inform you that I will be unable to submit written matters to [TJAG] on behalf of [Petitioner] by today." Dkt. 20-1, at 34. Counsel assured TJAG that he would provide any written materials within the next 30 days. It appears from the record that nothing was ever submitted.

On January 26, 2006, Petitioner's lead counsel requested funding from the Army to visit Petitioner. The Army denied this request, noting that there was no fiscal authority for civilian travel, but did provide Petitioner the assistance of detailed military defense counsel.

On September 12, 2006, the Army notified Petitioner's lead counsel that the Department of Justice was reviewing Petitioner's death sentence as part of the clemency process. On August 1, 2007, the Army notified Petitioner's counsel that the Department of Justice had completed its review of the case file and had returned the file to the White House.

G. Presidential Approval

On July 28, 2008, the President of the United States approved Petitioner's death sentence. Petitioner was notified of this decision the same day. On August 1, 2008, Petitioner made known his intention to seek review of his convictions and death sentence in the federal courts. On August 14, 2008, TJAG approved a request granting Petitioner additional detailed military defense counsel. That same day, Petitioner was notified that the Secretary of the Army had signed the execution order directing Petitioner's execution to take place on December 10, 2008, at 2200 hours.

On November 14, 2008, Petitioner's lead civilian counsel and detailed military defense counsel submitted a request that Petitioner's execution be stayed pending final disposition of federal habeas corpus review of his convictions and sentence. The request was denied.

H. Federal Civil Review

1. Motion for Stay of Execution and Petition for Habeas Corpus

On November 25, 2008, Petitioner's lead civilian counsel filed a Motion for Appointment of Counsel and Stay of Execution in the United States District Court for the District of Kansas. Dkt. 2. Judge Rogers granted the motion on November 26, 2008. Dkt. 7. That same day, the United States filed a Motion for Reconsideration (Dkt. 10), which was denied on December 5, 2008. Dkt. 13. On December 19, 2008, Judge Rogers issued a scheduling order granting Petitioner an additional 100 days from the date of the original appointment of counsel to prepare a petition for writ of habeas corpus. Dkt. 15. On April 1, 2009, Petitioner filed his Petition, alleging the following eighteen (18) assignments of error:

Ground 1: During peacetime, allowing a member of the armed forces to be sentenced to death by a court-martial panel of less than twelve, when there is no fixed panel size, promotes unreliability, undermines the right to an impartial fact finder and sentencer and creates an arbitrary factor in violation of the Fifth, Sixth, and Eighth Amendments.

Ground 2: In a capital court-martial during peacetime, the convening authority's power to hand-pick military subordinates –whose careers he can directly and immediately affect and control – to serve as court members violates the Fifth and Eighth Amendments.

Ground 3: An appellate court cannot *assume* that the trial judge made a determination as to whether trial counsel's explanation was credible or pretextual pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), without conducting a further hearing on the issue, when the trial judge ruled on Petitioner's *Batson* claim without even requiring the prosecutor to provide a race neutral explanation for the challenge.

Ground 4: Petitioner was denied the right to a fair and impartial jury when the military judge improperly granted government challenges for cause against two members.

Ground 5: The peremptory challenge procedure in the military justice system, which allows the government to remove one juror without cause, is unnecessary and subject to abuse in its application and was abused in Petitioner's case.

Ground 6: Petitioner was denied his rights under the Fifth, Sixth, and Eighth Amendments because the panel member selection pool in Petitioner's case did not include any females.

Ground 7: The military judge improperly denied a defense motion for a mistrial based on trial counsel's comments on Petitioner's right to remain silent.

Ground 8: The military judge precluded the sentencing panel from considering Petitioner's background as a basis for a sentence less than death in violation of the Fifth, Sixth, and Eighth Amendments.

Ground 9: Article 18 of the UCMJ and R.C.M. 201(f)(l)(c), which require trial by members in a capital case, violates the Fifth, Sixth, and Eighth Amendment guarantees of due process and a reliable verdict.

Ground 10: R.C.M. 1004's prohibition against guilty pleas in capital court-martial deprived Petitioner of a critical mitigating factor and caused other irreparable prejudice in violation of the Fifth, Sixth, and Eighth Amendments.

Ground 11: Petitioner was denied his Sixth Amendment right to effective assistance of counsel at his capital court-martial.

Ground 12: Petitioner's appellate counsel rendered ineffective assistance of counsel in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

Ground 13: The military judge improperly instructed the panel jury in violation of Petitioner's Fifth, Sixth, and Eighth Amendment rights.

Ground 14: The military judge denied resources necessary to retain expert services in criminal investigation to assist the defense in violation of the Fifth, Sixth, and Eighth Amendments.

Ground 15: The aggravating factor stated in R.C.M. 1004(c)(7)(i) is vague, fails to sufficiently clarify the factor involved, and does not narrow the class of persons eligible for the death penalty, and is therefore invalid under the Eighth Amendment.

Ground 16: Based on the Supreme Court's reasoning in *Ring v. Arizona*, 536 U.S. 584 (2002), Congress unconstitutionally delegated to the President the power to enact the functional equivalent of elements of capital murder, a purely legislative function.

Ground 17: The proportionality review in this case was insufficient as a matter of law in violation of the Fifth, Sixth, and Eighth Amendments.

Ground 18: The manner in which the government would carry out Petitioner's execution violates the Eighth Amendment.

Dkt. 17. The government filed its Answer and Return on May 1, 2009.

On May 8, 2009, Judge Rogers assigned Petitioner his current civilian defense counsel. Three days later, on May 11, 2009, counsel filed a Motion to Amend and Supplement the current scheduling order (Dkt. 26), which was granted on June 18, 2009, allowing Petitioner until September 30, 2009, to file his Traverse. Dkt. 33. On September 18, 2009, Petitioner filed a motion seeking to continue this deadline (Dkt. 36), which was granted on September 25, 2009, extending Petitioner's time to file his Traverse until November 30, 2009. Dkt. 38. On November 19, 2009, Petitioner again sought a Motion to Continue this deadline (Dkt. 39), which was granted on December 1, 2009, extending Petitioner's deadline to December 20, 2009. Dkt. 41. Petitioner filed his Traverse on December 18, 2009, alleging his original eighteen (18) assignments of error as well as three additional assignments of error:

Ground 19: Petitioner was denied his rights to due process, to a fair sentencing proceeding, to a public trial, and against cruel and unusual punishment, as guaranteed by the Fifth, Sixth, and Eighth Amendments, where the President, acting in a judicial role, approved Petitioner's death sentence in reliance upon confidential reports that were not disclosed to Petitioner.

Ground 20: Petitioner was denied his rights under the Sixth and Eighth Amendments when he was tried while incompetent to proceed and when he was incompetent during portions of the appellate proceedings. The trial court and the appellate courts erred in not conducting competency proceedings and prior counsel were ineffective for failing to litigate Petitioner's obvious incompetence.

Ground 21: The military courts lacked jurisdiction to capitally prosecute Petitioner for crimes committed in the United States during peacetime because Congress' ostensible grant of jurisdiction to prosecute such crimes under the UCMJ was unconstitutional in violation of the separation of powers and the Fifth, Sixth, and

Eighth Amendments; the military courts likewise lacked jurisdiction to capitally prosecute Petitioner in the absence of an adequate service connection to his crimes.

Dkt. 42.

On that same day, Petitioner filed a Motion to Amend and Supplement his Petition for Habeas Corpus. Dkt. 43. In response, the government filed a Motion to Strike Petitioner's Traverse. Dkt. 44. On September 30, 2010, Judge Rogers granted Petitioner's motion to amend and supplement and denied the government's motion to strike. Dkt. 47. The government filed its Response to Petitioner's Traverse on November 1, 2010. Dkt. 48.

2. Petition for Extraordinary Relief in the Nature of a Writ of Coram Nobis

On November 10, 2011, Petitioner requested an extension of time to file his reply to the government's Response to the Traverse. Dkt. 49. However, before the court could rule on this motion, Petitioner filed a Petition for Extraordinary Relief in the Nature of a Writ of *Coram Nobis* with the ACCA, alleging the following issues:

Claim 1: Petitioner was denied his rights under the Sixth and Eighth Amendments when he was tried while incompetent to proceed and when he was incompetent during portions of the appellate proceedings; the trial court and the appellate courts erred in not conducting competency proceedings; and prior counsel were ineffective for failing to litigate Petitioner's obvious incompetence.

Claim 2: Petitioner was denied his rights to due process, to a fair sentencing proceeding, to a public trial, and against cruel and unusual punishment, as guaranteed by the Fifth, Sixth, and Eighth Amendments, where the President, acting in a judicial role, approved Petitioner's death sentence in reliance upon confidential reports that were not disclosed to Petitioner.

Claim 3: The proportionality review in this case was insufficient as a matter of law in violation of the Fifth, Sixth, and Eighth Amendments; Petitioner's death sentence must be reversed because the death sentencing system as applied is unconstitutional and his sentence was the result of racial discrimination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Claim 4: Petitioner was denied his right to effective assistance of counsel where appellate counsel articulated and argued the incorrect standard of law regarding Petitioner's claim under *Witherspoon v. Illinois*.

Claim 5: Petitioner was denied his Sixth Amendment right to effective assistance of counsel at his capital sentencing.

Claim 6: Petitioner's appellate counsel rendered ineffective assistance of counsel in violation of the Fifth, Sixth, and Eighth Amendments.

Claim 7: During peacetime, allowing a member of the Armed Forces to be sentenced to death by a court-martial panel of less than twelve, when there is no fixed panel size, promotes unreliability, undermines the right to an impartial fact finder and sentence, and creates an arbitrary factor in violation of the Fifth, Sixth, and Eighth Amendments.

Dkts. 51-1, 51-2.[12] On February 14, 2011, Petitioner notified the court of the new military proceedings and requested that the court await the action of the military courts before taking any dispositive action. Dkt. 51. Judge Rogers granted this request on September 29, 2011, providing Petitioner with thirty (30) days to report on the status of his pending petition in the military courts. Dkt. 55.

On October 27, 2011, Petitioner notified the court that the military courts had yet to take any action on the pending petition for writ of error *coram nobis* and requested that the court continue its stay. Dkt. 58. On January 26, 2012, the ACCA denied the petition for *coram nobis*. Dkt. 59-1. The CAAF affirmed this denial on April 17, 2012. Dkt. 64-1. Petitioner filed his Reply to the government's Response to the Traverse on November 1, 2012. Dkt. 69.

[12] These assignments of error correspond to habeas corpus assignments of error 20, 19, 17, 4(d), 11, 12, and 1, respectively.

3. Continuation of Federal Habeas Corpus Review

This case was reassigned to the undersigned on November 7, 2014. On December 22, 2014, the court notified counsel of its wish to conduct an in-person status conference and ordered Petitioner to be present. Dkt. 72. The court also provided counsel with specific questions it wished to have addressed. Dkt. 74. The hearing was conducted on April 2, 2015, in Kansas City, Kansas.[13]

IV. Analysis

It goes nearly without saying that the situation this court now finds itself in is, at the very least, exceptional. We have arrived here through what likely could not have been imagined in 1988 at the time of Petitioner's sentencing. For this court, which has had the opportunity to review Petitioner's case only since November 2014, it has been overwhelming. For counsel, both the government and those who have walked alongside Petitioner, it can undoubtedly be said to be the same. And for Petitioner, who has had to live with a cloud of uncertainty around what is quite literally a matter of life and death, words likely cannot describe.

Through its review, this court has become intimately familiar with the details of Petitioner's case. By necessity, it has reviewed the details of Petitioner's crimes. By obligation and responsibility, it has painstakingly gone through, with a fine-tooth comb, the procedural history, which is replete with extraordinary effort on the part of counsel, on both sides, and, indeed, multiple bites at the apple for Petitioner. The court has read a mountain of case law, none of which provides a concrete answer, and some of which only muddies the waters further.

[13] The hearing was initially scheduled for February 23, 2015, but due to inclement weather, Petitioner's counsel was unable to travel to Kansas City on that date. April 2, 2015, was the first date available for all parties and the court to reschedule.

It has met with counsel formally on the record. It has seen Petitioner face to face. It has likewise looked into the faces of the surviving loved ones of Petitioner's victims and, in one instance, into the face of Petitioner's sole surviving victim herself.

There is some argument to be made that "death is different." The court hardly needs to be reminded of this: *of course* death is different. It is the only sentence that courts of this nation may impose that, once carried out, cannot be taken back. It cannot be corrected; it cannot be altered. As the Supreme Court has stated, "[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

Despite the murkiness of the present situation and, truth be told, despite the extraordinary delay now present in this case, the court remains bound by this very simple notion: "[o]ur duty to search for constitutional error with painstaking care is *never* more exacting than it is in a capital case." *Burger v. Kemp*, 483 U.S. 776, 785 (1987). Unfortunately, this is perhaps easier said than done. With little precedent, a near-indecipherable roadmap, and no clear directional signposts, this court is forced to draw upon every single resource available; it is obligated to leave no stone unturned, no option unconsidered.

The majority of Petitioner's claims, without a doubt, cannot be granted relief here. Of all the considerations present in this case, one of the most overarching is this:

> The military has its own independent criminal justice system governed by the Uniform Code of Military Justice. 10 U.S.C. 801-940. The code is all-inclusive and provides, inter alia, for courts-martial, appellate review, and limited certiorari review by the United States Court . . . Because of the independence of the military court system, special considerations are involved when federal civil courts collaterally review court-martial convictions.

Lips v. Commandant, 997 F.2d 808, 810 (10th Cir. 1993). This means "[w]hen a military decision has dealt 'fully and fairly' with an allegation raised in a habeas petition, 'it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence.'" *Watson v. McCotter*, 782 F.2d 143, 144 (10th Cir. 1986) (quoting *Burns v. Wilson*, 346 U.S. 137, 142 (1953)).

But, contrary to the government's argument, not *all* of Petitioner's claims are subject to the full and fair consideration standard. Petitioner raised the following claims which were not before the military courts on direct review:

1. Petitioner was denied his rights under the Sixth and Eighth Amendments when he was tried while incompetent to proceed and when he was incompetent during portions of the appellate proceedings; the trial court and the appellate courts erred in not conducting competency proceedings; and prior counsel were ineffective for failing to litigate Petitioner's obvious incompetence.

2. Petitioner was denied his rights to due process, to a fair sentencing proceeding, to a public trial, and against cruel and unusual punishment, as guaranteed by the Fifth, Sixth, and Eighth Amendments, where the President, acting in a judicial role, approved Petitioner's death sentence in reliance upon confidential reports that were not disclosed to Petitioner.

3. The proportionality review in this case was insufficient as a matter of law in violation of the Fifth, Sixth, and Eighth Amendments; Petitioner's death sentence must be reversed because the death sentencing system as applied is unconstitutional and his sentence was the result of racial discrimination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

4. Petitioner was denied his right to effective assistance of counsel where appellate counsel articulated and argued the incorrect standard of law regarding Petitioner's claim under *Witherspoon v. Illinois*.

5. Petitioner's appellate counsel rendered ineffective assistance of counsel in violation of the Fifth, Sixth, and Eighth Amendments for appellate counsel's failure to conduct an adequate investigation into Petitioner's background.

But that does not end the matter. At the time Petitioner's petition for habeas corpus was filed, these claims would have been deemed procedurally defaulted. The law on this matter was clear: the federal courts "will not review [a Petitioner's] claims on the merits if they were not raised at all in the military courts." *Watson*, 782 F.2d at 145.

But this is where the situation gets tricky. Perhaps anticipating that this would be the court's response, Petitioner sought extraordinary relief in the nature of a writ of error *coram nobis* before the ACCA raising these exact issues. Dkts. 51-1, 51-2.[14] After a Supreme Court ruling in 2009 in *United States v. Denedo*, 556 U.S. 904 (2009), the military court has jurisdiction to entertain a petition for a writ of error *coram nobis* to challenge its earlier, and final, decision affirming a criminal conviction.

In *Denedo*, the respondent, a native of Nigeria having become a lawful permanent resident, was charged by military authorities with conspiracy, larceny, and forgery, in violation of the UCMJ. 556 U.S. at 907. Denedo ultimately entered a guilty plea and was convicted of conspiracy and larceny and sentenced to three months' confinement, a bad-conduct discharge, and a reduction to the lowest enlisted pay grade. *Id*. He appealed to the ACCA on the ground that the sentence was unduly severe. *Id*. In 2006, the Department of Homeland Security commenced removal proceedings against Denedo based upon his court-martial conviction. *Id*. To avoid deportation, Denedo again attempted to challenge his conviction, even though it had been final for more than eight years, on the basis of ineffective assistance of counsel. *Id*. He

[14] Petitioner's writ of error *coram nobis* actually raised six issues in total but, as discussed below, the court finds that two of those issues were presented to the military courts on direct appeal and are therefore subject to full and fair consideration.

argued that the military court could set aside its earlier decision by issuing a writ of error *coram nobis*. *Denedo*, 556 U.S. at 908.

The Supreme Court ultimately granted certiorari and held that "Article I military courts have jurisdiction to entertain *coram nobis* petitions to consider allegations that an earlier judgment of conviction was flawed in a fundamental aspect." *Id*. at 917. However, the Court cautioned that "an extraordinary remedy may not issue when alternative remedies, such as habeas corpus, are available." *Id*. at 911.

A grant of a petition for a writ of error *coram nobis* is rare. It has, however, served as a useful tool in potential habeas default situations at least once in this Circuit. In *Thomas v. United States Disciplinary Barracks*, 2009 WL 3125962 (D. Kan. Sept. 29, 2009), the petitioner was convicted, *in absentia*, of two specifications of attempted rape of a minor, rape, two specifications of forcible sodomy with a minor, two specifications of assault consummated by a battery upon a child under sixteen years, adultery, and indecent acts upon a minor, in violation of the UCMJ. 2009 WL 3125962, at *1. He was sentenced to fifty years confinement, reduction to the grade of Private E-1, forfeiture of all pay and allowances, and a dishonorable discharge. *Id*.

The petitioner was subsequently arrested in Germany, returned to military custody, and convicted of attempted voluntary manslaughter, wrongful appropriation, two specifications of assault consummated by a battery, and desertion. *Id*. He was sentenced to thirteen years confinement, forfeiture of all pay and allowances, and a dishonorable discharge. *Id*.

Prior to his capture and arrest, the petitioner submitted a brief to the ACCA alleging six assignments of error relating to his original convictions. *Id*. at *1. In September 1997, he filed a motion requesting to supplement his original appeal to the ACCA with *Grostefon* errors. *Thomas*, 2009 WL 3125962, at *1. The ACCA granted the motion. *Id*. In 1999, the petitioner

submitted a supplemental brief to the ACCA alleging that he was prejudiced by the testimony of an expert witness, as well as a motion for a new trial. *Id*. The ACCA granted partial relief by dismissing some of the petitioner's charges as multiplicious, but denied the motion for a new trial. *Id*. The petitioner then sought review in the CAAF. *Id*. at *2. The CAAF granted the request for review but affirmed the decision of the ACCA. *Thomas*, 2009 WL 3125962, at *2. The United States Supreme Court denied the petitioner's request for certiorari. *Id*.

The petitioner then filed an action in this court for habeas corpus relief, which the court denied in July 2004. *Id*. The petitioner appealed but, during the pendency of that appeal, voluntarily sought, and was granted, an abatement to allow him to seek relief in the ACCA, which the petitioner did through a petition for a writ of error *coram nobis*. *Id*. The ACCA summarily denied the petition in 2006. *Id*. In light of the ACCA's decision, the Tenth Circuit remanded the petitioner's habeas claim to the district court. *Thomas*, 2009 WL 3125962, at *2.

On remand, the district court found that because the petitioner had sufficiently briefed and argued his habeas claims in his writ of error *coram nobis*, those claims were subject to the full and fair consideration standard. This was true, the district court stated, even though the CAAF *summarily* denied the writ. *Id*. The petitioner's habeas petition was therefore denied. *Id*.

Petitioner finds himself in much the same situation as did the petitioner in *Thomas* after his writ for *coram nobis* was denied, with the exception of a slight twist. In its opinion on Petitioner's writ of error *coram nobis*, the ACCA held as follows:

> In the military justice system, a Petitioner must satisfy several, stringent threshold requirements in order to obtain *coram nobis* relief:
>
> > (1) the alleged error is of the most fundamental character; (2) no remedy other than *coram nobis* is available to rectify the consequences of the error; (3) valid reasons exist for not seeking relief earlier; (4) the new information presented in the petition could not have been discovered

> through the exercise of reasonable diligence prior to the original judgment; (5) the writ does not seek to reevaluate previously considered evidence or legal issues; and (6) the sentence has been served, but the consequences of the erroneous conviction persist.
>
> Here, Petitioner cannot traverse these threshold requirements because there is, as a matter of law, a remedy other than *coram nobis* available to him. Although in our view Petitioner's right to habeas corpus in the military justice system has ended, this is not so for Article III courts. In fact, Petitioner has filed a writ of habeas corpus in federal district court and the government does not dispute the jurisdictional basis for doing so. The merits of Petitioner's claims are now for the federal district court, rather than this court, to decide.
>
> We are cognizant of the preference for military courts to hear issues potentially of first impression, but we are also mindful of clear constraints imposed on this court by statute and our superior court.

Dkt. 59-1, at 3 (internal citations omitted).

Further, on appeal to the CAAF, the CAAF issued what appears to be its own judgment, rather than merely affirming the opinion of the ACCA. It stated:

> On consideration of the writ-appeal petition, it is, by the Court . . . ORDERED:
>
> That said writ-appeal petition is hereby denied without prejudice to raising the issue asserted after the U.S. District Court for the District of Kansas rules on the pending habeas petition.

Dkt. 64-1.

This court has considered at length not only what precedent binds it to do, but also what is *correct*. In doing so, the court has weighed numerous factors, including, but not limited to: (1) the preference for military courts to rule on the merits on all issues arising from its jurisdiction and prior decisions, (2) the procedural process of this case, (3) the opinions of the military courts, and (4) the fact that this case has been pending essentially since Petitioner's sentencing in 1988, nearly three decades ago.

After full consideration, the court holds, as is explained in detail below, that Petitioner's Assignments of Error 1-3, 4(a)-(c), 5-11, and 13-16 are denied on the ground of full and fair consideration. The "coram nobis" assignments of error, which include habeas assignments of error 1, 4(d), 12, 17, 19, and 20 are denied without prejudice. Assignments of error 18 and 21 are denied.

A. Claim 21: Jurisdiction

The court first addresses Petitioner's habeas assignment of error 21, alleging the following:

> The military courts lacked jurisdiction to capitally prosecute Petitioner for crimes committed in the United States during peacetime because Congress' ostensible grant of jurisdiction to prosecute such crimes under the UCMJ was unconstitutional in violation of the separation of powers and the Fifth, Sixth, and Eighth Amendments; the military courts likewise lacked jurisdiction to capitally prosecute Petitioner in the absence of an adequate service connection to his crimes.

This is an issue of first impression. Indeed, perhaps the only case where such an issue *could have* arisen would have been in *Loving v. United States*, 517 U.S. 748 (1996), in which the petitioner (who, like Petitioner here, was sentenced to death for capital crimes committed in the United States during peacetime) challenged the constitutionality of Congressional delegation to the President the task of prescribing the aggravating factors required by Eighth Amendment jurisprudence. However, the petitioner in *Loving* did not challenge the power of the court-martial to try him for a capital offense committed during peacetime. *Loving*, 517 U.S. at 774 (Stevens, J., concurring); *see also* Justice Scalia's concurrence at 775.

A review of the Court's decision reveals that it did, even tacitly, lay out the foundation should such a challenge ever arise:

Although American courts-martial from their inception have had the power to decree capital punishment, they have not long had the authority to try and to sentence members of the Armed Forces for capital murder committed in the United States in peacetime. In the early days of the Republic the powers of courts-martial were fixed in the Articles of War. Congress enacted the first Articles in 1789 by adopting in full the Articles promulgated in 1775 (and revised in 1776) by the Continental Congress. Act of Sept. 29, 1789, ch. 25, § 4, 1 Stat. 96. (Congress reenacted the Articles in 1790 "as far as the same may be applicable to the constitution of the United States," Act of Apr. 30, 1790, ch. 10, § 13, 1 Stat. 121.) The Articles adopted by the First Congress placed significant restrictions on court-martial jurisdiction over capital offenses. Although the death penalty was authorized for 14 military offenses, American Articles of War of 1776, reprinted in W. Winthrop, Military Law and Precedents 961 (reprint 2d ed.1920) (hereinafter Winthrop); Comment, Rocks and Shoals in a Sea of Otherwise Deep Commitment: General Court–Martial Size and Voting Requirements, 35 Nav. L.Rev. 153, 156–158 (1986), the Articles followed the British example of ensuring the supremacy of civil court jurisdiction over ordinary capital crimes that were punishable by the law of the land and were not special military offenses. 1776 Articles, § 10, Art. 1, reprinted in Winthrop 964 (requiring commanders, upon application, to exert utmost effort to turn offender over to civil authorities). Cf. British Articles of War of 1765, § 11, Art. 1, reprinted in Winthrop 937 (same). That provision was deemed protection enough for soldiers, and in 1806 Congress debated and rejected a proposal to remove the death penalty from court-martial jurisdiction. Wiener, Courts–Martial and the Bill of Rights: The Original Practice I, 72 Harv. L.Rev. 1, 20–21 (1958).

Over the next two centuries, Congress expanded court-martial jurisdiction. In 1863, concerned that civil courts could not function in all places during hostilities, Congress granted courts-martial jurisdiction of common-law capital crimes and the authority to impose the death penalty in wartime. Act of Mar. 3, 1863, § 30, 12 Stat. 736, Rev. Stat. § 1342, Art. 58 (1875); *Coleman v. Tennessee*, 97 U.S. 509, 514 (1879). In 1916, Congress granted to the military courts a general jurisdiction over common-law felonies committed by service members, except for murder and rape committed within the continental United States during peacetime. Articles of War of 1916, ch. 418, § 3, Arts. 92–93, 39 Stat. 664. Persons accused of the latter two crimes were to be turned over to the civilian authorities. Art. 74, 39 Stat. 662. *In 1950, with the passage of the UCMJ, Congress lifted even this restriction.* Article 118 of the UCMJ describes four types of murder subject to court-martial jurisdiction, two of which are punishable by death:

Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he—

(1) has a premeditated design to kill;

> (2) intends to kill or inflict great bodily harm;
>
> (3) is engaged in an act which is inherently dangerous to another and evinces a wanton disregard of human life; or
>
> (4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson;
>
> is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct. 10 U.S.C. § 918.

Loving, 517 U.S. at 752-54 (internal citations omitted) (emphasis added). The important part of this passage is the Supreme Court's recognition that, in 1950, with the passage of the UCMJ, Congress allowed, perhaps by its silence, prosecutions by the military for capital crimes committed during peacetime.

This court is well aware that it must "give Congress the highest deference in ordering military affairs." *Id*. at 768. *See also Weiss v. U.S.*, 510 U.S. 163, 176 (1994) ("the tests and limitations of due process may differ because of the military context. The difference arises from the fact that the Constitution contemplates that Congress has plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline. Judicial deference thus is at its apogee when reviewing congressional decisionmaking in this area."). Therefore, given the status of the UCMJ and the lack of any contradictory directive from Congress, this court finds that the military courts did indeed have jurisdiction over Petitioner's crimes.

Petitioner further challenges jurisdiction on the basis that there existed no adequate service connection to his crimes. The Supreme Court has been very clear on the need for a service connection in *non*-capital cases: it is no longer necessary. In 1987, the Court held that

"the proper exercise of court-martial jurisdiction over an offense [depends] on one factor: the military status of the *accused*." *Solorio v. United States*, 483 U.S. 435, 439 (1987) (emphasis added); *accord Williams v. Weathersbee*, 280 Fed. Appx. 684, 686 (10th Cir. 2008) (holding that "[t]he proper exercise of court-martial jurisdiction over an offense [turns] on one factor: the military status of the accused.").

To be certain, there was a time when the Supreme Court departed from the "military status" test and adhered to the view "that a military tribunal may not try a serviceman charged with a crime that has no service connection." *Solorio*, 483 U.S. at 440 (citing *O'Callahan v. Parker*, 395 U.S. 258 (1969), wherein the Court held that a serviceman's off-base sexual assault on a civilian could not be tried by court-martial). However, the Supreme Court was very clear in *Solorio* that this "service connection" test has been overturned, holding "we have decided that the service connection test announced in that decision should be abandoned." *Id*. at 441.

While the Supreme Court has never announced whether the "military status" test applies in capital cases, there is no indication that the Court would be inclined to revert back to the "service connection" requirement for these cases. Therefore, the court finds that Petitioner's argument that the military courts lacked jurisdiction due to a lack of a service connection is without merit. As a result, habeas assignment of error 21 is denied in its entirety.

B. Full and Fair Consideration

Most of Petitioner's claims must be denied because the military courts have already dealt with them. "The federal civil courts have jurisdiction over habeas corpus actions filed under § 2241 by prisoners convicted in the courts-martial." *Piotrowski v. Commandant*, 2009 WL 5171780, at *3 (D. Kan. Dec. 22, 2009); *see also Burns*, 346 U.S. at 139 ("In this case, we are dealing with habeas corpus applicants who assert . . . that they have been imprisoned and

sentenced to death as a result of proceedings which denied them basic rights guaranteed by the Constitution. The federal civil courts have jurisdiction over such applications."). Review of these actions, however, "is very limited." *Piotrowski*, 2009 WL 5171780, at *3. This is so because, as noted above, "the military has its own independent criminal justice system governed by the Uniform Code of Military Justice." *Lips*, 997 F.2d at 810. Historically, review "was limited to the question of jurisdiction." *Fricke v. Sec'y of Navy*, 509 F.3d 1287, 1289 (10th Cir. 2007). In *Burns*, the United States Supreme Court expanded the scope of review, holding that "civil courts could consider constitutional claims regarding such proceedings if the military courts had not 'dealt fully and fairly' with such claims." *Id*. (quoting *Burns*, 346 U.S. at 142). The Tenth Circuit has articulated a four-part standard for reviewing military convictions in habeas corpus:

> To assess the fairness of the consideration, our review of a military conviction is appropriate only if the following four conditions are met: (1) the asserted error is of substantial constitutional dimension, (2) the issue is one of law rather than disputed fact, (3) no military considerations warrant a different treatment of constitutional claims, and (4) the military courts failed to give adequate consideration to the issues involved or failed to apply proper legal standards.

Thomas v. United States Disciplinary Barracks, 625 F.3d 667, 670-71 (10th Cir. 2012) (citing *Dodson v. Zelez*, 917 F.2d 1250, 1252-53 (10th Cir. 1990)). While the courts in this circuit continue to apply this four-part test, "recent cases have emphasized the fourth consideration as the most important." *Id*. at 671.

When dealing with these factors, the Tenth Circuit has "consistently held full and fair consideration does not require a detailed opinion by the military court." *Id*. Rather, "an issue is deemed to have been given full and fair consideration when it has been briefed and argued in the military court, even if that court resolved the matter summarily." *Young v. Belcher*, 2012 WL

1308308, at *4 (D. Kan. Mar. 27, 2013) (citing *Thomas*, 625 F.3d at 671); *see also Watson*, 782 F.2d at 145 ("When an issue is briefed and argued before a military board of review, we have held that the military tribunal has given the claim fair consideration, even though its opinion summarily disposed of the issue with the mere statement that it did not consider the issue meritorious or requiring discussion.").

"Where the military courts have given 'full and fair consideration' to the claims presented in a petition, a federal court may not grant habeas relief 'simply to re-evaluate the evidence,' and should deny the petition." *Piotrowski*, 2009 WL 5171780, at *3 (quoting *Lips*, 997 F.2d at 811); *see also Burns*, 345 U.S. at 142 (holding that "when a military decision has dealt fully and fairly with an allegation raised in [a petition for habeas corpus], it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence."). "The burden is on the Petitioner to establish that the review in the courts-martial was 'legally inadequate.'" *Piotrowski*, 2009 WL 5171780, at *3 (quoting *Watson*, 782 F.2d at 144).[15]

1. Petitioner's Argument Against Full and Fair Consideration

At the outset, this court notes that it is Petitioner's belief that the full and fair consideration standard should not apply to *any* of his claims, arguing that the test "does not apply and would be inadequate to give effect to a military capital petitioner's habeas corpus rights where the underlying crimes were committed in the United States during peacetime." Dkt. 42, at

[15] It has also long been settled that a federal court "will not entertain petitions by military prisoners unless all available military remedies have been exhausted." *Piotrowski*, 2009 WL 5171780, at *3 (quoting *Schlesinger v. Councilman*, 420 U.S. 738 (1975)). "If a claim was not presented to the military courts, the federal habeas court considers the claim waived and not subject to review." *Id*. at *11-12 (citing *Watson*, 782 F.2d at 145). "To obtain federal habeas review of claims based on trial errors to which no objection was made at trial, or of claims that were not raised on appeal, a state prisoner must show both cause excusing the procedural default and actual prejudice resulting from the error." *Lips*, 997 F.2d at 812 (citing *Murray v. Carrier*, 477 U.S. 478, 491 (1986)). This rule has also been applied to challenges to a court-martial conviction. *Id*. (citing *Wolff v. United States*, 737 F.2d 877 (10th Cir. 1984)).

16. Petitioner provides lengthy discussion about how civil courts have always maintained preeminence over military courts in the prosecution of capital crimes committed in the United States during peacetime, how the constitutional requirement of heightened reliability for all capital cases necessitates this court's substantive review of Petitioner's claims, and how recent Supreme Court law underscores the necessity of substantive review by an Article III court. Dkt. 42, at 16-30. Additionally, Petitioner argues that the military courts' consideration of some of his assignments of error on direct appeal was merely cursory in nature.

Whether these arguments carry any merit is not for this court to now say. This court can find no indication by Congress, by our Supreme Court, or by the Tenth Circuit that the full and fair consideration test is either: (1) no longer applicable, or (2) not applicable to capital crimes committed in the United States during peacetime. Therefore, the court holds that full and fair consideration is the proper analysis for those of Petitioner's claims that were presented to the military courts.

2. Grounds 2, 3, 5-10, and 13-17

In Grounds 2, 3, 4(a)-(c), 5-10, and 13-16, Petitioner alleges as follows:

Claim 2 — In a capital court-martial during peacetime, the convening authority's power to handpick military subordinates – whose careers he can directly and immediately affect and control – to serve as court members violates the Fifth and Eighth Amendments.

Claim 3 — The trial court failed to conduct a proper analysis under *Batson* when the court granted the prosecutor's peremptory strike without having the prosecutor present a race-neutral explanation for the strike or considering such a reason, in violation of Petitioner's constitutional rights.

Claim 5 — The peremptory challenge procedure in the military justice system, which allows the government to remove one juror without cause, is unnecessary and subject to abuse in its application and was abused in Petitioner's case.

Claim 6	Petitioner was denied his rights under the Fifth, Sixth, and Eighth Amendments because the panel member selection pool in Petitioner's case did not include any females.
Claim 7	The military judge improperly denied a defense motion for a mistrial based on the prosecutor's comments on Petitioner's right to remain silent.
Claim 8	The military judge precluded the sentencing panel from considering Petitioner's background as a basis for a sentence less than death in violation of the Fifth, Sixth, and Eighth Amendments.
Claim 9	Article 18 of the UCMJ and R.C.M. 201(F)(1)(c), which require trial by members in a capital case, violate the Fifth, Sixth, and Eighth Amendments.
Claim 10	The rules of prohibition against guilty pleas in capital courts-martial deprive Petitioner of a critical mitigating factor and caused other irreparable prejudice in violation of the Fifth, Sixth, and Eighth Amendments.
Claim 13	The military judge improperly instructed the panel jury in violation of Petitioner's Fifth, Sixth, and Eighth Amendment rights.
Claim 14	The military denied resources necessary to the defense to retain investigative assistance in violation of the Fifth, Sixth, and Eighth Amendments.
Claim 15	The aggravating factor stated in R.C.M. 1004(c)(7)(i) is vague, fails to sufficiently clarify the factor involved, and does not narrow the class of persons eligible for the death penalty, and is therefore invalid under the Eighth Amendment.
Claim 16	Based on the Supreme Court's reasoning in *Ring v. Arizona*, 536 U.S. 584 (2002), Congress unconstitutionally delegated to the President the power to enact the functional equivalent of elements of capital murder, a purely legislative function.

In each of these cases, the assignment of error now before this court is nearly identical, if not *verbatim*, what was before the military courts on direct appeal. *See* pages 6-25, *supra*. The record shows that Petitioner's briefing on these issues is voluminous. There is also evidence that

the military courts conducted hearings on the issues after which both the ACCA and the CAAF issued in-depth opinions demonstrating that, even where the issue was summarily dismissed, both courts had considered in great detail Petitioner's arguments. *See Gray I*, 37 M.J. 730; *Gray II*, 37 M.J. 751; *Gray III*, 51 M.J. 1.

The court therefore finds that Petitioner's habeas Grounds 2, 3, 4(a)-(c), 5-10, and 13-16 were briefed and argued before the military courts and thus were fully and fairly considered by those courts. No argument is made that incorrect legal standards were applied. Accordingly, these assignments of error are denied.

3. Ground 1

In Ground 1 of his habeas claim, Petitioner alleges as follows:

> During peacetime, allowing a member of the armed forces to be sentenced to death by a court-martial panel of less than twelve, when there is no fixed panel size, promotes unreliability, undermines the right to an impartial fact finder and sentencer, and creates an arbitrary factor in violation of the Fifth, Sixth, and Eighth Amendments.

Petitioner raised, briefed, and argued a portion of this assignment of error to the ACCA in Ground XVIII and to the CAAF in Ground XXXIX. He raised this assignment of error in its entirety in his petition for writ of certiorari to the Supreme Court and in his petition for writ of error *coram nobis*. At the very least, Petitioner's claim alleging constitutional violations for the *actual* composition of his court-martial panel, as briefed and argued before the ACCA and the CAAF on direct appellate review, is subject to full and fair consideration and is therefore denied.

With regard to the *systemic* failure of the UCMJ to fix a court-martial panel size for peacetime capital crimes, which was presented to the Supreme Court on direct appeal, even Petitioner admits that

> the unconstitutionality of a capital jury of unfixed size with as few as five members is *inextricable* from the claim that, in this capital case, Petitioner was sentenced unconstitutionally by a jury of six. Further, with the CAAF's permission, Petitioner filed a Petition for Reconsideration before that court, in which he raised this aspect of his claim. The CAAF *denied* the petition, but provided no explanation for its action.

Dkt. 42, at 55 (emphasis added).

This court would agree that what could be perceived as two separate assignments of error is really just one single assignment of error that has previously been briefed and argued before the military courts and at least briefed to the Supreme Court. As such, the entire current assignment of error is subject to full and fair consideration and is therefore denied.

4. Ground 11

In Ground 11, Petitioner alleges as follows:

> Petitioner was denied his Sixth Amendment right to effective assistance of counsel at his capital sentencing.

More specifically, Petitioner alleges that his sentencing counsel was ineffective for failing to conduct an adequate investigation into Petitioner's life history, mental illness, and mental illness history. Petitioner claims that sentencing counsel unreasonably cut short their life-history investigation, thereby preventing them from presenting evidence such as Petitioner's prenatal trauma, his mother's repeated neglect and abandonment, his improper exposure to sexuality as a young child, his brain damage, his family history of psychotic illness, of his own childhood mental illness, or of his severe and intensifying mental illness while in the Army. Furthermore, Petitioner argues, his sentencing counsel only presented a meager and misleading "hint" of the abuse that Petitioner suffered in his own home.

Whether or not any of this *substantive* evidence is relevant is not for *this* court to now say. Petitioner's appellate counsel did indeed present, as an assignment of error to both the

ACCA (ground XXIII) and the CAAF (ground VI), sentencing counsel's failure to adequately investigate the mitigating circumstances of Petitioner's traumatic family background and Petitioner's history with mental health issues. *See Gray I*, 37 M.J. at 745-47; *Gray III*, 51 M.J. at 18-19. Because this claim was therefore briefed and argued before the military courts, and because the military courts issued a ruling, this claim is now foreclosed by full and fair consideration and is therefore denied.

C. Remaining "Coram Nobis" Claims

This leaves only those claims that have not been adjudicated on the merits by the military courts, namely:

1. Petitioner was denied his rights under the Sixth and Eighth Amendments when he was tried while incompetent to proceed and when he was incompetent during portions of the appellate proceedings; the trial court and the appellate courts erred in not conducting competency proceedings; and prior counsel were ineffective for failing to litigate Petitioner's obvious incompetence.

2. Petitioner was denied his rights to due process, to a fair sentencing proceeding, to a public trial, and against cruel and unusual punishment, as guaranteed by the Fifth, Sixth, and Eighth Amendments, where the President, acting in a judicial role, approved Petitioner's death sentence in reliance upon confidential reports that were not disclosed to Petitioner.

3. The proportionality review in this case was insufficient as a matter of law in violation of the Fifth, Sixth, and Eighth Amendments; Petitioner's death sentence must be reversed because the death sentencing system as applied is unconstitutional and his sentence was the result of racial discrimination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

4. Petitioner was denied his right to effective assistance of counsel where appellate counsel articulated and argued the incorrect standard of law regarding Petitioner's claim under *Witherspoon v. Illinois*.

5. Petitioner's appellate counsel rendered ineffective assistance of counsel in violation of the Fifth, Sixth, and Eighth Amendments for appellate

> counsel's failure to conduct an adequate investigation into Petitioner's background.[16]

It would be very tempting to do here what the district court did in *Thomas* with claims that had only been presented to the military courts via a petition for writ of error *coram nobis* and find them subject to full and fair consideration. The procedural posture of these two cases is very similar: claims presented for the first time in a federal petition for habeas corpus, which would ordinarily be subject to procedural default, were taken back to the military courts on an extraordinary writ in an attempt to have the claims heard on the merits.[17] The one difference, which might be key, is that where the military court in *Thomas summarily* denied the writ of error *coram nobis* (*Thomas*, 2009 WL 3125962, at *3), the ACCA here ruled as follows:

> In the military justice system, a Petitioner must satisfy several, stringent threshold requirements in order to obtain *coram nobis* relief:
>
> > (1) the alleged error is of the most fundamental character; (2) no remedy other than *coram nobis* is available to rectify the consequences of the error; (3) valid reasons exist for not seeking relief earlier; (4) the new information presented in the petition could not have been discovered through the exercise of reasonable diligence prior to the original judgment; (5) the writ does not seek to reevaluate previously considered evidence or legal issues; and (6) the sentence has been served, but the consequences of the erroneous conviction persist.
>
> Here, Petitioner cannot traverse these threshold requirements because there is, as a matter of law, a remedy other than *coram nobis* available to him. Although in our view Petitioner's right to habeas corpus in the military justice system has ended, this is not so for Article III courts. In fact, Petitioner has filed a writ of habeas corpus in federal district court and the government does not dispute the

[16] To be clear, these assignments of error *were* raised before the military courts, just not on direct review. Rather, these are *coram nobis* claims 1-4, and 6, respectively.

[17] The court notes here that while the review in *Thomas* seems somewhat different than it is here, it is, for all intents and purposes, identical. In fact, Thomas' non-exhausted claims *were* originally procedurally defaulted by the district court. It was not until the appeal that he decided to try and correct this. Here, the process has simply skipped the step of this court first procedurally defaulting Petitioner's claims because Petitioner filed the writ of error *coram nobis* while his habeas claims were still pending before the district court.

> jurisdictional basis for doing so. The merits of Petitioner's claims are now for the federal district court, rather than this court, to decide.
>
> We are cognizant of the preference for military courts to hear issues potentially of first impression, but we are also mindful of clear constraints imposed on this court by statute and our superior court.

Dkt. 59-1, at 3 (internal citations omitted).

The ACCA's reference to "a remedy other than *coram nobis*" is somewhat illusory: for claims that were properly presented to the military courts on direct review, this court defers to the full and fair consideration standard. *See Burns*, 346 U.S. at 139. However, the ACCA's language clearly indicates that the Court did *not* rule on the merits of the *coram nobis* issues. Accordingly, and contrary to the government's argument in this case, this language precludes the application of the full and fair consideration standard to these *coram nobis* issues.

For those issues that were not first presented to the military courts, this court assigns procedural default and, absent a showing of cause and actual prejudice, must dismiss the claims. *See Piotrowski*, 2009 WL 5171780, at *3; *see also Lips*, 997 F.2d at 812. With this well-established law, it is unclear what remedy, exactly, the ACCA expected this court to provide.

The only other option, which comes from a single line in *Burns*, is for this court to consider the ACCA's decision a manifest refusal to consider the *coram nobis* claims, in which case, the district court could hear these claims *de novo*. The Court in *Burns* stated that "[h]ad the military courts manifestly refused to consider those claims, the District Court was empowered to review them *de novo*." 346 U.S. at 142. The Tenth Circuit has recognized this language as well. *See Faison v. Belcher*, 496 Fed. Appx. 890, 891-92 (10th Cir. Sept. 25, 2012) (holding that the district court "will entertain military prisoners' claims if they were raised in the military courts and those courts refused to consider them."). Such a remedy is rarely, if ever, invoked, let alone

used, undoubtedly because of the great deference the federal courts grant to decisions arising out of the nation's military courts.[18]

The lack of caselaw on this subject is both helpful and unhelpful to this court. It is unhelpful because there is no precedent, no guidelines to help explain what seems to be a sentence of such import. But, ironically, it is helpful for that very same reason. This court cannot help but conclude that if this were truly a workable solution, a *proper* solution, that examples would be plentiful. After all, it would allow military petitioners to have multiple, if not infinite, bites at the apple.

"Empowered" does not mean "required." The language from *Burns* is permissive, not mandatory. Had the Supreme Court desired the federal district courts to hear such claims *de novo* always and without reservation, it would have and could have used stronger language.

Moreover, this court is aware of the history of the relationship between the military and the civil courts. The Supreme Court in *Burns* stated it best:

> The statute which vests federal courts with jurisdiction over applications for habeas corpus from persons confined by the military courts is the same statute which vests them with jurisdiction over the applications of persons confined by the civil courts. But in military habeas corpus the inquiry, the scope of the matters open for review, has always been more narrow than in civil cases. Thus the law which governs a civil court in the exercise of its jurisdiction over military habeas corpus applications cannot simply be assimilated to the law which governs the exercise of that power in other instances. It is sui generis; it must be so, because of the peculiar relationship between the civil and military law.
>
> Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment. This Court has played no role in its development; we have exerted no supervisory power over the courts which enforce it; the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the

[18] Neither the submissions of the parties, nor the research of this court, have identified any instance of a district court actually employing *de novo* review of a military court's decision.

> civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress.
>
> Indeed, Congress has taken great care both to define the rights of those subject to military law, and provide a complete system of review within the military system to secure those rights. Only recently the Articles of War were completely revised, and thereafter, in conformity with its purpose to integrate the armed services, Congress established a Uniform Code of Military Justice applicable to all members of the military establishment. These enactments were prompted by a desire to meet objections and criticisms lodged against court-martial procedures in the aftermath of World War II. Nor was this a patchwork effort to plug loopholes in the old system of military justice. The revised Articles and the new Code are the result of painstaking study; they reflect an effort to reform and modernize the system—from top to bottom.
>
> Rigorous provisions guarantee a trial as free as possible from command influence, the right to prompt arraignment, the right to counsel of the accused's own choosing, and the right to secure witnesses and prepare an adequate defense. The revised Articles, and their successor—the new Code—also establish a hierarchy within the military establishment to review the convictions of courts-martial, to ferret out irregularities in the trial, and to enforce the procedural safeguards which Congress determined to guarantee to those in the Nation's armed services. And finally Congress has provided a special post-conviction remedy within the military establishment, apart from ordinary appellate review, whereby one convicted by a court-martial, may attack collaterally the judgment under which he stands convicted.

Burns, 346 U.S. at 139-41.

It is because of this long-held deference to the military courts that this court must reluctantly abstain from hearing Petitioner's *coram nobis* claims *de novo*. Furthermore, this court notes language from *Piotrowski*:

> The Court in *Denedo* also specifically held that the rule of finality . . . does not prohibit military appellate courts' collateral review of their earlier judgment. If respondent's argument were correct, that a military prisoner cannot obtain post-appeal review in a military court when civil court review is available under § 2241, *Denedo* would effectively be nullified, since § 2241 is generally available to any military prisoner.

2009 WL 5171780, at *12. Moreover, it seems clear that the CAAF, the highest military appellate court, left open the door for Petitioner to present these claims to the military courts

again upon learning what *this* court would do by denying the petition for *coram nobis without* prejudice.

Finally, the ACCA did not manifestly refuse to address Petitioner's *coram nobis* claims. Rather, the military court determined that the procedural vehicle of *coram nobis* precluded relief in light of the pending civilian habeas action. With the dismissal of the present case, that procedural defect is removed and the ACCA may address the merits of Petitioner's *coram nobis* claims.

The court is conscious of the delay reflected in the present case and has no wish to further defer justice. Both Petitioner and his victims deserve better. Nevertheless, the court is obliged to pursue the strong preference expressed in *Burns* that the military courts first be given every reasonable opportunity to address the merits of a military prisoner's post-conviction arguments. Civil courts must, if possible, *review* the decisions of the military courts, not seek to substitute their own judgment in place thereof.

Further, consideration of the additional *coram nobis* claims *de novo* would serve to encourage repeated or delayed presentation of claims to the military courts. Dismissal of the additional issues without prejudice, on the other hand, serves to discourage such belated, piecemeal assertions of error. The policy expressed in *Burns* contemplates the orderly presentation of *all* issues to the military courts, and only afterwards presented by habeas corpus to civilian courts.

Therefore, the court finds that Petitioner's five "*coram nobis*" claims, as set forth above, are dismissed without prejudice.

D. Ground 18

Finally, in Ground 18 of his petition, Petitioner alleges that "the manner in which the military would carry out Petitioner's execution violates the Eighth Amendment." Both in his original petition and the Traverse, Petitioner notes that the challenge to the means and methods used to potentially execute Petitioner can now be brought in a separate civil rights action under 42 U.S.C. § 1983. *See Hill v. McDonough*, 126 S.Ct. 2096 (2006). He admits that he only raises the assignment of error in his petition to avoid potential procedural default if and when such a separate proceeding becomes necessary.

Unfortunately for Petitioner, he failed to raise this assignment of error *anywhere* in the military courts, including in his extraordinary petition for *coram nobis* relief. It has "long been settled that a federal court 'will not entertain petitions by military prisoners unless all available military remedies have been exhausted.'" *Piotrowski*, 2009 WL 5171780, at *3 (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975)). "If a claim was not presented to the military courts, the federal habeas court considers the claim waived and not subject to review." *Id.* at *11-12 (citing *Watson*, 782 F.2d at 145).

Therefore, because Petitioner never raised this argument on review to the military courts, direct appeal or otherwise, this court has no choice but to deem the claim waived. As such, Petitioner's Claim 18 is denied.[19]

[19] The court is aware that the government challenges this assignment of error on several other grounds, including the fact that Petitioner cannot bring a § 1983 claim against the Department of the Army nor the Commandant because neither of these parties act under state law and a civil rights action cannot lie against the federal government, its agencies, or employees. The government also argues that Petitioner's claim is meritless and dilatory. Because this court finds sufficient basis to dismiss the claim due to procedural default, it declines to address these additional justifications.

V. Conclusion

In summary, the court makes the following rulings:

(1) Petitioner's habeas assignments of error 1-3, 4(a)-(c), 5-11, and 13-16 are denied on the basis of full and fair consideration.

(2) Petitioner's habeas assignments of error 4(d), 12, and 17-20 (which correspond to *coram nobis* claims 1-4, and 6, respectively), are dismissed without prejudice.

(3) Petitioner's habeas assignments of error 18 and 21 are denied.

IT IS SO ORDERED, this 29th day of September, 2015.

s/J. Thomas Marten
J. THOMAS MARTEN, JUDGE

United States Court of Appeals
for the Armed Forces
Washington, D.C.

Ronald GRAY, Appellant	)	USCA Dkt. No. 12-8017/AR
	)	Crim.App. Dkt. No. 20110093
v.	)	O R D E R
Eric BELCHER, Colonel, U.S. Army, Commandant, U.S. Disciplinary Barracks, Fort Leavenworth, Kansas, Appellee	)	

On consideration of the writ-appeal petition, it is, by the Court, this 17th day of April, 2012,

ORDERED:

That said writ-appeal petition is hereby denied without prejudice to raising the issue asserted after the U.S. District Court for the District of Kansas rules on the pending habeas petition.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

cc: The Judge Advocate General of the Army
Appellant Defense Counsel (NOLAS, Esq.)
Appellate Government Counsel (FISHER)

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
JOHNSON, COOK, and BURTON
Appellate Military Judges

Private E1 RONALD GRAY
United States Army, Petitioner
v.
Colonel ERIC BELCHER,
Commandant, United States Disciplinary Barracks
and
THE UNITED STATES, Respondents

ARMY MISC 20110093[1]

For Petitioner: Colonel Mark Tellitocci, JA; Captain Stephen J. Rueter, JA; Timothy P. Kane, Esq.; Shawn Nolan, Esq.; Billy H. Nolas, Esq. (on brief).

For Respondents: Colonel Michael E. Mulligan, JA; Major Amber J. Williams, JA; Major Adam S. Kazin, JA (on brief).

26 January 2012

OPINION OF THE COURT AND ACTION
ON PETITION FOR EXTRAORDINARY RELIEF
IN THE NATURE OF A WRIT OF CORAM NOBIS

JOHNSON, Senior Judge:

This is a petition for extraordinary relief in the nature of a writ of *coram nobis* based on several alleged errors discovered after petitioner's court-martial and appellate proceedings. We hold that petitioner cannot meet the threshold criteria for *coram nobis* review. Petitioner has other remedies available to him as a matter of law, but not within the military justice system.

I

In 1988, petitioner was tried by a general court-martial composed of officer and enlisted members. Contrary to his pleas, petitioner was convicted of the premeditated murder of Ms. KAR and Private LLV, as well as the attempted murder of Private MALN, in violation of Articles 118, and 80, Uniform Code of Military Justice, 10 U.S.C. §§ 918, and 880 (1982) [hereinafter UCMJ, 1982]. Petitioner was also convicted of rape (3 specifications), robbery (2 specifications), and sodomy

[1] The docket number for petitioner's direct appeal is ACMR 8800807.

(2 specifications) with respect to the above victims, as well as burglary and larceny of another person, in violation of Articles 120, 122, 125, 129, and 121, UCMJ, 1982, respectively. The convening authority approved his sentence to death, a dishonorable discharge, total forfeitures and reduction to E1.

The petitioner's conviction and sentence were affirmed by both the Army Court of Military Review, which is this court's predecessor, and the United States Court of Appeals for the Armed Forces. *United States v. Gray*, 37 M.J. 730 (A.C.M.R. 1992); *United States v. Gray*, 51 M.J. 1 (C.A.A.F. 1999), *aff'g* 37 M.J. 751 (A.C.M.R. 1993), *cert. denied*, 532 U.S. 919 (2001). On 28 July 2008, the President of the United States approved petitioner's sentence to death and ordered it executed. The Secretary of the Army scheduled petitioner's execution for 10 December 2008; however, before it could be carried out, the United States District Court for the District of Kansas granted a stay of execution in anticipation of petitioner filing a petition for extraordinary relief in the nature of a writ of habeas corpus. Thereafter, petitioner filed a writ of habeas corpus, which is still pending before that court.

On 11 February 2011, petitioner filed with this court the instant petition for extraordinary relief in the nature of a writ of *coram nobis*. We then ordered the government to show cause why the writ should not issue, and it filed an answer brief on 14 March 2011. Petitioner filed a reply brief on 13 June 2011. Petitioner is currently in confinement at the United States Disciplinary Barracks, Fort Leavenworth, Kansas.

II

In this case, there is a final judgment as to the legality of the proceedings under Article 71(c)(1), UCMJ, and the case is final under Article 76, UCMJ. *See Loving v. United States (Loving I)*, 62 M.J. 235, 244 (C.A.A.F. 2005). Therefore, this court is without jurisdiction to entertain collateral review under a writ of habeas corpus. *Loving v. United States (Loving II)*, 64 M.J. 132, 135 (C.A.A.F. 2006) (quoting *Loving I*, 62 M.J. at 236).[2] *See* H.R. Rep. No. 81-491, at 35 (1949) ("Subject only to a petition for a writ of habeas corpus in Federal court, [Article 76] provides for the finality of court-martial proceedings and judgments"). Although a case is final pursuant to Article 76, UCMJ, a service court may nonetheless entertain a writ of *coram nobis* "in aid of" its jurisdiction. *Denedo II*, 556 U.S. at ___, 129 S. Ct. at 2223–24; *Denedo I*, 66 M.J. at 120–21, 125; 28 U.S.C. § 1651(a) (2010).

[2] Although the reasoning in *Denedo v. United States (Denedo I)*, 66 M.J. 114 (C.A.A.F. 2008), and *United States v. Denedo (Denedo II)*, 556 U.S. 904, 129 S. Ct. 2213 (2009), could be construed to reach all forms of collateral review, their mutual holding is much more limited. Those cases extended collateral review beyond Article 76 only for writs of *coram nobis*.

In the military justice system, a petitioner must satisfy several, stringent threshold requirements in order to obtain *coram nobis* relief:

> (1) the alleged error is of the most fundamental character; (2) no remedy other than *coram nobis* is available to rectify the consequences of the error; (3) valid reasons exist for not seeking relief earlier; (4) the new information presented in the petition could not have been discovered through the exercise of reasonable diligence prior to the original judgment; (5) the writ does not seek to reevaluate previously considered evidence or legal issues; and (6) the sentence has been served, but the consequences of the erroneous conviction persist.

Denedo I, 66 M.J. at 126 (citing *United States v. Morgan*, 346 U.S. 502, 512–13 (1954), and *Loving I*, 62 M.J. at 252–53). Here, petitioner cannot traverse these threshold requirements because there is, as a matter of law, a remedy other than *coram nobis* available to him.[3] Although in our view petitioner's right to habeas corpus in the military justice system has ended, this is not so for Article III courts. In fact, petitioner has filed a writ of habeas corpus in federal district court and the government does not dispute the jurisdictional basis for doing so. The merits of petitioner's claims are now for the federal district court, rather than this court, to decide.

We are cognizant of the preference for military courts to hear issues potentially of first impression,[4] but we are also mindful of clear constraints imposed on this court by statute and our superior court.

III

The Petition for Extraordinary Relief in the Nature of a Writ of Error *Coram Nobis* is DENIED.

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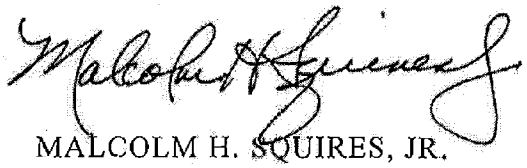
[3] Where a petitioner is in custody, he or she can obtain relief through a writ of habeas corpus and, therefore, cannot establish that no remedy other than *coram nobis* is available. *See Denedo I*, 66 M.J. at 126 (noting that the petitioner in that case did not have habeas corpus available to him because he was not in custody).

[4] *See generally Denedo I*, 66 M.J. at 121–122 (stating that "courts within the military justice system should have an opportunity to consider challenges to court-martial proceedings prior to review by courts outside the military justice system").

Judges COOK and BURTON concur.

FOR THE COURT:



MALCOLM H. SQUIRES, JR.
Clerk of Court

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before the Court Sitting En Banc*

Private RONALD GRAY,
United States Army, Petitioner
v.
UNITED STATES, Respondent

ARMY MISC 20160775

ORDER

On consideration of petitioner's "Motion for Reconsideration" filed with this court on 7 June 2017. Petitioner's request for reconsideration is DENIED.

DATE: 20 June 2017

FOR THE COURT:

JOHN P. TAITT
Chief Deputy Clerk of Court

CF: JALS-DA
JALS-GA
JALS-CCR
JALS-CCZ
JALS-CR4
JALS-TJ
Petitioner
Respondent

* Senior Judge MULLIGAN is taking no part in this case as a result of his disqualification.

STATUTORY PROVISIONS INVOLVED IN THIS CASE

10 U.S.C. § 866

(a) Each Judge Advocate General shall establish a Court of Criminal Appeals which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (f). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Criminal Appeals may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Criminal Appeals established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel.

(b) The Judge Advocate General shall refer to a Court of Criminal Appeals the record in each case of trial by court-martial—

(1) in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more; and
(2) except in the case of a sentence extending to death, the right to appellate review has not been waived or an appeal has not been withdrawn under section 861 of this title (article 61).

(c) In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

(d) If the Court of Criminal Appeals sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) The Judge Advocate General shall, unless there is to be further action by the President, the Secretary concerned, the Court of Appeals for the Armed Forces, or the Supreme Court, instruct the convening authority to take action in accordance with the decision of the Court of Criminal Appeals. If the Court of Criminal Appeals has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

(f) The Judge Advocates General shall prescribe uniform rules of procedure for Courts of Criminal Appeals and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the offices of the Judge Advocates General and by Courts of Criminal Appeals.

(g) No member of a Court of Criminal Appeals shall be required, or on his own initiative be permitted, to prepare, approve, disapprove, review, or submit, with respect to any other member of the same or another Court of Criminal Appeals, an effectiveness, fitness, or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces should be retained on active duty.

(h) No member of a Court of Criminal Appeals shall be eligible to review the record of any trial if such member served as investigating officer in the case or served as a member of the court-martial before which such trial was conducted, or served as military judge, trial or defense counsel, or reviewing officer of such trial.

10 U.S. C. § 867

(a) The Court of Appeals for the Armed Forces shall review the record in—

(1) all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death;

(2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review; and

(3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

(b) The accused may petition the Court of Appeals for the Armed Forces for review of a decision of a Court of Criminal Appeals within 60 days from the earlier of—

(1) the date on which the accused is notified of the decision of the Court of Criminal Appeals; or

(2) the date on which a copy of the decision of the Court of Criminal Appeals, after being served on appellate counsel of record for the accused (if any), is deposited in the United States mails for delivery by first-class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in his official service record.

The Court of Appeals for the Armed Forces shall act upon such a petition promptly in accordance with the rules of the court.

(c) In any case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals. In a case which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces, that action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review. The Court of Appeals for the Armed Forces shall take action only with respect to matters of law.

(d) If the Court of Appeals for the Armed Forces sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) After it has acted on a case, the Court of Appeals for the Armed Forces may direct the Judge Advocate General to return the record to the Court of Criminal Appeals for further review in accordance with the decision of the court. Otherwise, unless there is to be further action by the President or the Secretary concerned, the Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the court has ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charges.

10 U.S.C. § 867a

(a) Decisions of the United States Court of Appeals for the Armed Forces are subject to review by the Supreme Court by writ of certiorari as provided in section 1259 of title 28.

The Supreme Court may not review by a writ of certiorari under this section any action of the Court of Appeals for the Armed Forces in refusing to grant a petition for review.

(b) The accused may petition the Supreme Court for a writ of certiorari without prepayment of fees and costs or security therefor and without filing the affidavit required by section 1915(a) of title 28.

28 U.S.C. § 1259

Decisions of the United States Court of Appeals for the Armed Forces may be reviewed by the Supreme Court by writ of certiorari in the following cases:

(1) Cases reviewed by the Court of Appeals for the Armed Forces under section 867(a)(1) of title 10.

(2) Cases certified to the Court of Appeals for the Armed Forces by the Judge Advocate General under section 867(a)(2) of title 10.

(3) Cases in which the Court of Appeals for the Armed Forces granted a petition for review under section 867(a)(3) of title 10.

(4) Cases, other than those described in paragraphs (1), (2), and (3) of this subsection, in which the Court of Appeals for the Armed Forces granted relief.

28 U.S.C. § 1651

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

RONALD GRAY,
Private, U.S. Army,

Appellant,

v.

UNITED STATES,

Appellee.

Army Misc. 20160775

USCA Misc. Dkt. No. _____

THIS IS A CAPITAL CASE

NOTICE OF MANDATORY REVIEW

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

Appellant, RONALD GRAY, having an approved sentence to death, is entitled to mandatory review by this court under Article 67(a)(1) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867(a)(1), of the 9 May 2017 decision by the Army Court of Criminal Appeals (ACCA) denying Appellant's Petition for Extraordinary Relief in the Nature of a Writ of Coram Nobis.

The UCMJ requires that this court "*shall review* the record in--(1) *all cases* in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death." 10 U.S.C. § 867(a)(1) (emphasis added). Section 867(a)(1) applies here because this coram nobis proceeding is part of the case in which Appellant was sentenced to death. *See United States v. Denedo*, 556 U.S. 904, 912-13 (2009) ("Because coram nobis is but an extraordinary tool to correct a legal or factual error, an application for the writ is properly viewed as a belated extension of the original proceeding during which the error allegedly transpired."); *United States v. Morgan*, 346 U.S. 502, 505 n.4 (1954) (coram nobis is "a step in the criminal case and not, like habeas corpus where relief is sought in a separate case and record, the beginning of a separate civil proceeding"). Accordingly, and as this court has recognized, even a collateral appeal in a final capital case triggers "this Court's mandatory jurisdiction over every capital case in Article 67(a)(1)." *Loving v. United States*, 62 M.J. 235, 246 n.75

(C.A.A.F. 2005).

Because the government has declined to initiate certification of mandatory review by the Judge Advocate General pursuant to this court's Rules 18(a)(3) and 23, undersigned counsel is filing this notice of mandatory review together with the attached appendices.

Appellant was notified of ACCA's decision on 9 May 2017 and was notified of ACCA's denial of his motion to reconsider on 20 June 2017. This appeal is timely.

For the above reasons, and based on his right to due process, Appellant objects to this court construing this Notice as a petition for discretionary review. Nonetheless, if the court so construes the Notice, Appellant additionally states:

A detailed history of the case is set forth in Petitioner-Appellant's *Petition for Extraordinary Relief in the Nature of Coram Nobis*, which is being filed with this court on the same date as this Notice.

The relief sought by Appellant is for this court to receive briefing, hear argument, and substantively review ACCA's 9 May 2017 denial of Appellant's coram nobis petition. Upon substantive review, Appellant requests that his convictions and sentenced be vacated and a new court martial proceeding be ordered.

The issues presented in this appeal are:

A.1. Whether, before federal habeas review, the military courts have and should exercise their jurisdiction to hear a death-sentenced servicemember's unexhausted claims for relief, where the legal and/or factual bases of the claims arose after or in conjunction with the direct appeal and statutory approval of his convictions and death sentences?

A.2. Whether the Army Court of Criminal Appeals erred in ruling that coram nobis review is never available to death-sentenced servicemembers because their sentences necessarily have not yet been served?

A.3. Whether the Army Court of Criminal Appeals erred in ruling that Appellant was required to seek relief earlier where he has diligently sought review in both the federal and military courts since presidential approval of his sentence?

B. Whether Appellant was not mentally competent during trial and appellate proceedings where evidence available to prior counsel about Appellant's background and mental health was not collected and presented to relevant experts or to the military courts, and where the sole surviving trial expert and two of the three members of Appellant's post-trial sanity board have now concluded, in light of this information, that Appellant was not competent?

C. Whether the Army Court of Criminal Appeals erred in construing Appellant's claims of ineffective assistance of prior counsel for failing to collect and present available mitigating evidence as duplicative of a direct appeal claim where the present claims are based on a new factual proffer?

D. Whether military capital punishment as applied is unconstitutional and Appellant's death sentence the result of racial discrimination?

E. Whether the military death penalty now violates evolving standards of decency under the Eighth Amendment?

The facts relevant to this appeal are set forth in Petitioner-Appellant's *Petition for Extraordinary Relief in the Nature of Coram Nobis*, which is being filed with this court on the same date as this Notice; in the appendices thereto; and in the attached exhibits of filings from the proceedings in ACCA.

A.1. The Military Courts Have and Should Exercise Coram Nobis Jurisdiction

The writ of coram nobis is available to correct constitutional errors underlying a conviction and sentence, including errors due to the ineffective assistance of counsel. *United States v. Denedo*, 556 U.S. 904, 129 S. Ct. 2213 (2009) ("*Denedo II*"); *see also United States v. Morgan*, 346 U.S. 502, 513 (1954); *Garrett v. Lowe*, 39 M.J. 293, 295 (C.M.A. 1994). The military courts' statutory jurisdiction to "review[] court martial cases," 10 U.S.C. § 866(a), includes jurisdiction to consider petitions for writs of coram nobis in cases that have become final. *Denedo II*, 129 S. Ct. at 2222.

The All Writs Act gives the military courts authority to issue the writ whenever "necessary or appropriate." 28 U.S.C. § 1651(a); *Denedo II*, 129 S. Ct at 2221. The "necessary or appropriate" standard is flexible and equitable, and this court should find that this threshold is met here, for at least three reasons.

First, a death-sentenced servicemember undoubtedly maintains significant constitutional rights during direct appeal proceedings in the military courts and

during the subsequent statutory approval process. *See, e.g.*, *Martinez v. Ryan*, 566 U.S. 1, 13 (2012) (discussing "the direct-appeal process, where counsel is constitutionally guaranteed"). However, no process currently exists for the servicemember to obtain relief for violations of those constitutional rights. This court should invoke its authority over military court proceedings to clarify that death-sentenced servicemembers may receive one round of substantive review of claims of constitutional error arising after or in conjunction with direct appeal. Appellant's case has been caroming between the military and federal courts for more than six years. Future litigants and the courts will avoid such inefficiency and confusion only if this court announces a clear process for adjudicating these claims.

Second, with a single round of post-finality review, the military process would conform to the predominant approach used by state courts in post-conviction proceedings. Such conformity would enable the military courts to draw on well-established legal principles and case law in adjudicating post-conviction claims. As this court has elsewhere recognized, it is "necessary and appropriate" for the military courts to adopt the standards and processes used in state court post-conviction proceedings. *See United States v. Loving*, 64 M.J. 132, 144-45 (C.A.A.F. 2006).

Third, as the history of this case shows, the federal courts are extremely

reluctant to review such claims before the military courts have done so. *See Gray v. Gray*, 645 F. App'x 624, 625-26 (10th Cir. 2016); *Gray v. Gray*, No. 5:08-cv-3289-JTM, 2015 WL 5714260 at *35-36 (D. Kan. 2015). Federal courts are *required* to defer to the military courts in adjudicating claims of error in military proceedings. *See Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975) ("[I]mplicit in the congressional scheme embodied in the [UCMJ] is the view that the military court system generally is adequate to and responsibly will perform its assigned task" and the federal courts therefore "will not entertain habeas petitions by military prisoners *until all available military remedies have been exhausted*.") (emphasis added; quotations omitted); *Gusik v. Schilder*, 340 U.S. 128, 131-32 (1950) ("If an available procedure has not been employed to rectify the alleged error which the federal court is asked to correct, any interference by the federal court may be wholly needless."); *Hemphill v. Moseley*, 443 F.2d 322, 325 (10th Cir. 1971) ("Ordinarily habeas corpus petitions from military prisoners must not be entertained by federal civilian courts until all available remedies within the military court system have been invoked in vain.") (quoting *Noyd v. Bond*, 395 U.S. 683, 693 (1969)).[1] In light

[1] *See also Piotrowski v. Commandant, USDB*, 2009 WL 5171780, at *13 (D. Kan. Dec. 22, 2009) ("It has long been the established and effective practice of the military appellate courts, like state and federal courts, to exert their authority not only to hear direct appeals but to collaterally review constitutional challenges to their decisions regarding convictions and sentences as well. . . . As a matter of

of this precedent, this court should adopt a process to ensure military court adjudication of claims of constitutional error that arise during or after the direct appeal.

A.2. The Army Court of Criminal Appeals Erred in Ruling That Coram Nobis Relief Is Always Unavailable to Death-Sentenced Servicemembers

ACCA ruled that coram nobis relief is unavailable to Appellant because "his sentence has not been served." App. 1 at 16. *A fortiori*, ACCA's reasoning would preclude coram nobis relief for all death-sentenced and life-sentenced military prisoners.

This ruling failed to apply, and essentially overrules, the "necessary or appropriate" standard of the All Writs Act. 28 U.S.C. § 1651(a). The ruling failed to give effect to the age-old rule that military courts should police their own errors. *See supra*. ACCA's ruling also overlooked that this court's previous dismissals without prejudice essentially invited Appellant, despite his death sentence, to seek coram nobis relief after resolution of his then-pending federal habeas petition. *See* App. 2, Exs. 3 & 4.[2] And the ruling turns on its head the principle that a court's

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comity and judicial efficiency, if nothing else, the military courts should continue to decide collateral challenges in the first instance and have the opportunity to correct their own errors, while applying their expertise in military law.").

[2] Appendix 2 contains Appellant's coram nobis petition submitted to ACCA on 7 December 2016.

"duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (quotation omitted).

A.3. The Army Court of Criminal Appeals Erred in Ruling That Coram Nobis Relief Is Unavailable Because Appellant Was Required to Seek Relief Earlier.

As the federal court previously recognized, Appellant sought habeas relief "quickly" after the President approved his death sentence. *Gray v. Gray*, Order at 4 (D. Kan. Dec. 5, 2008) (App. 3); *see also Gray v. Gray*, Order at 2 (D. Kan. Sept. 30, 2010) (App. 4) ("Under the circumstances of this unique habeas action, the court finds no unjustifiable delay, bad faith, or dilatory motive in petitioner's presentation of his amendments and supplementation of the petition, or any undue prejudice to respondent"). Then, promptly after the government asserted non-exhaustion as a defense to several habeas claims, Appellant filed his first coram nobis petition in the military courts. Appellant has steadfastly sought review of his claims in the military and federal courts ever since.

ACCA nonetheless ruled that coram nobis relief is unavailable because Appellant "fail[ed] to seek relief earlier." App. 1 at 15. ACCA concluded that this court's decision in *Loving v United States*, 62 M.J. 235, 240 (C.A.A.F. 2005) ("*Loving I*") – wherein the court first found that a pre-finality habeas petition was

cognizable in the military courts – *required, upon pain of waiver*, that Appellant raise any collateral claims before the presidential approval of his sentence. ACCA also concluded, without any factual inquiry, that during that time period the Defense Appellate Division ("DAD") was "not burdened by any conflict-of-interest considerations" that hampered DAD counsel from investigating and alleging the ineffectiveness of the DAD chief or other DAD attorneys who represented Appellant during direct appeal.

ACCA's rulings were novel and erroneous. Appellant did not raise his post-conviction claims in the time period between certiorari and presidential approval because there was no requirement that he do so; because the Army refused to authorize funding for his counsel to investigate the case or meet with Appellant; and because Appellant did not know that the time period would extend for seven years, where no previous approval proceedings had taken so long. Under these circumstances, and even if this court were to adopt ACCA's rule for new cases in the future, there is no lawful basis to conclude that Appellant waived or forfeited his claims.

On 19 March 2001, the Supreme Court denied certiorari on Appellant's direct appeal, and on 14 May 2001, the Court denied rehearing. *Gray v. United States*, 532 U.S. 919 (2001). At the time, the law recognized no mechanism for

post-conviction review pending presidential approval of a military death sentence. *See Loving I*, 62 M.J. at 240 (addressing the "question[] of first impression" regarding "whether this Court's jurisdiction continues after completion of the direct review by the Supreme Court and during the period in which the case is pending presidential action under Article 71(a)"); *see also id*. at 242 ("[N]either the Supreme Court nor this Court has addressed the issue as to whether presidential action under Article 71(a) is a prerequisite for a case being final in the context of addressing the jurisdiction of this Court over a capital case.").

On 24 March 2003, the Judge Advocate General (TJAG) notified Appellant that his case was being transferred "to the Secretary of the Army for the action of the President"; that his case would "not be held in abeyance" after 3 May 2003; and that military defense counsel could be detailed to assist with *federal* habeas corpus proceedings. AR0216-17.[3]

In April 2003, TJAG denied Appellant's request for funding for a mitigation investigator. AR0203. In March 2005 or 2006, the Army denied Appellant's pro bono counsel's request for funding to travel to Leavenworth to meet with Appellant.

[3] Documents from the military court record are cited as follows: documents from the "administrative record" of the court martial proceedings are cited as "AR" followed by the relevant Bates stamped page number; the court martial transcript is cited as "Tr." followed by a page number; and the record on appeal is cited as "A" followed by a page number.

AR0220-22.

On 28 July 2008, the President approved Appellant's death sentence, and in November 2008, Appellant initiated federal habeas corpus proceedings and was appointed federal habeas counsel. *See* Order, Case No. 08-3289-RDR at 3 (D. Kan. Nov. 26, 2008) (App. 5).

In the middle of this seven-year interval between certiorari and presidential approval, on 20 December 2005, this court for the first time ruled that military courts have and may exercise jurisdiction to review capital post-conviction claims filed after certiorari but before presidential approval. *Loving I*, 62 M.J. 235. But the court neither adopted nor considered a rule whereby a death row prisoner would waive military review of any claims *not* raised during that time period. *See id.* And since *Loving I*, this court has never endorsed such a rule. To the contrary, this court's rulings in Appellant's prior coram nobis proceedings reflect that military post-conviction review remains available after presidential approval. *See* App. 2, Exs. 3-4.

Even if this court adopted such a rule prospectively, it would undermine basic principles of equity to enforce the rule retroactively against Appellant. Procedural default of collateral review is equitable only where the procedural rule is "firmly established" and "consistently and regularly applied." *Johnson v. Mississippi*, 486

U.S. 578, 587 (1986); *see also Ford v. Georgia*, 498 U.S. 411, 423-24 (1991). Procedural default may not be enforced based on a rule that was not in effect at the time the default purportedly occurred. *See Terrell v. Morris*, 493 U.S. 1, 2 (1989) (per curiam). As Justice Kennedy has explained, "[w]e have not allowed state courts to bar review of federal claims by invoking new procedural rules without adequate notice to litigants who, in asserting their federal rights, have in good faith complied with existing state procedural law." *Beard v. Kindler*, 558 U.S. 53, 63-64 (2009) (Kennedy, J., concurring). This principle should apply equally in military court because "[n]ovelty in procedural requirements cannot be permitted to thwart review." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958).

This conclusion is especially clear given that the military system does not provide counsel or other resources to enable death row prisoners to pursue such review. Appellant's counsel sought, but was denied, the resources to investigate post-conviction claims. *See supra*. The availability of military post-conviction relief in capital cases should not depend on the luck of a death row prisoner, like Mr. Loving, in obtaining pro bono post-conviction counsel who can afford to investigate and litigate substantial claims for relief. *Cf. Martinez*, 556 U.S. at 12 ("While confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial

record.”).

ACCA’s rule would also be impracticable given that a capital petitioner lacks clear notice of, or control over, the length of time that this procedural window may remain open. At any point after certiorari is denied, the President may approve a capital case and close that window. Here, Appellant was informed that his “case will not be held in abeyance after 8 May 2003,” AR0216, yet the approval process then lasted for another five years. Before this case, the entire statutory approval process typically lasted about a year. *See, e.g.*, *Bennett v. Davis*, 267 F.2d 15 (10th Cir. 1959) (thirteen-month approval process); *Day v. Wilson*, 247 F.2d 60, 61 (D.C. Cir. 1957) (fourteen-month approval process). ACCA’s rule is simply unworkable and, if enforced against Appellant, entirely inequitable.

ACCA was likewise misguided in concluding, without any factual inquiry, that DAD counsel were not burdened in investigating and alleging the ineffectiveness of other DAD counsel in the circumstances of this case. From 1988 to 2008, the Defense Appellate Division represented Appellant without interruption. On 8 August 1988, ACCA ordered “the Chief, Defense Appellate Division, and such additional or other appellate counsel as he may assign [to] represent the accused in these proceedings and in any further or related proceedings in the United States Court of Military Appeals.” *See* App. 6; *see also* 10 U.S.C. § 870(c) (providing that

appellate defense counsel shall represent defendants at all levels of review). The Chief obeyed the order and the DAD continued representing Appellant through the President's approval of sentence in 2008. As a DAD Chief has stated, the "Defense Appellate Division has represented petitioner, along with civilian counsel, since his original court-martial." App. 1 at 13 (quoting 4 August 2008 memo from DAD chief to TJAG).

While it is true that numerous individual attorneys assisted the DAD Chief, and that these attorneys typically worked on the case for only a year before being transferred out of the division, that does not change the fact that the DAD, through its chief and other staff, consistently represented Appellant during those two decades. Under these circumstances, ACCA erred in summarily concluding that new individual attorneys who worked on the case "were not burdened by any conflict-of-interest considerations that would have hampered criticism of their predecessors." *Id*. at 15. To the contrary, newly assigned line attorneys would be materially constrained from investigating and alleging that their chief and other division attorneys provided ineffective assistance. *See* 32 C.F.R. § 776.26(a) (counsel "shall not represent a client if . . . [t]here is a significant risk that the representation of one or more clients will be materially limited by the covered attorney's responsibilities to . . . a third person or by a personal interest"). Indeed,

implicit in Appellant's current allegations that appellate counsel failed to adequately investigate and present these claims was the failure of the DAD to commit sufficient resources to the case – and that failure persisted throughout the division's representation of Appellant. A line attorney could not reasonably be expected to investigate and raise such allegations against her own former or current colleagues and chief.

* * * * * *

Appellant below restates and re-alleges, in summary form, the specific claims for relief raised in ACCA for which he seeks review here.

CLAIM 1 APPELLANT WAS DENIED HIS RIGHTS UNDER THE SIXTH AND EIGHTH AMENDMENTS WHEN HE WAS TRIED WHILE INCOMPETENT TO PROCEED AND WHEN HE WAS INCOMPETENT DURING PORTIONS OF THE APPELLATE PROCEEDINGS; THE TRIAL COURT AND THE APPELLATE COURTS ERRED IN NOT CONDUCTING COMPETENCY PROCEEDINGS; AND PRIOR COUNSEL WERE INEFFECTIVE FOR FAILING TO LITIGATE APPELLANT'S INCOMPETENCE

Appellant was incompetent during his trial and appellate proceedings. He suffered from severe mental illness and was incapable of cooperating with and assisting his counsel. Background investigation and consultation with experts by undersigned counsel have revealed profound mental illness. At the time of the crimes, trial, and appeal, Appellant suffered Bipolar Disorder, Manic type, with

severe psychotic episodes, organic brain damage, and Post Traumatic Stress Disorder ("PTSD"). These diagnoses, and their severely debilitating impact on Appellant, have now been confirmed by Appellant's trial psychologist, Ex. 6-4[4]; two of the three experts who evaluated Appellant in a post-trial sanity board, Exs. 6-5 and 6-6; and defense experts retained by current counsel, Exs. 6-2 and 6-3. Appellant has never had a court hearing to consider his competency or to consider the ineffective assistance of counsel he received with respect to this issue. After finding that coram nobis relief was precluded on procedural grounds, ACCA addressed the substance of this claim without evidentiary proceedings and without due regard for Appellant's substantial factual proffer.

A. Legal Principles

The Supreme Court has "repeatedly and consistently recognized that 'the criminal trial of an incompetent defendant violates due process.'" *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996) (quoting *Medina v. California*, 505 U.S. 437, 453 (1992); *Drope v. Missouri*, 420 U.S. 162, 171-72 (1975); *Pate v. Robinson*, 383 U.S. 375, 378 (1966)). The prohibition against subjecting an incompetent person to

[4] These proffers were initially submitted to the federal court as exhibits in support of Appellant's amended habeas petition. Those submissions are attached in full as Exhibit 6 within Appendix 2 to this Notice, and the seventy-five exhibits contained within that pleading are herein cited as "Ex. 6-#." A complete index of those exhibits begins at page 211 of Exhibit 6.

criminal proceedings is a "fundamental component of our criminal justice system." *Cooper*, 517 U.S. at 364 n.20 (quoting *United States v. Cronic*, 466 U.S. 648, 653 (1984)). This fundamental principle of law was violated during Appellant's trial and appellate proceedings.

This right is so fundamental that it must be "protect[ed] even if the defendant has failed to make a timely request for a competency determination." *Cooper*, 517 U.S. at 354 n.4 (citing *Pate*, 383 U.S. at 384). The "trial court must always be alert to circumstances suggesting . . . [that] the accused [is] unable to meet the standards of competence to stand trial." *Drope*, 420 U.S. at 181. When there are indicia of incompetency, *the court must hold a competency hearing*. *Pate*, 383 U.S. at 385.

In safeguarding these rights, trial courts "rel[y] on counsel to bring these matters to [the court's] attention. . . . If counsel fails . . . to alert the court to the defendant's mental status the fault is unlikely to be made up." *Bouchillon v. Collins*, 907 F.2d 589, 597 (5th Cir. 1990). Accordingly, "counsel has a duty to investigate a client's competency" and is ineffective if he fails to do so. *Agan v. Singletary*, 12 F.3d 1012, 1018 (11th Cir. 1994); *see also Williamson v. Ward*, 110 F.3d 1508, 1518 (10th Cir. 1997) (counsel ineffective for failing to investigate his client's competency and for failing to request a hearing). Because incompetency is often "not visible to a layman," counsel's thorough investigation and consultation

with mental health experts is often "the sole hope that it will be brought to the attention of the court." *Bouchillon*, 907 F.2d at 597.

Military courts guarantee that service members who are not competent to stand trial will not do so: "No person may be brought to trial by court-martial if that person is presently suffering from a mental disease or defect rendering him . . . mentally incompetent to the extent that he . . . is unable to understand the nature of the proceedings . . . or to conduct or cooperate intelligently in the defense. . . ." Rule for Courts-Martial ("R.C.M.") 909(a). "An accused is presumed to have been mentally responsible for his offenses and to have the mental capacity to stand trial. . . . However, facts may arise which call these presumptions into question." *United States v. McGuire*, 63 M.J. 678, 680 (A. Ct. Crim. App. 2006) (citing *United States v. Estes*, 62 M.J. 544, 548 (A. Ct. Crim. App. 2005)). Such facts arose here, as described below.

In addition, as an alternative basis for relief, much of the evidence of mental incompetence now being presented to this court is newly discovered. Ordinarily, military courts grant petitions for new trials "only if a manifest injustice would result absent a new trial . . . based on proffered newly discovered evidence." *United States v. Williams*, 37 M.J. 352, 356 (C.M.A. 1993). Given the right circumstances, such as those present here, the court may permit a new trial on the basis of newly

discovered evidence when: (1) the evidence was discovered after the trial; (2) the evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and (3) the newly discovered evidence, if considered by a court-martial in light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused. R.C.M. 1210(f)(2). To the extent that prior counsel were *not* ineffective in failing to collect available evidence in this case, all three of Rule 1210's requirements are met here. *See United States v. Harris*, 61 M.J. 391 (C.A.A.F. 2005) (granting new trial in light of after-discovered evidence of mental impairments of the accused).

B. Appellant Was Incompetent at the Time of Trial and Appellate Proceedings

"The test for determining competency to stand trial is well-established. The trier of fact must consider 'whether [defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him.'" *McGregor v. Gibson*, 248 F.3d 946, 952 (10th Cir. 2001) (quoting *Dusky v. United States*, 362 U.S. 402 (1960)). Under this test, the facts "[t]hat defendant can recite the charges against [him], list witnesses, and use legal terminology are insufficient to demonstrate that he had a rational, as well as factual, understanding of the proceedings." *Id.* (quoting *United States v. Williams*, 113 F.3d 1155, 1159

(10th Cir. 1997)). This is particularly true when there are stark indicia of incompetence, as here. From the first time that he saw Appellant, trial expert Dr. Selwyn Rose reported Appellant's incompetency:

> It is my opinion that Mr. Gray is not presently mentally competent to stand trial. I can't determine whether he knows the nature of the charges against him, but I am convinced he is unable to cooperate with counsel in a rational manner.

Ex. 6-51, Selwyn Rose Letter to Brewer (11/4/87) at 1. Yet counsel never requested a competency hearing before the court, as constitutionally required. Instead, counsel requested a government sanity board and accepted its findings without adequate investigation and without seeking an adversarial hearing.

Two weeks after the request, General Stiner, the convening authority of Appellant's court martial, ordered the sanity board and assigned four members, including Colonel Richard Armitage, who was to be the president of the board. *See* Ex. 6-53, Sanity Board Memorandum (11/23/87). However, the full board never actually convened. Defense counsel agreed to accept the findings of only one member of the board, Colonel Armitage. *See* Ex. 6-54, Sanity Board Report (2/4/88) ¶ 1. Because defense counsel failed to conduct a thorough mitigation and mental health background investigation, Colonel Armitage had little or no life history or mental health history information regarding Appellant, and simply based his conclusions on a clinical interview and discovery materials related to the charged

crimes. As a result, his findings were severely hampered. *See* Ex. 6-4, John Warren, Ph.D., Decl. ¶ 9 ("We had no collateral personal or social or family history, no such medical history and no such mental health history. As a result, our evaluations were rendered unreliable. The lack of collateral data thwarted us and undermined the accuracy of our evaluations. The near complete absence of such background information from counsel for me, Dr. Armitage and Dr. Rose about Appellant stands in stark contrast with my experience of working with other attorneys in capital cases.").[5]

Dr. Warren, who testified at Appellant's penalty phase hearing, has now had the opportunity to review all of the collateral data that could have been made available to experts at the time of the court martial. Had he been provided background information, he would have had substantial doubts about Appellant's competency:

> Without recognizing the episodic nature of Mr. Gray's [Bipolar] illness, we did not properly evaluate Mr. Gray's capacity to appreciate the nature and wrongfulness of his criminal behavior. Nor could we reliably assess Mr. Gray's ability to assist his military counsel and to appreciate the nature of the court martial, and, accordingly, our competency assessment was flawed. The information now available about Mr. Gray raises substantial doubts about his competency to stand trial, which I now hold.

Id. at ¶ 16.

[5] Drs. Armitage and Rose are deceased.

In addition to Dr. Rose's initial indication to counsel that Appellant was incompetent, defense counsel had first-hand knowledge of Appellant's incompetence. Counsel's descriptions of his interactions with Appellant leave little doubt that Appellant was incompetent:

> From the first time I met Mr. Gray, it appeared to me that he had serious mental problems. He frequently talked about hearing voices that told him what to do. I personally thought that he was seriously mentally ill or to put it simply, that he was "crazy." I was very surprised when the psychiatric findings came back with only personality disorders. I was sure there was much more there based on my interactions with him. As a whole, based upon my discussions with Mr. Gray over a period of months, I personally thought he was insane. His behavior was such that he was of little help in assisting in his own defense, often being uncooperative, silent, belligerent or unable or unwilling to focus on his case.
>
> Sometimes when I would visit with Ron, he would be completely incoherent, like he had no idea of what was going on. Other times he would be more lucid. But it was always clear to me that he had mental problems. He seemed to have drastic mood swings. Some days he seemed relatively communicative, but other days he seemed totally out of it and he seemed lacking any sense of reality. I also remember him telling me that at some points during the time period of the crimes, he would hear voices telling him what to do.

Ex. 6-38, Craig Teller Decl. ¶¶ 3-4. Due to his severe mental illness, Appellant could not cooperate with counsel and could not understand the nature of the trial proceedings. Yet, counsel failed to raise an objection based on competency or to request a hearing.

Appellant was likewise incompetent during appellate proceedings.[6] After his conviction and sentence of death, while appellate counsel was preparing his appeal, Appellant was evaluated by Dr. William Kea, then the chief psychologist at the Disciplinary Barracks at Fort Leavenworth. Dr. Kea determined that Appellant was not competent then or at the time of his court martial:

> After conducting this evaluation, I prepared a report with my conclusions. Among other findings, I found that at the time of the alleged criminal conduct, Mr. Gray had a severe mental disease or defect. I also found that he was unable to appreciate the nature or quality of wrongfulness of his conduct. I found that he did not have the mental capacity to cooperate intelligently in the defense both at the time of trial and at the time of my evaluation, which was during the pendency of his appeals.

Ex. 6-5, Kea Decl. ¶ 3; *see also* A2857, Dr. Kea's Initial Report. Thereafter, Dr. Kea participated in a formal post-trial sanity board with Drs. Edwards and Marceau. Dr. Kea's initial findings of incompetence were changed in the final report of the board. Dr. Edwards never saw Dr. Kea's initial report and did not know of those findings. She now has reviewed new background material uncovered by current counsel and has averred: "This new information highlights for me that the

[6] The government has previously alleged that Appellant could not have been incompetent during the appeal because he "personally assert[ed]" *Grostefon* errors. *See* Respondents' Answer, Army Misc. No. 20110093, at 39 & n.169 (filed in this court on 13 April 2011). This allegation is false. The *Grostefon* errors were identified, researched, raised, and briefed solely by counsel. Any continuing dispute of that question can be resolved at a hearing.

conclusions in the initial, undisclosed report of Dr. Kea were correct, i.e., that Mr. Gray was mentally ill and not competent." Ex. 6-6, Edwards Decl. ¶ 7.

Dr. Kea has also now had the opportunity to review the collateral data and background information that could have been made available at the time of the court martial and at the time of his evaluations of Appellant. He too has concluded that his original assessment of Appellant was correct, that the subsequent sanity board findings were flawed, and that Appellant was not competent:

> [I]t is equally clear that, as I stated in my initial report, Mr. Gray was unable to appreciate the nature and quality or wrongfulness of his conduct, and did not have the mental capacity to cooperate intelligently with the defense at either the time of trial or at the time of the sanity board and appellate proceedings.

Ex. 6-5, Kea Decl. ¶ 10.

The record contains inadequate explanation as to why Dr. Kea's initial findings were changed; why the military categorized the initial findings as preliminary when in fact they were Dr. Kea's conclusions based on his professional evaluation; why the findings did not lead to a formal, adversarial competency hearing; or why the initial findings were not shared with all of the other members of the sanity board. Had appellate counsel obtained a competency hearing, there is a reasonable probability that such evidence would have been revealed. Absent a meaningful adversarial process, however, the initial findings of incompetency on

appeal – as with the initial findings of incompetency at trial – were not brought to light. A *Dubay* hearing is appropriate to examine these troubling events.

In addition to the contemporaneous indications of incompetence, Appellant has been evaluated at the request of undersigned habeas counsel by two mental health professionals – Pablo Stewart, M.D., and Richard Dudley, M.D. Appellant has been diagnosed with Bipolar Disorder, Manic type, causing psychotic episodes, a severe mental illness that existed at the time of the crimes, the trial, and the appeal. Dr. Stewart has concluded that Appellant "was afflicted by an extended and severe manic episode with mood-congruent psychotic features beginning in 1986 and ending after his arrest in 1987." Ex. 6-2, Stewart Decl. ¶ 26. Appellant's psychosis and delusions "undermined his ability to distinguish fantasy from reality." *Id.* at ¶ 30. Dr. Dudley concurs: "at the height of his manic, psychotic episodes, Mr. Gray had lost touch with reality and was unable to control himself." Ex. 6-3, Dudley Report at 4.

Appellant has also been diagnosed with organic brain damage and PTSD, which also constitute severe mental impairments. "PTSD is a severe, debilitating and, when untreated, chronic psychiatric impairment." Ex. 6-2, Stewart Decl. ¶ 33. "Mr. Gray's brain damage undermined his cognitive functioning, impairing his ability to think through the consequences of behavior, to control impulses and

emotions, and to have proper, rational judgment." *Id.* at ¶ 46. Such profound mental impairments implicate issues of competency.

Drs. Dudley and Stewart were asked specifically to assess, among other issues, Appellant's competence. Both of these psychiatrists reviewed Appellant's social history, family history, medical history, and history of severe mental illness – information not made available to the military experts who evaluated Appellant at the time of trial and appeal. Both experts concluded that, based upon all of these factors, Appellant's competency to assist his attorneys is in serious doubt:

> [Mr. Gray's] current counsel has also asked me to assess Mr. Gray's competency at the time of his capital proceedings. Retrospective competency determinations are inherently difficult, particularly in assessing the competency of someone like Mr. Gray who suffered from episodes of mania and psychosis. It is clear based on the information I have reviewed that his many significant cognitive and emotional impairments, particularly his active psychoses, limited Mr. Gray's ability to appreciate the gravity and seriousness of his criminal behavior. These impairments likewise would have limited his ability to assist counsel, as his trial counsel has attested, and to appreciate the nature of his capital trial proceedings. I can state with a high degree of confidence, beyond a reasonable certainty, that his overall mental health profile raises serious questions about his trial competency. There are substantial doubts about his competency at that time, given all the objective data. The evaluations conducted at the time of trial do not resolve these doubts in favor of a finding of competency, as those evaluations suffered from limited information, a dearth of the background data necessary for a meaningful assessment of Mr. Gray's mental illness and, as a result, misdiagnosis of his mental illnesses and impairments.

Ex. 6-2, Stewart Decl. ¶ 48.

> I can state with certainty that, individually and collectively, Mr. Gray's psychiatric impairments constitute an extreme mental and emotional disturbance and rendered him unable to conform his conduct to the requirements of the law. There is also little doubt that, during his manic episodes, Mr. Gray's ability to appreciate the gravity and seriousness of his criminal behavior was severely limited. Mr. Gray's ability to assist his military counsel and to appreciate the nature of the military court proceedings was also severely limited. These limitations raise substantial doubts about his trial competency.

Ex. 6-3, Dudley Report at 5; *see also id.* at 4 ("Mr. Gray's psychiatric impairments, particularly his manic episodes and organic brain damage, are of sufficient severity to warrant inquiry into his ability to appreciate the nature and quality or wrongfulness of his conduct at the time of the crimes and his ability to understand and assist counsel during his military court proceedings.").

The record is troubling: Appellant had serious mental health impairments derived from a variety of sources that prevented him from understanding the proceedings and assisting counsel. Although experts at trial and on appeal initially recognized these severe impairments, Appellant's competency was never assessed by a neutral factfinder in an adversarial hearing. A *Dubay* hearing should be ordered at which the defense will prove that Appellant was incompetent at the time of trial and during his appeals.

C. Trial and Appellate Counsel Were Ineffective for Failing to Request a Competency Hearing, and the Trial and Appellate Military Courts Erred in Not Ordering Such a Hearing

Because of the fundamental importance of competency to a defendant's right to a fair trial, counsel and the court must be particularly vigilant to a defendant's potential incompetence. Appellant's indicia of incompetency during trial were such that counsel should have requested a hearing; their failure to do so was not based on reasonable strategic considerations and instead amounted to deficient performance. Appellant was prejudiced as he was incompetent during the court martial proceedings. As referenced above, numerous red flags apparent to counsel indicated that Appellant's mental state was seriously flawed. *See* Ex. 6-38, Teller Decl. ¶¶ 3-4. Yet, counsel did not adequately investigate and litigate the issue.

The trial court was also required to conduct a competency proceeding, because it was aware, or reasonably should have been aware, of indicia of incompetence. Courts have an independent obligation to monitor a defendant's competency and to hold a hearing where appropriate. Since "the conviction of an accused person while legally incompetent violates due process, states must provide adequate procedures to protect accused individuals." *McGregor*, 248 F.3d at 952. Moreover, "'even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would

render the accused unable to meet the standards of competence to stand trial.'" *Id.* (quoting *Drope*, 420 U.S. at 181).

Here, the court was made aware of the competency issue. Defense counsel made the court aware, *inter alia*, that Appellant claimed to have "special powers to interpret passages from the Bible"; that Appellant claimed that "Yahweh" came to him in visions and guided his actions; and that Appellant could not make "rational or logical decisions." *See* Ex. 6-52 at 3. Further, Dr. Rose's opinion that "Mr. Gray is not presently mentally competent to stand trial [and] . . . is unable to cooperate with counsel in a rational manner," was submitted to the court. *See* Tr. 99. Despite these stark questions about Appellant's competency, the court failed to properly monitor Appellant and failed to hold a competency hearing, in violation of due process.

Appellate counsel were ineffective both for failing to raise competency at the time of their representation and for failing to raise the claim that Appellant was incompetent at the time of his trial. As established above, there were substantial doubts about Appellant's competence at the time of his court martial. Additional evidence of Appellant's incompetency came to light during the appellate proceedings. Dr. Kea initially found that Appellant was incompetent. *See* Ex. 6-5, Kea Decl. ¶ 3; A2857, Kea Initial Report. Appellate counsel should have raised

this claim throughout the pendency of Appellant's military appeals. *See* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 11.9.2 (1989) (capital appellate counsel has a professional duty to "present all arguably meritorious issues"). Counsel's failure to do so amounted to deficient performance.

Appellate counsel have admitted that they should have raised a competency claim and that they had no strategic reason for failing to do so. *See* Ex. 6-40, Michael Berrigan Decl. ¶ 7 ("During the appeal, we did not specifically raise the issue of Mr. Gray's competence at the time of the trial or at the time of the appeal. There was no strategic reason for our failure to raise this issue on appeal."); Ex. 6-41, Michael Smith Decl. ¶ 5 ("There was no strategic reason for our decision not to raise [competency] on appeal."); Ex. 6-39, Jon Stentz Decl. ¶ 2 ("I felt that [Appellant] was incompetent and was not capable of assisting me as appellate counsel in his case."); *id.* ¶ 4 ("I cannot recall any issues that we decided to forgo for any strategic reason, nor do I recall intentionally waiving issues as to Ronald Gray's sanity or ability to participate in his own defense.").

Appellant was prejudiced by appellate counsel's deficiencies. Had counsel raised this claim on appeal, there is a reasonable probability that the outcome of the appellate proceedings would have been different. Indeed, the military courts have

"an awesome plenary, de novo power" of review. *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003). As such, there is a reasonable probability that the military appellate courts would have vacated Appellant's convictions, or, at the very least, the sentences of death.

Moreover, both trial and appellate counsel should have challenged the findings of the two sanity boards. The conclusions drawn by the boards were erroneous; in conflict with initial impressions of experts; and based on inadequate background information and investigation. Counsel had a professional duty to challenge Appellant's competency as findings of a sanity board "do not bind the court-martial in its determination of . . . competency." *United States v. Best*, 61 M.J. 376 (C.A.A.F. 2005). Trial and appellate counsel were ineffective for failing to challenge the erroneous conclusions of the boards that Appellant was competent.

CLAIM 4[7] APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT HIS CAPITAL SENTENCING

&

CLAIM 5 APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE

In claims 4 and 5, Appellant alleged that his counsel at trial and on appeal

[7] The claim numbers used herein correspond to the claim numbers used in the coram nobis petition submitted to ACCA. Appellant does not further pursue Claim 2 from the petition below. For Claim 3, ACCA found that it lacked jurisdiction; Appellant does not challenge that ruling and instead raises that claim in his original coram nobis petition being filed contemporaneously with this court.

were ineffective in failing to investigate, collect, and present available mitigating evidence. In support of these claims, Appellant proffered voluminous new evidence from lay and expert witnesses detailing Appellant's depraved upbringing, trauma, and lifelong mental illnesses. ACCA did not analyze the proffer, however, because it mistakenly believed that the same claim had been raised on direct appeal. *See* App. 1 at 22. Because ACCA did not adjudicate these claims on their merits, Appellant pleads them in his original coram nobis petition being filed contemporaneously with this court.

In an abundance of caution, Appellant here briefly sets forth the legal precedent demonstrating that ACCA erred in construing Appellant's instant claims as having been previously litigated on direct appeal. While it is true that Appellant asserted the same legal ground for relief on direct appeal – the Sixth Amendment right to effective assistance of counsel[8] – the factual bases for that claim are almost entirely different, as Appellant's extensive proffer makes clear. Under these circumstances, federal law squarely rejects the notion that the "same claim" is being raised. *See Cone v. Bell*, 556 U.S. 449, 459-60, 466-67 (2009) (ruling, where

[8] Nevertheless, as set forth in the accompanying original coram nobis petition and as this court recognized in *Loving v. United States*, 64 M.J. 132, 134-35 (C.A.A.F. 2006) ("*Loving II*") and *Loving v. United States*, 68 M.J. 1, 3-5 (C.A.A.F. 2009) ("*Loving III*"), the Supreme Court's governing precedent for such claims has changed significantly since Appellant's direct appeal was decided.

defendant raised *Brady* claim on direct appeal and another *Brady* claim in post-conviction based on different evidence, that the lower courts' conclusion that the latter claim was previously litigated "rested on a false premise" and was "mistaken"); *Fairchild v. Workman*, 579 F.3d 1134, 1148-49 (10th Cir. 2009) (finding "new claim" where petitioner's proffer was "of a substantially different nature, based on evidence and arguments that were not previously considered. . . . [A]t a certain point, when new evidence so changes the legal landscape that the state court's prior analysis no longer addresses the substance of the petitioner's claim, [the court] must necessarily say that the new evidence effectively makes a new claim"); *Malone v. Workman*, 282 F. App'x 686, 689 n.4 (10th Cir. 2008) (finding that new petition did not reassert prior claim where, "although [petitioner] asserted ineffective assistance of counsel as a ground for relief in both the 2003 petition and the instant petition, the 2003 claim seems to have been predicated upon different alleged failings of counsel than advanced in the current habeas action"); *see also Ward v. Stevens*, 777 F.3d 250, 258 (5th Cir. 2015) (new claim where "the additional evidence in federal court puts the claim in a significantly different and stronger position") (internal quotation omitted); *Dickens v. Ryan*, 740 F.3d 1302, 1318 (9th Cir. 2014)(new claim where "new factual allegations either 'fundamentally alter the legal claim already considered by the state courts,' or 'place the case in a

significantly different and stronger evidentiary posture than it was when [previously] considered'")(internal citations omitted).

CLAIM 6 APPELLANT'S DEATH SENTENCE MUST BE REVERSED BECAUSE THE MILITARY DEATH SENTENCING SYSTEM AS APPLIED IS UNCONSTITUTIONAL AND HIS SENTENCE WAS THE RESULT OF RACIAL DISCRIMINATION, IN VIOLATION OF ARTICLE 66 OF THE UNIFORM CODE OF MILITARY JUSTICE AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

Appellant, an African American, was sentenced to death by a military capital punishment system that has long been plagued by racial inequities. Evidence demonstrates that the military death penalty system does not fulfil its mandate under *Furman v. Georgia*, 408 U.S. 238 (1972), to limit arbitrariness, and that race was likely a determinative factor in Appellant's death sentence. Such evidence was proffered below and would be presented and proven at a *Dubay* hearing.

Military tribunals are significantly more likely to sentence minority defendants to death than non-minority defendants. There is also substantial race-of-victim discrimination, as cases involving white victims are far more likely to result in a death sentence. These discriminatory effects are multiplied where the defendant is non-white and the victims are white, as in this case. These effects persist even after controlling for the seriousness of the case and the characteristics of the offender. When the specter of arbitrariness and racially unequal treatment so

infects a death penalty system that sentencing outcomes do not result solely from the consideration of legitimate factors, a death sentence may not stand. Additional evidence published since the petition was filed below further confirms that the military criminal justice system is plagued by racial inequities. *See* Don Christensen, Col. (Ret.) & Yelena Tsilker, *Racial Disparities in Military Justice: Finding of Substantial and Persistent Racial Disparities Within the United States Military Justice System*, (Protect Our Defenders), May 5, 2017, at i-ii,13, 15.

Appellant's death sentence violates Article 66, due process, and the Eighth Amendment, as the sentence derives from a constitutionally impermissible level of arbitrariness. Due process and equal protection were violated because race was likely a determinative factor in Appellant's death sentence; similarly-situated white defendants and cases involving non-white victims received death sentences at significantly lower rates. Appellant's death sentence should be vacated.

A. Appellant's Proof of Discrimination

Appellant's proof of discrimination demonstrates that the military's death sentencing system does not comply with the minimal requirements of a constitutional process. The proof is specific to Appellant's case, showing that his death sentence was influenced by such discrimination. The principal sources for this information were the court files themselves, including transcripts, court

opinions, and verdict sheets. Significantly, this wealth of data permitted controls to be used in order to assess the influence of race, *e.g.*, to see if the disparities could be explained by legitimate factors such as the culpability of the offender. It also permitted the researchers to reach conclusions about whether discrimination affected the outcome in this case.

For the study, data was collected on all 104 death eligible cases prosecuted by the Armed Forces between 1984 and 2005. The criterion for inclusion – death eligibility – was the allegation of premeditated or felony murder where there was at least one aggravating circumstance present in the case. For each case, the data collection encompassed more than 200 variables relating to the characteristics of the accused and victim, the nature of the crime, the case presented against the accused, the defense pursued, as well as any mitigation presented. The data also included a detailed narrative summary of each case. Each procedural step was tracked so as to permit precise analysis of key decision points in the military capital punishment system.

The study included analysis of subsets of cases that shared attributes with Appellant's case to determine whether similarly-situated capital defendants have been treated similarly. The researchers' examination of court martial sentencing outcomes showed minority defendants are sentenced to death at a much higher rate

than white defendants and cases involving white victims receive death sentences at a much higher rate – disparities that persist after controls are introduced for legitimate case differentiations:

- Unadjusted disparities (before controls) demonstrate that a death verdict was ultimately returned against minorities (non-whites) in 26% of death eligible cases but only 9% of the time where the defendant was white. After controlling for the level of aggravation in logistic regression analysis, minorities were still more than twice as likely to receive a death sentence than whites (23% v. 11%). Ex. 6-74, Tbl. 3.

- Unadjusted disparities show that white-victim cases resulted in a death sentence 18% of the time whereas in non-white victim cases the rate was only 6%. After adjusting for case severity, a death verdict remained three times as likely if a victim was white (18% v. 6%). *Id.*

In the subsets of cases most like Appellant's, the effects remained substantial:

- Unadjusted disparities demonstrate that when a defendant was non-white and one or more of the victims were white, a death verdict results 37% of the time whereas in all other cases the rate was 8%. These disparities remained substantial (twice as likely) after controlling for case severity (27% v. 12%). *Id*.

- When limited to multiple victim cases (n=16), the unadjusted disparities show minorities received death 78% (7/9) of the time and whites only 14% (1/7) of the time, a 64 percentage point disparity. The disparities remain substantial after adjusting for case severity in the regression based scales, 67% v. 28% (a 39 percentage point disparity). Ex. 6-74, Tbl. 12.

- Of thirteen murder cases involving rape or sodomy prosecuted in the military courts, only Appellant's case resulted in a death sentence.

- Removing the race effects from the analysis for defendants in Appellant's culpability level reduce the likelihood of death by 31 percentage points (87% v. 56%). Ex. 6-74, Tbl. 3.

B. Appellant's Death Sentence Violates Due Process and the Eighth Amendment

In 1972, the Supreme Court struck down virtually every death penalty statute then in existence, holding that the death penalty could not be constitutionally imposed under sentencing schemes that result in the arbitrary and capricious infliction of a death sentence. *See Furman*, 408 U.S. 238. Since *Furman*, the Eighth Amendment has required that a capital sentencing scheme "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983).

The arbitrariness concerns expressed in *Furman* were not answered merely by the passage of guided discretion statutes; systems must be constitutional in application as well. *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (a state has a "constitutional responsibility to tailor *and apply* its law in a manner that avoids the arbitrary and capricious infliction of the death penalty") (emphasis added). It is the obligation of the courts to continue to monitor their systems and to remedy violations wherever found.

In *McCleskey v. Kemp*, 481 U.S. 279 (1987), the Supreme Court rejected a

claim that patterns of race discrimination in capital prosecutions in Georgia violated the Eighth Amendment because McCleskey failed to demonstrate "a constitutionally significant risk of racial bias." *Id.* at 313. Appellant's evidence here overcomes the deficiencies identified in *McCleskey.* The overwhelming proof of racially biased decision-making in the military capital sentencing system, and a corresponding lack of procedural safeguards, amply demonstrate a constitutionally impermissible risk of arbitrary and capricious capital sentencing.

The *McCleskey* Court found the evidence regarding Georgia's system "at most" showed a "discrepancy that appear[ed] to correlate with race" and concluded such "[a]pparent disparities in sentencing are an inevitable part of our criminal justice system." *Id.* at 312-13. Conversely, Appellant's evidence permits analysis of each discretionary procedural step and permits identification of the points in the military system where discrimination is greatest. The disparities demonstrated in this case are not "apparent disparities" nor "inevitable" ones; they are stark and intolerable by any credible measure, and reflect actual discrimination against racial minorities.

Moreover, the safeguards in the Georgia system that were noted by the *McCleskey* Court are far weaker in the military system. The *McCleskey* Court pointed to the jury system, specifically juries "representative of a criminal

defendant's community," as a critical safeguard and as key to its conclusion that McCleskey failed to demonstrate an impermissibly high risk of discrimination:

> Because of the risk that the factor of race may enter the criminal justice process, we have engaged in "unceasing efforts" to eradicate racial prejudice from our criminal justice system. Our efforts have been guided by our recognition that the inestimable privilege of trial by jury is a vital principle, underlying the whole administration of criminal justice. Thus, it is the jury that is a criminal defendant's fundamental protection of life and liberty against race or color prejudice. Specifically, a capital sentencing jury representative of a criminal defendant's community assures a diffused impartiality in the jury's task of expressing the conscience of the community on the ultimate question of life or death.

Id. at 310-11 (citations and some internal quotations omitted).

The safeguards presumed by the Supreme Court are significantly weaker in military courts than the civilian courts. The "representative community" so crucial to the *McCleskey* Court is, in the military, hand-picked by the very commanding officer who deemed the defendant deserving of the death penalty. The "diffused impartiality" of a twelve-person jury of one's peers is reduced to a variable size - here only six - of military personnel senior in rank to the defendant. The resulting panel cannot be said to reliably "express[] the conscience of the community on the ultimate question of life or death." Even the pools from which the court martial members were drawn were racially and gender-skewed, and thus are not representative of Appellant's "community."

In military capital cases, the status of being a minority is tantamount to an aggravating factor, saddling an entire class of defendants with an unacceptably high risk of a death sentence based not on their conduct, but on their race and ethnicity, and on the race and ethnicity of the victims. In *Zant*, the Supreme Court cautioned that if a state "attached the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as . . . the race . . . of the defendant . . . due process of law would require that the jury's decision to impose death be set aside." 462 U.S. at 885. The same practical effect has been demonstrated here.

C. Appellant's Death Sentence Violates Equal Protection and Due Process

Appellant's proffered evidence demonstrates not only significant discrimination by race of the defendant and victim, but also persistence of these disparities in cases most similar to this one. This evidence overcomes the evidentiary limitations imposed in *McCleskey*.

McCleskey's equal protection claim failed because he did not show that purposeful discrimination was operative in his case. "[T]o prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose." *McCleskey*, 481 U.S. at 292. McCleskey's principal proof showed a statewide race-of-victim effect, encompassing the entire

course of the case from the prosecutor's election to seek death to the jury's verdict.

Appellant's proof overcomes the deficiencies identified in *McCleskey* by focusing acutely on how discrimination affected this case at *each* stage. One shortfall of McCleskey's proof was that it encompassed too many decision-making entities, including prosecutors, judges, and juries. *Id.* at 294-95. By contrast, Appellant's evidence permits an analysis focused on each sentencing decision-maker, further narrowing the comparison group to cases that were similarly situated. Appellant's proof – multiple measures showing that minorities who have committed murders of severity comparable to Appellant's are sentenced to death at a significantly higher rate than whites – overcomes the concerns expressed in *McCleskey* and compels a finding of, or at least a formal hearing and inquiry into, purposeful discrimination.

D. Appellant's Death Sentence Is Disproportionate

Appellant was at a particularly high risk of racial prejudice because his victims, including non-decedent rape victims, were white, historically a circumstance associated with discrimination. A comparative analysis of similar cases points to the high risk of discrimination in this case:

> Overall, these findings document a significant risk of racial prejudice in the application of the death penalty in the multiple-victim cases especially in those cases where the accused is minority and the victim is white.

Ex. 6-75. at 22. A comparative review of cases most like Appellant's – cases involving sexual offenses or multiple victims – shows that his sentence is aberrational, supporting an inference that racial prejudice was operative in his case:

> We believe to a reasonable degree of scientific and statistical certainty this evidence establishes (a) a substantial risk of systemic race-of-victim discrimination in convening authority and courts-martial decisions that advance cases to capital sentencing hearings, and (b) a substantial risk of systemic discrimination based on the race of the accused in courts-martial sentencing decisions. Finally, our findings identify multiple-victim cases as a particularly important source of those overall racial disparities in the system.

Id. at 23.

CLAIM 7 THE MILITARY DEATH PENALTY VIOLATES EVOLVING STANDARDS OF DECENCY UNDER THE EIGHTH AMENDMENT

The military courts are empowered to consider the constitutionality of laws that apply within their jurisdiction. *United States v. Matthews*, 16 M.J. 354, 366 (C.M.A. 1983). The *Matthews* court explained the legislative intent of Congress to give the military courts "unfettered power to decide constitutional issues - even those concerning the validity of the Uniform Code." *Id*. at 366-67. Because the military courts are responsible for "the protection and preservation of the Constitutional rights of persons in the armed forces," *id*. at 367, this power necessarily includes considering whether and when the military's system of capital

punishment violates our society's evolving standards of decency.

Punishments violate the Eighth Amendment when they "are incompatible with the evolving standards of decency that mark the progress of a maturing society, or which involve the unnecessary and wanton infliction of pain." *United States v. Lovett*, 63 M.J. 211, 214 (C.A.A.F. 2006) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976)).

The military capital punishment system violates our society's evolving standards of decency for at least three reasons. First, racial disparities have long beset military capital punishment and remain a major predictor of death sentences. *See* Claim 6, *supra*. Second, excessive delays undermine any legitimate penological goal in conducting executions. Third, the increasing rarity of executions nationwide – the military has not conducted an execution in more than a half-century – anticipates the abolition of capital punishment in the United States, as has already occurred throughout other Western civilized societies. Under these circumstances, Appellant's execution would be contrary to evolving standards of decency.

WHEREFORE, Appellant respectfully requests that this court:

1. Docket this appeal and provide the parties with notice thereof;
2. Order formal briefing and oral argument;
3. Remand for a *Dubay* hearing on Appellant's claims;
4. Vacate Appellant's convictions and sentences; and
5. Grant such other relief as may be appropriate.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This filing complies with the type-volume limitation of Rule 24(c) because:

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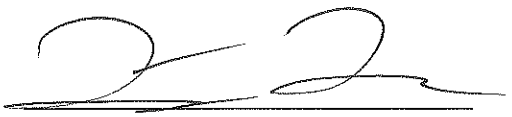

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 7 July 2017 the foregoing *Notice of Mandatory Review* was delivered to FedEx for delivery and filing with the United States Court of Appeals for the Armed Forces on 10 July 2017, and a copy of the same was served via email and first class mail upon counsel for the United States:

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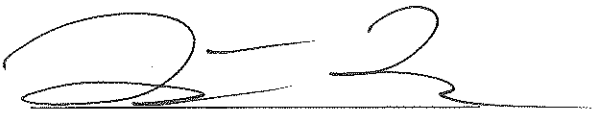

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

IN RE RONALD GRAY,
Private, U.S. Army,

Petitioner,

v.

UNITED STATES,

Respondent.

USCA Misc. Dkt. No. 170502

CAPITAL CASE

(Prior Dkt. Nos.:
USCA 16-0581/AR
USCA 12-8017/AR
USCA 93-7001)

PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF CORAM NOBIS

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Table of Cases, Statutes, and Textbooks Cited

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Other Opinions

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

Preamble

Petitioner RONALD GRAY hereby prays for the court to issue a writ of error coram nobis and grant relief from his sentences of death.

Petitioner has collateral claims for relief that arose after or in conjunction with this court's review of his direct appeal – claims that Petitioner therefore could not raise in that proceeding. In 2009, Petitioner pled the claims in a habeas corpus petition in federal district court, but the government asserted the defense of non-exhaustion.

Since that time, Petitioner has been seeking review of his claims in the military and federal courts. In April 2012 and June 2016, this court denied Petitioner's prior requests for review "without prejudice" to seeking relief after the federal court ruled on the habeas petition. On 26 October 2016, the federal court dismissed the entire habeas petition without prejudice. Ex. 5 at 2-3.

Petitioner then sought and was denied review by the Army Court of Criminal Appeals ("ACCA"). Ex. 7. On 9 May 2017, ACCA found that it lacked jurisdiction to adjudicate the first claim pled herein (a finding that Petitioner does not challenge). *See id.* at 22. As to the second claim pled herein, ACCA declined

to adjudicate it based on the court's mistaken belief that the same claim was raised on direct appeal. *Id.*

As to those claims that ACCA addressed on the merits, and as to the procedural bars that ACCA found to preclude coram nobis relief to any death-sentenced prisoners, Petitioner is filing a separate pleading on this date invoking this court's mandatory appellate review of ACCA's decision or, in the alternative, seeking discretionary review.

Taken together, Petitioner's present filings raise novel questions of whether the military courts will police the errors arising during or after military appeal proceedings; whether coram nobis review can ever be obtained by death-sentenced and life-sentenced military prisoners; and how, and by whom, collateral review will be conducted in "final" death penalty cases in the future.

Petitioner submits that the principles of comity, judicial efficiency, and exhaustion, and the military courts' expertise in and unique responsibility for military law, dictate that the military courts should review collateral claims for relief in the first instance. ACCA's contrary ruling frustrates the purpose of coram nobis review and would lead to absurd results wherein collateral review will be available only to those convicted of lesser crimes but will never be available to those who receive sentences of life imprisonment or death. When these issues are properly

analyzed, the prudential concerns limiting the availability of coram nobis review are significantly outweighed by the interests favoring meaningful review.

The resolution of these questions will affect not only this case – the first "final" military capital case in more than 50 years – but will also determine the course of future litigation in future military capital cases. This court should hear and decide these important questions.

I

History of the Case

On 11 April 1988, a judgment of conviction was entered against Petitioner after a general court martial convened by the Commanding General of the 82nd Airborne Division, Fort Bragg, North Carolina, on two counts of murder, one count of attempted murder, three counts of rape, two counts of robbery, and two counts of forcible sodomy. Judgment of sentence was entered on 12 April 1988, in which Petitioner was sentenced to death, dishonorable discharge, forfeitures of pay and allowances, and reduction to Private E-1.

Petitioner appealed to the Army Court of Military Review ("ACMR"), which affirmed his convictions and sentence on 15 December 1992. *United States v. Gray*, 37 M.J. 730 (A.C.M.R. 1992). This court affirmed ACMR's decision on 28 May 1999. *United States v. Gray*, 51 M.J. 1 (C.A.A.F. 1999). Neither ACMR nor

this court granted Petitioner an evidentiary hearing on any of his claims.

On 19 March 2001, the Supreme Court denied a petition for writ of certiorari. *Gray v. United States*, 532 U.S. 919 (2001). Seven years later, on 28 July 2008, Petitioner's convictions and sentences became final when President Bush approved the death sentence. *See* AR0231 (Presidential Order).[1]

Through prior pro bono counsel, Petitioner filed a habeas corpus petition on 1 April 2009, in the United States District Court for the District of Kansas. The government filed an Answer on 1 May 2009. Due to health problems, Petitioner's prior counsel left the practice of law soon thereafter.

The district court then appointed undersigned counsel from the Federal Community Defender Office for the Eastern District of Pennsylvania to represent Petitioner. On 18 December 2009, Petitioner filed a Traverse, along with a motion to amend the habeas petition and the proposed amendments. On 30 September 2010, the district court granted Petitioner's motion to amend, and on 1 November 2010, the government submitted its response to the amended federal petition. The response asserted the affirmative defense of non-exhaustion to several claims and

[1] Documents from the military court record are cited as follows: documents from the "administrative record" of the court martial proceedings are cited as "AR" followed by the relevant Bates stamped page number; the court martial transcript is cited as "Tr." followed by a page number; and the record on appeal is cited as "A" followed by a page number.

sub-claims raised by Petitioner.

On 11 February 2011, Petitioner filed a Petition for Extraordinary Relief in the Nature of a Writ of Coram Nobis in ACCA, raising the claims and sub-claims to which the government had asserted a non-exhaustion defense in federal court. The government filed its Answer on 13 April 2011, and Petitioner filed a Reply on 13 June 2011.

ACCA denied the petition on 26 January 2012. The court reasoned that coram nobis review was not appropriate "because there is, as a matter of law, a remedy other than coram nobis available," *i.e.*, federal habeas review. Ex. 1 at 3. The court concluded that "[t]he merits of petitioner's claims are now for the federal district court, rather than this court, to decide." *Id.*

On 15 February 2012, Petitioner filed a writ-appeal petition in this court. On 12 March 2012, the government filed its Answer. On 17 April 2012, the court ordered: "[t]hat said writ-appeal petition is hereby denied without prejudice to raising the issue asserted after the U.S. District Court for the District of Kansas rules on the pending habeas petition." Ex. 2.

After supplemental briefing and oral argument, the federal district court ruled on the habeas petition on 29 September 2015. The district court denied some of Petitioner's claims, but declined to rule on five claims and instead dismissed those

claims without prejudice. As to those claims, the district court explained:

> [I]t seems clear that the CAAF, the highest military appellate court, left open the door for Petitioner to present these claims to the military courts again upon learning what *this* court would do by denying the petition for coram nobis *without* prejudice.

Gray v. Gray, No. 5:08-cv-3289-JTM, 2015 WL 5714260 at *35 (D. Kan. 2015) (emphasis by the court). With respect to ACCA's ruling in the prior coram nobis proceedings, the district court wrote:

> [ACCA] determined that the procedural vehicle of coram nobis precluded relief in light of the pending civilian habeas action. With the dismissal of the present case, that procedural defect is removed and the ACCA may address the merits of Petitioner's coram nobis claims.

Id. at *36. The court further noted that it was "obliged to pursue the strong preference expressed in *Burns* [*v. Wilson*, 346 U.S. 137 (1953)] that the military courts first be given every reasonable opportunity to address the merits of a military prisoner's post-conviction arguments." *Id.*

Petitioner filed a notice of appeal to the United States Court of Appeals for the Tenth Circuit, and filed a second coram nobis petition in ACCA. In the federal appeal, the Tenth Circuit, with the consent of both parties, summarily reversed. *Gray v. Gray*, 645 F. App'x 624 (10th Cir. 2016). The appeals court ruled that the district court's "hybrid disposition of the petition" – addressing some claims on the merits while dismissing other claims without prejudice – ran afoul of federal

precedent. *Id.* at 626. After stating that "[a] prisoner challenging a court martial conviction through 28 U.S.C. § 2241 must exhaust *all available military remedies*," the appeals court remanded to the district court. *Id.* at 625-26 (emphasis added; citations omitted).

On 10 May 2016, ACCA dismissed the second coram nobis petition without prejudice. Ex. 3 at 2. On 8 June 2016, this court again denied review "without prejudice to re-filing" after the district court ruled on the recently remanded federal habeas petition. Ex. 4 at 1-2.

On remand, the federal district court reiterated "the strong preference that the military courts first be given every reasonable opportunity to address the merits" of Petitioner's claims and dismissed the entire habeas corpus petition without prejudice. Ex. 5 at 2-3. The district court specifically anticipated that its dismissal order would "allow petitioner to fully exhaust the unexhausted claims" in the military courts. *Id.* at 3.

On 9 December 2016, Petitioner filed a third coram nobis petition in ACCA. The court issued an order to show cause, to which the government filed its response on 1 March 2017. Petitioner filed a reply on 27 March 2017. On 9 May 2017, ACCA denied relief. Ex. 7.

II

Reasons Relief Not Sought Below

Petitioner raised Claim I, below, in his coram nobis petition in ACCA, but the court determined that it lacked jurisdiction to adjudicate the claim. *See* Ex. 7 at 22. Petitioner does not challenge that jurisdictional ruling herein or in his separate request for appeal. However, this court's jurisdiction under the UCMJ is not as limited as ACCA's, and this court has jurisdiction to consider the claim. *Compare* UCMJ Art. 67(a) (CAAF "shall review the record in . . . all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death"), *with* UCMJ Art. 66(c) (ACCA "may act only with respect to the findings and sentence as approved by the convening authority"). The claim is therefore properly brought in this petition for extraordinary relief.

Petitioner raised the second claim, below, in his coram nobis petition in ACCA, but the court failed to adjudicate it. *See* Ex. 7 at 22. The court mistakenly believed that the same claim had previously been decided by this court. *See id.* Because the court did not address the claim on the merits, and because the factual bases for the claim are new, Petitioner includes the claim in this petition for extraordinary relief.

III

Relief Sought

Petitioner requests that his claims for collateral relief be considered on the merits, seeks an order permitting him to present evidence at a *Dubay* hearing on the second claim set forth herein, and asks that this court grant relief by vacating his death sentences.

IV

Issues Presented

Whether this court has jurisdiction to hear a death-sentenced servicemember's unexhausted claims for relief, where the legal and/or factual bases of the claims arose after or in conjunction with the direct appeal and statutory approval of his convictions and death sentences?

If so, whether the exercise of such jurisdiction is necessary and appropriate, or alternatively, whether the federal courts are the only forum for litigating such claims?

Claim I: Whether Petitioner was denied his rights to due process, to fair sentencing proceedings, to a public trial, and against cruel and unusual punishment where the President, acting in a judicial role, approved Petitioner's death sentence in reliance upon confidential reports and evidence that were not disclosed to Petitioner, his counsel, or the public?

Claim II: Whether Petitioner's prior counsel rendered ineffective assistance by failing to collect and present available mitigating evidence concerning Petitioner's background, upbringing, and mental illnesses, and whether such mitigating evidence should be analyzed in light of the Supreme Court's recent case law?

V

Statement of Facts

The facts relevant to the gateway procedural questions are set forth in the "History of the Case," above. The facts relevant to Petitioner's specific claims for relief are set forth, to the extent practicable, in the body of those claims below and in the attached exhibits.

VI

Reasons Why Writ Should Issue

A. This Court Has and Should Exercise Coram Nobis Jurisdiction

The writ of error coram nobis is available to correct constitutional errors underlying a conviction or sentence, including errors resulting from the ineffective assistance of counsel. *United States v. Denedo*, 556 U.S. 904, 917 (2009) ("*Denedo II*"); *see also United States v. Morgan*, 346 U.S. 502, 513 (1954); *Garrett v. Lowe*, 39 M.J. 293, 295 (C.M.A. 1994). The military courts' statutory jurisdiction to "review[] court martial cases," 10 U.S.C. § 866(a), includes jurisdiction to consider petitions for writs of error coram nobis in cases that have become final. *Denedo II*, 556 U.S. at 913-14. The All Writs Act gives the military courts authority to issue the writ whenever "necessary or appropriate." 28 U.S.C. § 1651(a); *Denedo II*, 556 U.S. at 911. Coram nobis review is necessary and appropriate here.

This court specifically authorized the "re-filing" of Petitioner's coram nobis claims after the federal court ruled on the habeas petition, Exs. 2, 4, and that event has now occurred. Implicit in the court's rulings in Petitioner's prior coram nobis proceedings was its recognition and exercise of its own jurisdiction, and its invitation that Petitioner seek review of his claims in the instant proceedings.

As the federal courts have repeatedly emphasized in this case, merits review of Petitioner's coram nobis claims also squares with the military courts' well-established duty to shoulder primary responsibility for reviewing their own cases and correcting their own errors. *See Gray*, 645 F. App'x at 625-26; *see also* Ex. 5 at 2-3. As this court has explained:

> A prominent theme running through the Supreme Court's consideration of military justice cases on collateral review is that the system of courts established by Congress for the military justice system should serve as the primary mechanism for review of court-martial cases, and that the courts within the military justice system should have an opportunity to consider challenges to court-martial proceedings prior to review by courts outside the military system.

Denedo v. United States, 66 M.J. 114, 121-22 (C.A.A.F. 2008) ("*Denedo I*"); *accord Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975) ("[I]mplicit in the congressional scheme embodied in the [Uniform Code of Military Justice] is the view that the military court system generally is adequate to and responsibly will perform its assigned task" and the federal courts therefore "will not entertain habeas

petitions by military prisoners until *all available military remedies* have been exhausted.") (emphasis added; quotations omitted); *Hemphill v. Moseley*, 443 F.2d 322, 325 (10th Cir. 1971) ("Ordinarily habeas corpus petitions from military prisoners must not be entertained by federal civilian courts until all available remedies within the military court system have been invoked in vain.") (quoting *Noyd v. Bond*, 395 U.S. 683, 693 (1969)); *Gusik v. Schilder*, 340 U.S. 128, 131-32 (1950) ("If an available procedure has not been employed to rectify the alleged error which the federal court is asked to correct, any interference by the federal court may be wholly needless."); *see also Loving v. United States*, 62 M.J. 235, 249-50 (C.A.A.F. 2005) ("*Loving I*").

B. Petitioner's Claims Identify Significant Constitutional Violations

The specific constitutional grounds justifying issuance of the writ of error coram nobis are set forth below. In support of the second claim, Petitioner submits an extensive factual proffer of sworn declarations, expert reports, and records in the attached exhibits.[2] These proffers are indicative of the evidence that Petitioner

[2] The proffers were initially submitted to the federal court as exhibits in support of Petitioner's amended habeas petition. Those submissions are attached in full as Exhibit 6 to this petition, and the seventy-five exhibits contained within that pleading are herein cited as "Ex. 6-##." A complete index of those exhibits begins at page 211 of Exhibit 6. These same exhibits were submitted with Petitioner's coram nobis petitions in ACCA.

would present and prove at a *Dubay* hearing.

CLAIM I PETITIONER WAS DENIED HIS RIGHTS TO DUE PROCESS, TO A FAIR SENTENCING PROCEEDING, TO A PUBLIC TRIAL, AND AGAINST CRUEL AND UNUSUAL PUNISHMENT, AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, WHERE THE PRESIDENT, ACTING IN A JUDICIAL ROLE, APPROVED PETITIONER'S DEATH SENTENCE IN RELIANCE UPON CONFIDENTIAL REPORTS AND EVIDENCE THAT WERE NOT DISCLOSED TO PETITIONER.

A. The Undisclosed Evidence

The UCMJ provides that where "the sentence of the court martial extends to death, that part of the sentence providing for death may not be executed until approved by the President." 10 U.S.C. § 871(a). As part of this statutory approval process, and pursuant to Rule for Courts-Martial 1204(c)(2), the Judge Advocate General ("JAG") was required to submit a report to the Secretary of the Army recommending that the President either disapprove or approve Petitioner's death sentence. The Secretary of the Army then forwarded this report to the President, together with the Secretary's own recommendation. The Secretary of Defense submitted a similar report to the President, and other officials may have submitted such reports as well.

These reports were submitted during the seven-year statutory approval process that occurred between the Supreme Court's denial of Petitioner's writ of

certiorari on 19 March 2001, and the President's approval of Petitioner's death sentence on 28 July 2008. These reports were never disclosed to Petitioner or his counsel, despite express requests, *see* AR0225, and Petitioner therefore never had an opportunity to deny, contest, or explain the information contained therein.[3]

B. The Statutory Approval Process Is of a Judicial Nature

As the highest official overseeing the Article I military courts, the President's approval or disapproval of a court martial sentence is a distinctly judicial act. *United States v. Fletcher*, 148 U.S. 84, 88-89 (1893) ("[T]he action required of the President in respect of the proceedings and sentences of courts martial is judicial . . ."); *United States v. Page*, 137 U.S. 673, 678 (1891) ("Undoubtedly, the action required of the President under this [prior statutory approval provision] is judicial action."); *Runkle v. United States*, 122 U.S. 543, 557 (1887) ("[T]he action required of the President is judicial in its character . . . ."). An Opinion of the Attorney General has explained this principle:

> Undoubtedly the President, in passing upon the sentence of a court martial, and giving to it the approval without which it cannot be executed, acts judicially. The whole proceeding from its inception is

[3] Petitioner's current counsel attempted to obtain the undisclosed reports through requests under the Privacy Act, 5 U.S.C. § 552a, and the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. These requests were submitted to the Department of Defense, the Department of the Army, the Department of Justice, and the Executive Office of the President. The agencies declined to disclose the requested documents.

> judicial. The trial, finding, and sentence, are the solemn acts of a court organized and conducted under the authority and according to the prescribed forms of law. It sits to pass upon the most sacred questions of human rights that are even placed on trial in a court of justice; rights which, in the very nature of things, can neither be exposed to danger nor entitled to protection from the uncontrolled will of any man, but which must be adjudged according to law. And the act of the office who reviews the proceedings of the court, whether he be the commander of the fleet or the President and with whose approval the sentence cannot be executed, is as much a part of this judgment, according to law, as is the trial or the sentence.

11 Op. Att'y Gen. 19, 21 (1864). More recent Supreme Court decisions buttress the conclusion that, in acting to approve or disapprove a jury's death verdict, an official performs the judicial role of a "sentencer." *See Espinosa v. Florida*, 505 U.S. 1079, 1082 (1992) (where a statutory scheme places "capital sentencing authority in two actors rather than one," both actors are subject to applicable constitutional standards); *Lambrix v. Singletary*, 520 U.S. 518, 533-34 (1997) (explaining that the trial judge acts as "the sentencer" or as "at least a constituent part of 'the sentencer'" where the statutory scheme permits judicial override of a jury's advisory death sentence) (quoting *Sochor v. Florida*, 504 U.S. 527, 535 (1992)); *see also Proffitt v. Florida*, 428 U.S. 242, 249 (1976) (in an advisory sentencing scheme, "the actual sentence is determined by the trial judge").

Presidential review and approval or disapproval of a court martial death sentence under 10 U.S.C. § 871(a) shares the judicial nature of other sentencing

proceedings. Like other judicial sentencing determinations, the President's action is not optional, but is compelled by statute. And just as other judicial sentencing bodies have discretion in pronouncing a final sentence, so too does the President. Thus, in exercising his judicial sentencing authority, the President must honor a defendant's constitutional rights in the same manner as any other judicial sentencing authority. *Cf. Espinosa*, 505 U.S. at 1082. The Presidential approval process failed to do so here.

C. The Constitutional Violations

In *Gardner v. Florida*, 430 U.S. 349, 362 (1977), the Supreme Court held that a death sentence is unconstitutional when partially based on information in a presentence report that was not disclosed to the defense. The Court found that due process is violated "when the death sentence was imposed, at least in part, on the basis of information which [the defendant] had no opportunity to deny or explain." *Id.*[4] It is a fundamental rule of due process that, whenever life or liberty interests are at stake, a defendant is entitled to notice of the procedure to be followed and an opportunity to challenge any information that the decision maker considers. *Id.* Without full disclosure of the basis for the death sentence, a capital sentencing

[4] *Accord Hale v. Gibson*, 227 F.3d 1298, 1326 (10th Cir. 2000); *Paxton v. Ward*, 199 F.3d 1197, 1213 (10th Cir. 1999); *Duvall v. Reynolds*, 139 F.3d 768, 797 (10th Cir. 1998).

procedure invites arbitrary application, in violation of the Eighth Amendment. *See id.* at 361; *see also id.* at 363-64 (White, J., concurring) (emphasizing that the Eighth Amendment prohibits a procedure for imposing the death penalty that allows for the consideration of secret information).

The *Gardner* Court found that consideration of a "secret" report compromised the integrity of capital sentencing proceedings and warned that "[t]he risk that some of the information accepted in confidence may be erroneous, or may be misinterpreted . . . is manifest." *Id.* at 359. The Court explained:

> Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases.

Id. at 349. In applying this principle, the Tenth Circuit has found a due process violation where a prosecutor misrepresented facts during closing argument at a capital sentencing proceeding. *Paxton v. Ward*, 199 F.3d 1197, 1216 (10th Cir. 1999). Central to the Tenth Circuit's ruling was the fact that the defense did not have any effective means for rebutting the prosecution's statements. *Id.* at 1218; *see also Osborn v. Shillinger*, 861 F.2d 612, 627 (10th Cir. 1988) (explaining that a prosecutor's *ex parte* communications of information to the trial court before sentencing "may well have been unconstitutional" under *Gardner*).

The statutory approval process of Petitioner's death sentence violated the *Gardner* rule. It is beyond dispute that the President approved Petitioner's sentence in reliance, in whole or part, on secret reports and evidence submitted by JAG, the Secretary of the Army, the Secretary of Defense, and perhaps others. Petitioner had no effective means of rebutting information in reports that were kept secret from him, despite his explicit requests, *see* AR0225. Without a fair opportunity to deny or explain the information in those reports, Petitioner's due process rights were violated.

It is worth emphasizing that, although this is the first and only military death sentence approved in a half-century, and thus the first statutory approval since *Gardner* was decided, the type of reports kept secret here *have previously been disclosed to the defense and made public in military capital cases*. *See, e.g.*, JAG Memo to the Secretary of the Air Force ("SecAF") re *Herman P. Dennis, Jr.* (Nov. 14, 1950) *in* 4 C.M.R. (A.F.) 904-07 (recommending President approve death sentence).[5] The historical record reflects that secrecy in the approval process is

[5] *See also, e.g.*, JAG Memo to SecAF re *Robert W. Burns* (Nov. 14, 1950), *in* 4 C.M.R. (A.F.) 927-30 (same); JAG Memo to SecAF re *Calvin Dennis* (Nov. 14, 1950) *in* 4 C.M.R. (A.F.) 953-56 (recommending President disapprove death sentence); JAG Memo to SecAF re *Robert E. Keller* and *James H. Burks* (Jan. 9, 1950), *in* 2 C.M.R. (A.F.) 549-52 (recommending President approve death sentence for Keller and disapprove death sentence for Burks); JAG Memo to the

novel and unwarranted.

Further, although the *Gardner* Court found it unnecessary to consider the nature of the undisclosed information in analyzing the due process violation, a review of these earlier, public recommendations is instructive. The information contained in the recommendations was precisely the type that makes "debate between adversaries . . . essential to the truth-seeking" process. *Gardner*, 430 U.S. at 349. For example, in the case of *Charlie B. Williams*, the recommendation from JAG included the following:

> Among the papers attached to the record of trial is a telegram from the police department at Louisville, Kentucky, stating that accused is a known petty thief and vagrant and that he was arrested in 1934 for housebreaking and grand larceny; in February 1935 for malicious cutting; in October 1935 for shooting and wounding; in 1936 for possession of marihuana; in 1937 for carrying a deadly concealed weapon; in 1938 for malicious cutting; and in 1941 for grand larceny. I recommend that the sentence to be hanged by the neck until dead be confirmed and carried into execution.

38 Bd. Rev. 179. Obviously, a record of arrests and a bald accusation of being a "vagrant" are the type of information to which a defendant should be able to

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Secretary of the Army re *Albert A. Morales* (June 24, 1949), *in* 1 Bd. Rev. & Jud. Coun. 212 (recommending President disapprove death sentence); JAG Memo to the Secretary of War ("SecWar") re *Garlon Mickles* (Oct. 29, 1946), *in* 64 Bd. Rev. 333 (recommending President approve death sentence); JAG Memo to SecWar re *Charlie B. Williams* (Sept. 1, 1944), in 38 Bd. Rev. 179 (recommending that President approve death sentence).

respond. An even more troubling recommendation – in light of the military's history of racial disparities in imposing the death penalty – appeared in the case of *Garlon Mickles*. There, JAG recommended as follows:

> Accused, colored, was found guilty of the rape on Guam of a white woman, a civilian employee of the United Seamans' Service. The rape was a brutal one and I believe that the imposition of the death sentence is justified. I therefore recommend that the sentence be confirmed and carried into execution.

64 Bd. Rev. 333. The information contained in the reports and recommendations submitted in the statutory approval process warrants notice to the defendant and an opportunity to respond.

It is of no moment that the President, and not a trial judge, was the final sentencing authority here. In *Gardner*, the trial court was the final sentencing authority, after receiving the jury's advisory verdict. 430 U.S. at 352-53. In *Paxton*, the jury was the final sentencing authority. 199 F.3d at 1203. The due process violations found in those cases derived not from the identity of the sentencer, but from the fact that the sentencer imposed a death sentence based on information that the defendant had no opportunity to rebut or explain. Further, as established above, the President's action in this case was of a judicial nature. *Fletcher*, 148 U.S. at 88-89. Accordingly, the President's approval of the death sentence must follow the same due process standard as governs any other judicial

imposition of a death sentence. *See Espinosa*, 505 U.S. at 1082. The President's approval of Petitioner's death sentence violated that standard.

A *Gardner* violation is *per se* reversible error, because imposing a death sentence in partial reliance on information that was not disclosed to the defendant fundamentally undermines the adversary process and precludes a fair sentencing proceeding. *Harvard v. Florida*, 459 U.S. 1128, 1133 (1983); *see also Gardner*, 430 U.S. at 362 (finding that it would be an insufficient remedy for the reviewing court to consider the undisclosed information in deciding the appropriateness of the death sentence). A showing of prejudice is therefore unnecessary, and Petitioner's death sentence must be vacated.

Further, because the approval process amounted to judicial proceedings, Petitioner's Sixth Amendment public trial rights were violated by the secrecy in which the process was conducted. Criminal judicial proceedings must be conducted publicly in order to assure fairness. *Press-Enterprise Co. v. Superior Court of Cal.*, 478 U.S. 1, 7 (1986). Open proceedings are required because the "contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *In re Oliver*, 333 U.S. 257, 270 (1948). The Sixth Amendment guarantees a presumption of openness that may be overcome only when the government demonstrates an overriding interest that secrecy is essential to

preserve higher values, and where the secrecy is narrowly tailored to serve that interest. *Waller v. Georgia*, 467 U.S. 39, 45 (1984). The secrecy of the Presidential approval process does not meet that standard here. As the history of this process demonstrates, these proceedings are amenable to openness and traditionally have been conducted openly, and the recent *carte blanche* exclusion of capital defendants and the public from this process is not a narrowly tailored remedy to any overriding interest in secrecy. The statutory approval process thus violated Petitioner's public trial right. *Cf. United States v. Canady*, 126 F.3d 352, 362 (2d Cir. 1997) (failure to announce verdict in open court violates a defendant's right to public trial). Because public trial violations are structural errors, *see Waller*, 467 U.S. at 49 n.9, the court should vacate Petitioner's death sentence on this additional ground as well.

CLAIM II PETITIONER WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT HIS CAPITAL SENTENCING WHERE COUNSEL FAILED TO COLLECT AND PRESENT AVAILABLE MITIGATING EVIDENCE; PRIOR COUNSEL, INCLUDING APPELLATE COUNSEL, WERE LIKEWISE INEFFECTIVE.

Included in Exhibit 6 and discussed below is an extensive factual proffer of mitigating evidence that was available both at the time of trial and appeal but was not collected or presented by defense counsel or appellate counsel. The military

courts have never considered this wealth of mitigating evidence because of an unbroken chain of ineffective assistance of defense and appellate counsel. A thorough investigation into Petitioner's life history, trauma, and mental health history was thus never conducted at trial or during the appeal. In light of appellate counsel's ineffectiveness, Petitioner was prevented from presenting a thorough claim of trial counsel ineffectiveness to the military courts during direct appeal, thus establishing cause and prejudice for any default for failing to raise these allegations at that time.

An evidentiary hearing and thorough consideration of the evidence underlying this claim are also appropriate in light of this court's opinions in *Loving v. United States*, 64 M.J. 132 (C.A.A.F. 2006) ("*Loving II*") and *Loving v. United States*, 68 M.J. 1 (C.A.A.F. 2009) ("*Loving III*"). There, this court acknowledged that its earlier consideration of penalty phase ineffectiveness claims – which by implication included its consideration of Petitioner Gray's ineffectiveness claim on direct appeal – did not address the adequacy of counsel's mitigation investigation in light of the Supreme Court's decision in *Wiggins v. Smith*, 539 U.S. 510 (2003). *Loving II*, 64 M.J. at 134-35, 150-53; *Loving III*, 68 M.J. at 3-5. The court therefore ordered a *Dubay* hearing and consideration of the new factual proffer under the Supreme Court's latest case law. *Loving II*, 64 M.J. at 152-53. The same situation

is present here, and the same steps are appropriate.

Indeed, in its decision denying Petitioner's appeal on 28 May 1999, *Gray*, 51 M.J. 1, this court did not have the benefit of any of the Supreme Court's subsequent jurisprudence applying *Strickland* analysis to penalty phase ineffectiveness of counsel claims. *See Williams v. Taylor*, 529 U.S. 362, 396 (2000) (defense counsel must "fulfill their obligation to conduct a thorough investigation of the defendant's background"); *Wiggins*, 539 U.S. at 524 (mitigation investigations "should comprise efforts to discover all reasonably available mitigating evidence"); *Rompilla v. Beard*, 545 U.S. 374, 381-82 (2005) (counsel ineffective although counsel interviewed Rompilla himself, spoke to five members of his family in a "detailed manner," and obtained three mental health evaluations); *Porter v. McCollum*, 558 U.S. 30, 39 (2009) ("[C]ounsel had an obligation to conduct a thorough investigation of the defendant's background.") (internal quotation omitted); *Sears v. Upton*, 561 U.S. 945, 954 (2010) (same). Nor was Petitioner ever granted a hearing at which he could develop the factual predicates of his claim.

Accordingly, in light of intervening precedent and the instant factual proffer, this court erroneously found that counsel's performance was not deficient, unreasonably applied federal law, and unreasonably determined the facts. *See Gray*, 51 M.J. at 18-19. The court gave three reasons for finding that counsel's

performance was not deficient. *See id.* First, the court reasoned that Petitioner's claim "equates failure to discover certain facts with failure to conduct a proper investigation." *Id.* at 18. But Petitioner alleges squarely here that defense counsel failed to conduct a proper investigation. And it is now clear that in capital cases a "proper investigation" requires collecting "all reasonably available mitigating evidence." *Wiggins*, 539 U.S. at 524; *see also Williams*, 529 U.S. at 396 (Sixth Amendment requires capital defense counsel to "fulfill their obligation to conduct a thorough investigation of the defendant's background"); 1 ABA Standards for Criminal Justice 4-4.1, commentary, at 4-55 (2d ed. 1980). There is little question that the information collected by current counsel was at least as available in 1987 and 1988 as it was decades later.

Rompilla is particularly instructive on this point. There, the Supreme Court found counsel deficient after recounting defense counsel's mitigation investigation in which counsel interviewed the petitioner (as defense counsel did here); interviewed five family members (more than defense counsel did here); and consulted a "cadre of three mental health witnesses" (as defense counsel did here). *Rompilla*, 545 U.S. at 382. The Supreme Court noted, however, that defense counsel "did not go to any other historical source that might have cast light on Rompilla's mental condition." *Id.* The Supreme Court rejected the government's

argument that "reasonably diligent counsel [could] draw a line [because] they have good reason to think further investigation would be a waste." *Id.* at 383. Again, the governing standard is whether counsel collected "all reasonably available mitigating evidence." *Wiggins*, 539 U.S. at 524. Counsel here, like counsel in *Rompilla*, failed to do so, as Petitioner's extensive factual proffer makes clear.

This court's second reason for finding that counsel was not deficient was that Petitioner "ignores any role he himself may have played in remaining silent and failing to make full disclosure to his attorney on these matters." *Gray*, 51 M.J. at 18. The evidence below reveals that the court's reasoning was factually misguided and legally erroneous. In the months leading up to his trial, Petitioner was incoherent and psychotic. His own lawyers avowed at the time that Petitioner believed he had "special powers to interpret passages from the Bible," that "Yahweh" was coming to him in visions and guiding his actions, and that, as a result of these and other psychoses and delusions, Petitioner could not make "rational or logical decisions." *See* Ex. 6-52, Request for Sanity Board at 3. In these circumstances, trial counsel was not reasonable in relying on Petitioner's failure "to make full disclosure" on matters of trauma, abuse, and mental health history. Further, as a matter of constitutional law, this court's prior reasoning has since been squarely rejected. *See Rompilla*, 545 U.S. at 381 (finding counsel deficient where

the petitioner's "own contributions to any mitigation case were minimal," "[c]ounsel found him uninterested in helping," he indicated that his "childhood and schooling . . . "had been normal," and [t]here were times when Rompilla was even actively obstructive by sending counsel off on false leads"); *Porter*, 558 U.S. at 40 (finding counsel deficient despite a "fatalistic and uncooperative" defendant).

The final reason cited by this court in finding that counsel was not deficient was that Petitioner "overlooks the substantial mitigating evidence presented in this case." *Gray*, 51 M.J. at 18. This finding runs afoul of Supreme Court precedent holding that counsel have an "obligation to conduct a thorough investigation of the defendant's background" for "*all reasonably available mitigating evidence*." *Wiggins*, 539 U.S. at 522, 524 (emphasis added). Because the dispositive inquiry is whether counsel failed to discover mitigating evidence that was "reasonably available," counsel's performance can be deficient even where they presented "substantial mitigating evidence." *See Williams*, 529 U.S. 362 (counsel deficient where they interviewed family members and had defendant evaluated by three mental health experts); *Wiggins*, 539 U.S. 510 (counsel deficient where they tracked down Department of Social Services records on defendant and his family, obtained a presentence investigation report that included an account of defendant's personal history, and had investigators interview defendant's family); *Rompilla*, 545 U.S. 374

(counsel deficient where they extensively interviewed defendant's family members and obtained three mental health evaluations).

As the proffer below reveals, this court's finding of "substantial mitigating evidence" was also an unreasonable factual determination. Petitioner's own counsel told the panel that: "there's not a whole lot of mitigation you can bring forth in a case like this." Tr. 2548. That was simply wrong. Because counsel unreasonably cut short their investigation, they did not present any evidence of Petitioner's prenatal trauma; of his mother's repeated neglect and abandonment; of Petitioner's improper exposure to sexuality as a young child; of Petitioner's brain damage; of Petitioner's family history of psychotic illness; of Petitioner's childhood mental illness; or of Petitioner's severe and intensifying mental illness while in the Army.

Further, counsel presented only a meager and misleading hint of the abuse actually suffered by Petitioner in the home. Petitioner's mother testified to only one incident of physical abuse, in which Petitioner's stepfather, Willie Hurd, hit Petitioner. Tr. 2326. Far from being "substantial mitigating evidence," the incident was an overlooked red flag. Proper investigation of Petitioner's physical abuse would have revealed that his mother, Mr. Hurd, and other boyfriends beat, whipped, and otherwise assaulted Petitioner severely throughout his childhood.

Similarly, counsel presented the briefest testimony through Dr. Armitage about Petitioner's neighborhood – essentially that Petitioner grew up in the projects in poverty. *See* Tr. 2432. This information was another red flag that could have led to readily available information about Petitioner's daily childhood exposure to extreme violence, crimes, and sexuality on the streets, as discussed below.

As an alternative basis for consideration, this court will note that most of the evidence presented in support of this claim is new and different than that submitted previously. The court can grant a new sentencing hearing "based on proffered newly discovered evidence." *United States v. Williams*, 37 M.J. 352, 356 (C.M.A. 1993). A new hearing is appropriate where: (1) the evidence was discovered after the trial; (2) the evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and (3) the newly discovered evidence, if considered by a court-martial in light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused. R.C.M. 1210(f)(2). In this case, assuming, *arguendo*, that counsel was diligent and not deficient, all three requirements are met. *See United States v. Harris*, 61 M.J. 391 (C.A.A.F. 2005) (vacating guilty pleas and granting new trial in light of after-discovered evidence of mental impairments of the accused).

This court should thus consider this claim and find that Petitioner was denied

the effective assistance of counsel at the capital penalty phase of his court martial and on appeal. Prior counsel's representation was unconstitutionally deficient because they failed to conduct a thorough investigation of Petitioner's background. This failure prejudiced Petitioner because the members of the panel and the appellate courts never heard significant mitigation evidence when deciding whether Petitioner should live or die. A reasonable investigation would have shown that Petitioner's childhood was marked with physical abuse, neglect and abandonment, and would have led to diagnoses of Petitioner's debilitating mental impairments including Manic Bipolar Disorder, Post-traumatic Stress Disorder, and organic brain damage. Had the panel or appellate courts heard the compelling mitigation that was available, there is a reasonable probability that Petitioner would not have been sentenced to death. This court should vacate the death sentence.

A. Prior Counsel Failed to Conduct a Thorough Investigation

The Sixth Amendment requires capital defense counsel to "fulfill their obligation to conduct a thorough investigation of the defendant's background." *Williams*, 529 U.S. at 396; *see also Wiggins*, 539 U.S. at 524. In *Wiggins*, the Court found counsel ineffective for failing to develop a social history of the capital defendant from "social services, medical, and school records, as well as interviews with the petitioner and numerous family members." 539 U.S. at 516.

Here, Petitioner's counsel did not reasonably investigate Petitioner's life history, and, as a result, provided no background materials to any experts. Defense counsel did request that the military approve funding for a defense investigator, but these requests were denied. Tr. 161. Counsel was deficient in failing to apprise the military court of the need for investigative assistance to collect the significant mitigating evidence available in Petitioner's case. At the time of the final funding request on 7 March 1988, counsel had been representing Petitioner for approximately one year. That was ample time for defense counsel either to collect the mitigating evidence described below or to apprise the military court of the numerous red flags indicating that Petitioner had suffered from childhood abuse, neglect and abandonment, organic brain damage, and major psychiatric illnesses. In the funding requests, however, defense counsel made no proffer of mitigating issues whatsoever and instead proffered far-fetched guilt phase investigative leads as the basis for those requests. *See, e.g.*, Tr. at 159-61. Counsel's failure to apprise the military courts of the need for investigative assistance to collect mitigating evidence was itself deficient performance.

In the absence of investigative funding, defense counsel should have undertaken the mitigation investigation themselves, but failed to do so. In an affidavit, defense counsel Mark Brewer stated as follows: "the defense investigative

work that was done consisted primarily of my phone calls and letters and a side trip from a CLE I was attending in Florida to meet with SPC Gray's family in Miami." Ex. 6-49, Brewer Aff. (Feb. 3, 1992). Mr. Brewer apparently met only with Petitioner's mother and sister on that trip to Florida.

Mr. Brewer also arranged for Petitioner's father to be contacted and interviewed by a Criminal Investigation Command, or CID, agent. A CID agent is the military's equivalent of a police detective. Ex. 6-37, Robert Birck Decl. ¶ 1. CID agents are neither trained nor experienced in conducting mitigation investigations. *Id.* at ¶ 8. Mitigating evidence by its nature often entails evidence of criminal activity such as child abuse, illegal drug use, and so forth. It is simply unreasonable to expect lay witnesses to divulge such information to law enforcement officers. *Id.* Further, in arranging for an agent of the prosecution to search for mitigating evidence, defense counsel compromised the confidentiality of the defense investigation, thus depriving Petitioner of the effective assistance of counsel.

The few small steps taken by defense counsel to collect mitigating evidence were surely not an adequate substitute for the comprehensive mitigation investigation required under the Sixth Amendment. That counsel failed to conduct an adequate investigation into Petitioner's life history became clear at the penalty

phase. Counsel presented the testimony of three family members. Their entire combined testimony, including cross-examination and questions from panel members, consisted of *a total of thirty transcript pages*. See Tr. 2320-27 (Debra Gray); Tr. 2327-36 (Felton Gray); Tr. 2350-64 (Lizzie Hurd).

Because counsel failed to investigate thoroughly, these witnesses did not describe the abusive, violent, and dysfunctional childhood endured by Petitioner. Based on the testimony, defense counsel in his summation to the panel mentioned only in passing that Petitioner was from a poor, crime-ridden neighborhood. Tr. 2546-47. He went on to argue that Petitioner was "an average, normal, good kid, nice to his mother, does good work around the house, helps his uncle . . . ." Tr. 2549. As shown in the life history presented herein, this inaccurate portrait does not come close to showing the compelling mitigation about Petitioner's life that was available to defense counsel at trial.

The other life history evidence presented to the panel members was the testimony of various co-workers, who simply described Petitioner as a good worker. This, too, was a misleadingly incomplete picture of this profoundly mentally ill man. As established below and in the findings of Dr. Pablo Stewart, Petitioner's manic behavior at work supports the mental health diagnoses that have now been made of Petitioner and could have been made at the time of trial. Indeed, witnesses who did

testify were aware of symptoms of mental illness from which Petitioner suffered – information that has now been relied upon by Petitioner's experts but was never developed by defense counsel at trial. *See* Ex. 6-28, Section Decl. ¶¶ 3-4; Ex. 6-29, Eric Smith Decl. ¶¶ 3-7.

Thus, counsel had, at best, only a "rudimentary knowledge of [Petitioner's] history from a narrow set of sources." *Wiggins*, 539 U.S. at 524. Under these circumstances, effective counsel would have expanded their investigation beyond their "narrow set of sources," and would have sought other sources of background information. *See id.* at 516. But counsel failed to investigate Petitioner's life history and, as a result, had little to present. Counsel in fact told the panel that "there's not a whole lot of mitigation you can bring forth in a case like this." Tr. 2548. Counsel's performance was deficient. *See Blanco v. Singletary*, 943 F.2d 1477, 1505 (11th Cir. 1991) (counsel ineffective for emphasizing to sentencer that there was a paucity of mitigation).

Capital counsel also have the duty to ensure that the client receives full and meaningful expert assistance on mitigation issues. As such, counsel must first conduct a thorough investigation of the defendant's background, including events that could affect the defendant's later functioning, such as physical abuse, alcoholism in the family, and mental health problems in the family. *See Wiggins*,

539 U.S. at 524-25 (counsel's failure to investigate further was unreasonable, given that counsel had "acquired only rudimentary knowledge of [the defendant's] history from a narrow set of sources," and that "what counsel actually discovered" suggested that further mitigating evidence might exist). Once counsel has conducted an adequate investigation, she must arrange for any appropriate expert mental health examinations and testing for the purpose of presenting mitigating evidence. Simply retaining experts is not enough. Counsel must provide experts with sufficient background materials to conduct a meaningful evaluation. Here, experts received almost no background materials whatsoever.

The record shows that defense counsel requested a sanity board evaluation of Petitioner. *See* Ex. 6-52, Request for Sanity Board (11/10/87). Therein, counsel requested that the board make findings as to thirteen questions, related to Petitioner's mental state at the time of the alleged crimes and at the time of the evaluations. *Id.* at 1-2. Defense counsel offered little or no background life history information to the board and did not request that the board look into mitigation issues.

Two weeks after the request, General Stiner, the convening authority of Petitioner's court martial, ordered the sanity board and assigned four members, including Colonel Armitage, who was to be the president of the board. *See* Ex.

6-53, Sanity Board Memorandum (11/23/87). However, the full board never convened. Defense counsel agreed to accept the findings of only one member of the board, Colonel Armitage. *See* Ex. 6-54, Sanity Board Report (2/4/88) ¶ 1. Because defense counsel failed to conduct a reasonable mitigation investigation, Colonel Armitage had little or no life history information regarding Petitioner, and based his conclusions on a clinical interview with Petitioner and discovery materials related to the charged crimes. Colonel Armitage was called at the penalty phase and testified that Petitioner is properly diagnosed with personality disorder not otherwise specified, Tr. 2399, schizotypal personality disorder, Tr. 2401, and alcohol dependence, Tr. 2407. On cross-examination, he testified that there were sadistic features to Petitioner's diagnosis and an anti-social aspect to Petitioner's personality. Tr. 2424-25.

Although the military judge repeatedly denied funding for an independent investigator, he did allocate some funds for the retaining of two experts, a psychiatrist and a psychologist. Defense counsel retained Selwyn Rose, M.D., and John Warren, Ph.D. Counsel again provided these experts with minimal background materials and with no social history information whatsoever.

Dr. Rose met with Petitioner in November 1987 in the county prison. He initially found that Petitioner was not "mentally competent to stand trial." Ex. 6-51,

Letter Selwyn Rose, M.D., to Mark Brewer (11/4/87) at 1. He apparently met with Petitioner again in February, two months prior to the start of the capital court martial, but never prepared a report. At trial, he testified that at the time of his second and third visits, Petitioner was "more together, much more aware of reality and much better able to communicate." Tr. 2450. He testified that the diagnosis offered by Dr. Armitage, "schizotypal or borderline type of personality structure" was consistent with his findings. *Id.* Unfortunately, these findings were skewed by counsel's failure to investigate and failure to provide the experts with crucial background information. *See* Tr. 2467 ("With the exception of the psychological testing, all of [the information was] gathered from the accused [himself].").

Dr. Warren also met with Petitioner in February, two months before the trial. He conducted a clinical interview and administered personality testing. Tr. 2501. He, too, was provided no background materials. Ex. 6-4, Warren Decl. ¶ 9 ("We were provided with none of the requisite information from background sources by Gray's counsel. Gray's counsel gave us nothing. We had no collateral personal or social or family history, no such medical history and no such mental health history."). Counsel did not discuss areas of mitigation or ask Dr. Warren to collect any background information. *Id.* at ¶ 10 ("The lawyers for Mr. Gray did not inform me of the areas of mitigating evidence that they wished to develop; nor was I

provided a theory of defense for the penalty phase. I was not asked to develop Mr. Gray's life and social history as mitigation. Had I been asked to, I would have informed the lawyers to pursue the types of information that the current lawyers have obtained."). Because counsel provided insufficient information, counsel only elicited testimony from Dr. Warren that the results of his testing showed deficits in attention and concentration and were consistent with schizotypal personality disorder. Tr. 1505.

The testimony of these experts barely scratched the surface of the true nature of Petitioner's severe and debilitating mental illnesses. Because of counsel's failure to conduct meaningful life history mitigation investigation, these doctors misdiagnosed Petitioner. Had these experts been provided with adequate background information, the panel would have heard the proper diagnoses of severe mental illnesses, as described in detail below. This would have been powerful mitigation evidence. Counsel's failure to provide the experts with sufficient information amounted to constitutionally deficient performance.

Counsel's background "investigation" fell short of that demanded by the Sixth Amendment and prevailing professional norms in a capital case. Here, as in *Wiggins*, "counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of

sources. . . . The scope of their investigation was also unreasonable in light of what counsel actually [knew about Petitioner]." *Wiggins*, 539 U.S. at 524-25 (citations omitted). Counsel's investigation here was indistinguishable from those where the Supreme Court has found capital counsel ineffective. *See Rompilla*, 545 U.S. at 381-82 (counsel ineffective although counsel interviewed Rompilla himself, spoke to five members of his family in a "detailed manner," and obtained three mental health evaluations); *Wiggins*, 539 U.S. at 523-24 (counsel's investigation deficient where they obtained a psychological evaluation and reviewed petitioner's post-sentencing investigation report and Department of Social Services records); *Williams*, 529 U.S. at 369, 395-96 (counsel ineffective despite testimony from petitioner's mother, two neighbors, and a psychiatrist).

Appellate counsel was similarly deficient. The Defense Appellate Division assigned several different attorneys to Petitioner's case during the appellate proceedings. Most of those attorneys did not investigate Petitioner's background at all. *See* Ex. 6-41, Michael Smith Decl. ¶ 4 ("During the time I represented Mr. Gray, I was never able to meet with any of Mr. Gray's family, friends, co-workers, or witnesses. . . . Nor did I obtain all of the records needed for a full and proper life history and mental health investigation."); Ex. 6-39, Jon Stentz Decl. ¶ 5 ("It is my recollection that (prior to my leaving the U.S. Army), neither I nor anyone in the

Defense Appellate Division ever traveled to Miami to conduct a life history investigation of Mr. Gray . . . ."). Only one of Petitioner's appellate attorneys, Michael Berrigan, did any investigation, and he focused on one area of mitigation relating to Petitioner's organic brain damage. Ex. 6-40, Berrigan Decl. ¶ 4.

Neither he nor any staff at the Defense Appellate Division investigated and developed the other available information in the many areas that have now been identified. These areas include evidence of prenatal trauma, physical abuse and violence in Petitioner's childhood home, exposure to violence outside the home, improper childhood exposure to sexuality, neglect and abandonment, childhood mental illness, manic episodes in the Army, and an extensive family history of psychotic illnesses. *See infra.* The mitigating evidence that was readily available to appellate counsel is the same mitigating evidence that was readily available to defense counsel at trial.

Appellate counsel had no strategic or tactical reason for failing to investigate these areas. Ex. 6-40, Berrigan Decl. ¶ 4; Ex. 6-41, Michael Smith Decl. ¶ 6; Ex. 6-39, Stentz Decl. ¶ 4. Failure to investigate these areas amounted to deficient performance. *See, e.g., Canales v. Stephens*, 765 F.3d 551, 569 (5th Cir. 2014) ("[T]he performance of his state habeas counsel fell below an objective standard of reasonableness. . . . [S]tate habeas counsel did not make a strategic choice to forego

a mitigation investigation."); *Wessinger v. Cain*, No. CIV.A. 04-637-JJB, 2015 WL 4527245, at *4 (M.D. La. July 27, 2015) ("Petitioner's state initial-review counsel's performance fell below an 'objective standard of reasonableness' by failing to conduct any mitigation investigation, particularly when the underlying claim is one of ineffective assistance of trial counsel at the penalty phase."); ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 11.9.3 (1989) (post-conviction counsel's duties include "conducting a full investigation of the case, relating to both the guilt/innocence and sentencing phases"); *see generally Strickland v. Washington*, 466 U.S. 668, 687 (1984).

During the military appeals, counsel did make repeated requests of the Judge Advocate General and the military courts for funding in order to have a mitigation specialist conduct a life history investigation of Petitioner, and for expert assistance. These requests were routinely denied.[6] Prior to current counsel's representation of

[6] *See* AR2652-90, Motion for Funding for Expert Psychiatrist, Attorney and Investigator (Dec. 28, 1990) (denied Mar. 12, 1991, *see* AR2618-26); AR 1940-47, Motion for Funding (Dec. 30, 1992) (denied Jan. 21, 1993); AR1929-39, Petition for Reconsideration [of Funding Requests] (Jan. 4, 1993) (denied Jan. 22, 1993, *see* AR1926-27); AR1878-88, Motion for En Banc Reconsideration of Motion for Funding (Feb. 11, 1993) (denied Mar. 11, 1993, *see* AR1752); AR194-95, Ex Parte Request for Expert Assistance (Aug. 9, 1993) (denied Aug. 19, 1993, *see* AR172-73); AR177-197, Motion for Funding of Expert Investigator and Behavioral Neurologist (Sept. 10, 1993) (denied Apr. 25, 1994, *see* AR1634-40); AR174-76, Ex Parte Request for Expert Assistance (Oct. 15, 1993) (denied Nov. 8, 1993, *see*

Petitioner, there has never been a thorough life history investigation during the thirty-year pendency of his case. *Petitioner is the only service member facing a sentence of death in which these funds were denied by the military.* *See* Dwight H. Sullivan, *Raising the Bar: Mitigation Specialists in Military Capital Litigation*, 12 Geo. Mason U. Civ. Rts. L. J. 199, 226-27 (2002) ("Gray is the only service member on military death row who did not receive funding for a mitigation specialist either at the trial or appellate level."). Petitioner's "status as the lone military death row inmate never to have the services of a government-funded mitigation specialist raises obvious constitutional concerns." *Id.* at 227 n.177.

Appellate counsel were nonetheless deficient for failing to conduct that investigation themselves. Appellate counsel were also deficient in failing to conduct even an initial investigation to identify all of the specific areas of available mitigation evidence and to use that information to support their requests for investigative assistance. And to the extent that Petitioner's appellate counsel were *not* deficient in failing to conduct a mitigation investigation themselves, the military's denial of funds rendered appellate counsel deficient.

AR170); AR201-02, Ex Parte Request for Expert Assistance (Apr. 28, 1994) (denied June 6, 1994, *see* AR198-200); AR205-07, Request for Funding for Mitigation Expert (Apr. 21, 2003) (denied Apr. 23, 2003, *see* AR203-06).

B. Petitioner Was Prejudiced by Prior Counsel's Deficient Performance

Had prior counsel conducted a thorough mitigation investigation, they would have been able to present a powerful mitigation case. The mitigating evidence described below, all of which was available at the time of Petitioner's capital sentencing and appeal, shows that Petitioner was prejudiced by counsel's failures. The available mitigation is substantial and undermines confidence in the death sentence. Because of counsel's failures, the panel did not hear the "compassionate or mitigating factors stemming from the diverse frailties of humankind," *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976); Petitioner was not treated as a "'uniquely individual human bein[g],'" *id.*; there was no "reliable determination that death is the appropriate sentence," *Penry v. Lynaugh*, 492 U.S. 302, 319 (2002) (quoting *Woodson*, 428 U.S. at 304-05); and the death sentence is not a "reasoned moral response" to the offense and the offender, *Penry*, 492 U.S. at 323 (quotations omitted). Petitioner's death sentence should be vacated.

As noted above, the paltry mitigation that was presented to the panel did not begin to tell the true story of Petitioner's life or the severity of his mental illnesses. Counsel presented a picture of a man who was a good worker, loved by his family, who had some manageable personality disorders, and who just had a bad year. Tr.

2553 ("[H]e started off as a good person. He led a good life as a child, he had a good public life in the Army, he's had a good life in jail. He's had that one horrible year of his life when everything came together."). Far more compelling – and accurate – mitigation could have been presented. Where, as here, counsel's deficient performance leaves the sentencer with little or nothing to weigh against the aggravating circumstances, prejudice is established. *Wiggins*, 539 U.S. at 537 (finding prejudice where jury "heard only one significant mitigating factor," counsel's deficient performance prevented the jury from placing "petitioner's excruciating life history on the mitigating side of the scale," and petitioner's record could not have been used to "offset this powerful mitigating narrative"); *Rompilla*, 545 U.S. at 391-93 (finding prejudice where effective counsel could have shown that petitioner had alcohol problem, had been abused and deprived by his alcoholic father, and had related mental health problems).

Effective counsel would have conducted a thorough life history investigation and would have provided the results of that investigation to experts. Had counsel done so, the panel and appellate courts would have heard that Petitioner's entire life was marked with abuse, neglect, and abandonment, and that he suffered severe mental illnesses beginning early in life and manifesting fully in early adulthood. Now that a thorough life history has been developed, Petitioner has been diagnosed

accurately with Bipolar Disorder, Manic (including Severe Manic Episode With Mood-congruent Psychotic Features); Post-traumatic Stress Disorder; Organic Mental Syndrome, Not Otherwise Specified; and Substance Dependence (alcohol). Had the panel and appellate courts heard this powerful mitigation, there is a reasonable probability that Petitioner would not be under sentence of death.

1. Petitioner's Life History

Current counsel's investigation revealed that Petitioner's entire life was marred by trauma, abuse, neglect, and abandonment. As a child, he exhibited symptoms predictive of and consistent with his psychiatric diagnoses, but he never received any treatment for those impairments. Because prior counsel did not thoroughly investigate his life history, neither the testifying experts, the panel, nor the appellate courts heard this compelling mitigation evidence, which is briefly summarized below.

a. Prenatal Trauma. The trauma inflicted on Petitioner began even before his birth when, during his mother's pregnancy, he was subjected to heightened risks for brain damage and other cognitive deficits. His father, Wilbert Washington, violently beat his mother, Lizzie Gray, while she was pregnant with Petitioner. Ex. 6-8, Eula Mae Smith Decl. ¶ 7; Ex. 6-9, Robert Wilmore Decl. ¶ 5; Ex. 6-10, Rosebud Roby Decl. ¶ 2. A close friend of Wilbert and Lizzie's

describes the beatings this way:

> He would rage on her for no reason, punching and stomping her, screaming at her and threatening to kill her. I seen him beat her hard with my own eyes more than once. He would snap and just lose control of himself and take it out on her. Early on in her time with Wilbert, Lizzie got pregnant with Ronald. Everyone knew she was pregnant, but that didn't stop Wilbert from beating her. Like I said, he just couldn't control himself. It wouldn't surprise me if the baby got injured that way since Wilbert was so rough on her.

Ex. 6-9, Wilmore Decl. ¶¶ 5-6.

In addition to being exposed to physical violence in the womb, Petitioner was exposed to his mother's alcohol abuse during the pregnancy. *Id.* at ¶ 4. Both of these factors significantly increased the likelihood that Petitioner would suffer from brain damage and other cognitive impairments. *See* Stewart Decl. ¶ 36. Neither the mental health experts at trial nor the panel ever heard this evidence.

b. Physical Abuse and Violence in the Home. Family members describe Ron Gray's upbringing as a living hell. Ex. 6-11, Deborah Fuller Decl. ¶ 10. Petitioner's mother brought numerous men into the home who were frequently violent with her and the children. Ron and his siblings watched as these men raged, violently beating and threatening their mother, even when she was pregnant. *Id.* at ¶¶ 4, 8; Ex. 6-12, Dorothy Gray Decl. ¶¶ 10, 18; Ex. 6-13, Lizzie Bonner Decl. ¶¶ 5-6. Lizzie fought back violently and even tried to stab one of her

boyfriends in front of the children. Ex. 6-14, Quincy Bonney Decl. ¶ 5.

These men frequently turned their abuse on Petitioner and the other children, hitting them, beating them, and whipping them with belts. Ex. 6-11, Fuller Decl. ¶¶ 4-6, 9; Ex. 6-12, Dorothy Gray Decl. ¶ 18. As one of these men concedes, "I was not afraid to put something on their tail if Ron or the other kids acted up. I took a belt to Ron and to his sister too. If they misbehaved I put the boom down on them." Ex. 6-15, Perry Johnson Decl. ¶ 4.

Lizzie Gray was physically abusive as well. She hit Ron and beat him with belts. Ex. 6-11, Fuller Decl. ¶¶ 4-6, 9. These beatings often happened after Lizzie was in a fight with one of her men, as if Ron and his siblings "got her leftover rage." Ex. 6-14, Bonney Decl. ¶ 6; *see also id.* ¶¶ 6-7 ("She would go into a rage. I remember Lizzie Mae screaming, 'God damn it. Bring your ass here!' Lizzie Mae used to slap Ron in the face, beat him with a belt, hit him in the back of [the] head and with a shoe. The boyfriends did those kinds of things too."). When she was with her children, Lizzie taught them that problems should be solved with violence. She delivered this lesson both through her violent relationships and through her "parenting." *See, e.g.*, Ex. 6-13, Bonner Decl. ¶ 3. The panel and appellate courts never heard this compelling evidence.

c. Violence Outside the Home. In addition to violence in

the home, Petitioner witnessed all manner of violence outside the home, including gang shootings, stabbings, and beatings on the streets. Ex. 6-17, David Ford Decl. ¶¶ 2, 9; Ex. 6-11, Fuller Decl. ¶¶ 12-14; Ex. 6-18, Eric Brown Decl. ¶ 4; Ex. 6-13, Bonner Decl. ¶ 7. This violence occurred on a near daily basis. Ex. 6-19, Freddie Smith Decl. ¶ 5; Ex. 6-20, Henry Cooley Decl. ¶ 4; Ex. 6-21, Theresa McKenzie Decl. ¶ 9. To be in safe in their own homes, children frequently had to stay low and avoid being near the windows. Ex. 6-23, Ivery Brown Decl. ¶ 6.

Walking to school was like being in a war zone. In one of the neighborhoods where Petitioner grew up, it was so violent that the police rarely patrolled there. Dr. Marvin Dunn, who is an expert in urban issues in Miami, describes the conditions of Petitioner's neighborhood at the time:

> During one period in the late 1970s and early 80s, the police refused to enter the Liberty Square projects with fewer than three patrol units - one car to lead, another to cover the rear, while the center car responded to the call. Police feared riots, snipers, and stray bullets. Fire and Rescue, and any social service agency, simply refused to go in without police escort. It was, to be blunt, a war zone. Mr. Gray came of age in the midst of this tumult.

Ex. 6-7, Dunn Decl. ¶ 8. During some periods of his childhood, Petitioner lived in another violent and tumultuous neighborhood, Goulds. Dr. Dunn also describes the horrific conditions of that area. *Id.* at ¶ 14.

In the summer of 1980, near the time of Petitioner's fifteenth birthday, he and

his family moved to the James E. Scott projects in the Liberty City neighborhood of Miami. That summer, Liberty City was devastated by large-scale riots and violence following a verdict in the Arthur McDuffie case, acquitting white police officers in the shooting and death of an unarmed black motorist. The *New York Times* reported on 20 May 1980 that the rioting had been "centered" in the "Liberty City area." *Guard Reinforced to Curb Miami Riot; 15 Dead over 3 Days*, N.Y. Times, May 20, 1980 at A1. The article continued:

> By noon today, many buildings there were still smoldering, most of them commercial shops and retail businesses. The police said that many had been looted before they were set afire. National Guardsman cradling automatic weapons stood on nearly every corner, and in the heart of the ravaged neighborhoods scarcely a block seemed to have been left untouched by the rioters. On some blocks, every building was a smoking, burned-out shell.

Id. Even months after the riots, violence continued to plague the neighborhood and the James E. Scott projects in particular. Outsiders were targeted, stores were looted, robberies and vandalism continued to occur. Ex. 6-1, Colleen Francis Decl. ¶ 35; Ex. 6-25, Dennis Ford Decl. ¶ 9. Police violence also occurred:

> Five police officers were shot and at least 15 other persons, including a firefighter, were injured in disturbances that continued into the evening in Liberty City . . . the disturbances began at 3:30 this afternoon as a crowd of about 100 persons gathered to watch police officers pursuing four black robbery suspects near the James E. Scott housing project in Liberty City.

Jo Thomas, 5 Officers Shot in Miami Unrest; 15 Persons Hurt, N.Y. Times, July 16, 1980. *See also Jo Thomas, National Guard Alerted and Curfew Imposed in Miami*, N.Y. Times, July 18, 1980 at A1; Nathaniel Sheppard, Jr., *Tense Miami Area Fears The Anger of its Youth*, The Palm Beach Post, July 20, 1980, at 30. Petitioner grew up in the midst of this violence, but the panel and appellate courts never heard this evidence.

d. Improper Childhood Exposure to Sexuality. During the late 1970s, Petitioner's mother was married to Willie Hurd, a violent and abusive drunk. In addition to physically abusing mother and children, Hurd exhibited abusive and improper sexual behavior, to which Petitioner was directly exposed as a child. Petitioner's brother, Anthony Johnson, recalls that Hurd showered with the bathroom door open in full view of the children in the house (the shower did not have a shower curtain). Ex. 6-16, Johnson Decl. ¶ 2. When Anthony was a young boy, Hurd showered with him and would lay in bed naked with Lizzie Gray in full view of the children. *Id.* Petitioner's cousin, who was raised in the same home, confided that Mr. Hurd molested her on a regular basis. Ex. 6-24, Lisa Howard Decl. ¶ 6; *see also* Ex. 6-13, Bonner Decl. ¶ 2 (describing Petitioner's mother's promiscuity).

In addition to his exposure to this sexual misconduct, Ron and the other

children could literally look outside the windows of their home and see prostitutes having sex in the lot next to their house. Ex. 6-11, Fuller Decl. ¶ 13; Ex. 6-24, Howard Decl. ¶ 5. As family friend Lisa Howard describes:

> Prostitutes used to work the corner right next to the house where Ronald Gray and his family lived. The prostitutes would be out there at all times of the day and night with their pimps. We couldn't help but see prostitutes turn tricks in the empty lot right next to Lizzie Mae's house.

Ex. 6-24, Howard Decl. ¶ 5.

In short, Petitioner was raised in an environment where improper and illegal sexual activity was the norm. The emotional and psychiatric impact of being improperly exposed to sexuality as a young child affected Petitioner's mental well-being. Ex. 6-3, Richard Dudley, M.D., Report at 5 (Petitioner's "early sexual thought processes derive from inappropriate exposure to sexuality at a very young age, and quite possibly to some form of sexual abuse"). This evidence would have been compelling mitigation. *Id.*; *see also* Stewart Decl. ¶ 34 ("[T]here are strong indications that there was a sexual component to Mr. Gray's childhood trauma."). The panel and appellate courts never heard this evidence.

e. Neglect and Abandonment. Petitioner's childhood was also marked by more subtle, but still profoundly damaging, types of mistreatment. For example, his mother periodically abandoned Petitioner and her other children

for days, weeks, and months at a time without explanation. She would leave them at home to fend for themselves while she went out partying at night, or she would send them to live with relatives for days or months at a time. Ex. 6-11, Fuller Decl. ¶¶ 3, 10; Ex. 6-12, Dorothy Gray Decl. ¶ 9; Ex. 6-10, Roby Decl. ¶ 6; Ex. 6-13, Bonner Decl. ¶ 2; Ex. 6-1, Francis Decl. ¶ 23. She seemed to care more about the men she was chasing than about her children. Ex. 6-11, Fuller Decl. ¶ 10; Ex. 6-13, Bonner Decl. ¶ 2.

Petitioner's mother did not provide adequately for her children. During much of Petitioner's childhood, eight family members lived in small, rat and bug infested projects. Ex. 6-16, Johnson Decl. ¶¶ 2-3; *see also* Ex. 6-11, Fuller Decl. ¶¶ 2-3. Petitioner and his siblings frequently went to school in worn out, hand-me-down clothes. Ex. 6-25, Dennis Ford Decl. ¶ 2; Ex. 6-12, Bonner Decl. ¶ 5. At times, they went hungry and had to beg their relatives for food. *See* Ex. 6-12, Dorothy Gray Decl. ¶¶ 16-17. And perhaps most damaging, despite his burgeoning mental problems, Petitioner's family never sought out treatment for him. Ex. 6-19, Freddie Smith Decl. ¶ 7. The panel and appellate courts never heard this compelling mitigating evidence.

f. Childhood Mental Illness. As a child, Petitioner's behavior and thought processes were strange. Much of the time, he was a loner,

spending time by himself in his room. Ex. 6-20, Cooley Decl. ¶ 4; Ex. 6-23, Ivery Brown Decl. ¶ 5. He would be silent for long periods of time, not responding when spoken to, appearing anxious and worried but otherwise devoid of emotion. Ex. 6-12, Dorothy Gray Decl. ¶¶ 11-12; Ex. 6-18, Eric Brown Decl. ¶ 2; Ex. 6-8, Eula Mae Smith Decl. ¶ 2; Ex. 6-19, Freddie Smith Decl. ¶ 2; Ex. 6-26, Joanne Smith Decl. ¶ 3; Ex. 6-21, McKenzie Decl. ¶ 4.

Other times, he would become hyperactive and upbeat, exercising intensely and acting out fantasies. Ex. 6-18, Eric Brown Decl. ¶ 2; Ex. 6-1, Francis Decl. ¶ 37; Ex. 6-25, Dennis Ford Decl ¶ 5. At those times, he could be seen sitting up in his bed, wide awake in the middle of the night. Ex. 6-19, Freddie Smith Decl. ¶ 5. He thought of himself as a ninja and would strike trees until his hands bled. Ex. 6-16, Anthony Johnson Decl. ¶¶ 2-3; Ex. 6-25, Dennis Ford Decl. ¶ 5. He became obsessed with martial arts and even wore a ninja suit to school. Ex. 6-25, Dennis Ford Decl. ¶ 4. He seemed unable to separate reality from fantasy. *Id.* at ¶¶ 5-6.; Ex. 6-27, Roger Smith Decl. ¶ 4. He would be found talking to himself or to the sky. Ex. 6-12, Dorothy Gray Decl. ¶¶ 11-12; Ex. 6-19, Freddie Smith Decl. ¶ 5.

During his episodes of hyperactivity, Petitioner worked out very intensely, running and working out alone in the field next to his house while other kids teased and heckled him. Ex. 6-25, Dennis Ford Decl. ¶ 4. His exercises became most

intense when something had happened at home that made him angry. *Id.* at ¶ 5.

He frequently pretended to be Batman or Superman, and thought he could fly if he wore a cape. Ex. 6-26, Joanne Smith Decl. ¶ 4. He would jump off of roofs. Ex. 6-19, Freddie Smith Decl. ¶ 4. As a young child, he once fell from a second floor balcony, landed on his head and was unconscious. Ex. 6-14, Bonney Decl. ¶ 4; Ex. 6-12, Dorothy Gray Decl. ¶ 12. His family did not take him for medical treatment. *Id.* His childhood fantasies did not end at a normal age. He continued to wear a cape, play with and talk to his action figures, and dress up like a ninja during his teenage years. Ex. 6-14, Bonney Decl. ¶ 4; Ex. 6-21, McKenzie Decl. ¶ 6.

Because Petitioner's counsel never investigated his life history, the panel never heard this compelling evidence. Further, the mental health experts at trial never learned of Petitioner's childhood mental illness and thus were unable to accurately diagnose Petitioner, as discussed in detail below.

g. Manic Episodes in the Army. Relatives and friends were astounded to hear that the Army had accepted Ron despite his mental problems. *See* Ex. 6-26, Joanne Smith Decl. ¶ 6; Ex. 6-27, Roger Smith Decl. ¶ 4. The Army at that time did not have any reliable method for screening and detecting mental health illness. Ex. 6-28, Lee Section Decl. ¶ 5. The Army's macho,

heavy-drinking culture seemed to encourage Petitioner's increasingly pathological behavior. *Id.* ¶ 5; Ex. 6-29, Eric Smith Decl. ¶ 6. Petitioner's mental illness went largely unnoticed and completely untreated in the Army.

By 1986, Petitioner's mental illness had become extreme. While on leave in Miami, friends and family members quickly noticed that Ron's behavior had undergone a drastic change. He was expansive, talkative, and arrogant, and he was lifting weights or running nearly all the time. Ex. 6-16, Anthony Johnson Decl. ¶ 7. He could not sit still. Ex. 6-17, David Ford Decl. ¶ 6. He had never drank or smoked before joining the Army, but now he was drinking alcohol and smoking cigarettes and marijuana. *Id.* at ¶ 6. Friends observed him losing control of his mind and exhibiting strange and unpredictable behavior. *See id.* at ¶¶ 6-7.

More and more, Ron became hyperactive and unpredictable. He was unable to sit still, frequently covered in sweat, and became obsessive about his work. Ex. 6-29, Eric Smith Decl. ¶¶ 3-4; Ex. 6-28, Section Decl. ¶ 3. In the months before his arrest, he complained frequently about headaches, became increasingly dependent on alcohol, had unpredictable mood swings, and was rarely sleeping. Ex. 6-30, Earlene Vierra Decl. ¶¶ 2-4. A friend described him as having a "split personality." She explained:

There were times when he just wouldn't talk, like he was completely

> withdrawn. He'd just look at me blankly or stare off into space. [His wife] Earlene would say that he just came home from work that way sometimes. She would say he was cranky. Seemed like he blocked everything out. He would be like that for a day, maybe two or three days in a row. Then, he would go back to normal where he liked to drink and go out walking or jogging, practicing his ninja stuff. . . . But more often than not, Ron was full of energy.

Ex. 6-31, Penny Garcia Decl. ¶¶ 7-8.

As now recognized both by Petitioner's current experts and by experts who evaluated him in the military, information regarding Petitioner's mental state in the months leading up to the crimes was crucial both for an accurate psychiatric diagnosis and for a basic understanding of Petitioner's behavior. *See* Ex. 6-2, Stewart Decl. ¶ 42; Ex. 6-4, Warren Decl. ¶¶ 8-12, 15; Ex. 6-5, William Kea, Ph.D., Decl. ¶ 10. But neither the panel nor the mental health experts learned of this evidence.

h. Family history of psychotic illness. The mental health experts were also hampered by a lack of information about Petitioner's extensive family history of psychotic illness. Such a history is a crucial prerequisite for a comprehensive mental health evaluation. *See* Ex. 6-2, Stewart Decl. ¶ 8. Petitioner's family history reveals that numerous family members on both his mother's and father's sides of the family have suffered from psychotic mental illnesses for generations.

Petitioner's father exhibited symptoms of severe mental illness, including psychosis. *See* Ex. 6-33, Patricia Washington Decl. ¶¶ 2-5; Ex. 6-10, Roby Decl. ¶ 2; Ex. 6-32, Tiffany Washington Decl. ¶¶ 2-3; Ex. 6-35, Tommie Lee Washington Decl. ¶¶ 2-6. Relatives described him as "two people in one." Ex. 6-9, Wilmore Decl. ¶ 3. One of Ron's two paternal half-brothers has been diagnosed with Schizoaffective Disorder - Bipolar Disorder, and the other has been diagnosed with Schizophrenia - Paranoid Type. Ex. 6-1, Francis Decl. ¶¶ 11-12; *see also* Ex. 6-32, Tiffany Washington Decl. ¶ 7; Ex. 6-34, Tracey Washington Decl. ¶¶ 2-3. Paternal aunts and uncles, among other paternal relatives, likewise exhibited symptoms of psychotic illnesses. Ex. 6-10, Roby Decl. ¶ 5; Ex. 6-35, Tommie Lee Washington Decl. ¶¶ 10-11.

Petitioner's maternal half-brother, Mickyleto Hurd, has been diagnosed with Bipolar Disorder. Ex. 6-1, Francis Decl. ¶ 13. Relatives describe him as exhibiting bizarre behavior, talking to himself, and wearing winter clothes in the middle of summer. Ex. 6-12, Dorothy Gray Decl. ¶ 15. Petitioner's maternal grandfather exhibited similar symptoms of mental illness. *Id.* ¶¶ 3-4; Francis Decl. ¶ 16.

* * * * *

Petitioner's life history, in and of itself, provides ample mitigation evidence to establish prejudice for his counsel's failure to fully investigate the mitigation available in his case. There is a reasonable likelihood that this evidence of Petitioner's horrible upbringing would have resulted in a life sentence. Further, as discussed more below, had counsel provided experts with this history, the debilitating psychiatric effects of such a childhood could have been explained to the panel and the appellate courts.

2. Mental Health Mitigation

Dr. Pablo Stewart describes the psychiatric effects of a traumatic upbringing:

> The adverse mental health effects of being subjected to such a traumatic childhood are well established. As discussed in more detail below, Mr. Gray exhibits the symptoms typically seen in survivors of severe childhood abuse. Children who are forced to endure such trauma are left with long-term debilitating psychological impairments.

Ex. 6-2, Stewart Decl. ¶¶ 6. Such an explanation of the mental health results of the type of childhood development endured by Petitioner would have been powerful mitigation.

Petitioner's exposure as a child to inappropriate sexual conduct also had a tremendous impact on his development and should have been presented to the panel:

> Information gathered during his current court proceedings reveals that Mr. Gray grew up in a household where he was at great risk of being exposed and subjected to inappropriate sexual conduct. For example,

> his mother exhibited promiscuous sexual behavior, taking up with numerous different men, and being naked in bed with lovers while having her bedroom door open. At least one man who she lived with, Willie Hurd, exhibited inappropriate sexual behavior by physically and sexually forcing himself upon Mr. Gray's mother, showering with the bathroom door open in full view of the children, and according to at least one witness, sexually molesting one of the female children in the house. At various times during his childhood, Mr. Gray also lived in neighborhoods where prostitutes engaged in sexual activity in full view of the children living in Mr. Gray's home.

Ex. 6-3, Dudley Report at 5. The impact of this exposure would have been compelling mitigation:

> The range of sexual conduct/activities that occurred in and around Mr. Gray's home throughout his childhood years, and the psychiatric manifestations of inappropriately early exposure to such sexuality/sexual activity that Mr. Gray has exhibited since early childhood, would have been important mitigating information for the jury to hear and consider in his case. This is especially true given the sexual nature of the crimes. An accurate and comprehensive psychiatric profile of Mr. Gray would have helped the jury to understand that, particularly during the manic psychotic episodes of his Bipolar Disorder, Mr. Gray was unable to control his sexual impulses and lived in a fantasy world where those impulses governed both his thought processes and his behavior.

Id.

The psychological impact on the development of a child growing up in the midst of a violent and impoverished community is likewise devastating:

> The emotional and psychological effects of growing up in the midst of such extreme chaos and violence are well established in the field of psychology. The impact of living under these conditions tends to be

> especially problematic for young black males, especially those who grew up in unstable family conditions. Among the effects are low self-esteem, high drop-out rates from school, depression, post-traumatic stress disorder, anger control problems, drug addiction and involvement in crime (usually related to drugs or domestic issues). It also increases the incidence of domestic violence.

Ex. 6-7, Dunn Decl. ¶ 17.

Further, because of counsel's failure to conduct a proper investigation, Petitioner was misdiagnosed at trial. As described above, the mental health mitigation presented to the panel was that Petitioner suffered from personality disorders. Had counsel conducted a life history investigation and provided that investigation to his experts, they could have presented compelling evidence that Petitioner suffered from mental illnesses much more debilitating than personality disorders. The members of the panel never heard, and the appellate courts only heard in part, that Petitioner suffers from organic brain damage, Bipolar Disorder, and Post-traumatic Stress Disorder. Nor did they hear of his diminished mental state at the time of the crimes as a result of these mental illnesses. Had they heard this evidence there is a reasonable probability that the outcome of the sentencing would have been different.

a. Bipolar Disorder, Manic (including Severe Manic Episode with Mood-congruent Psychotic Features). Dr. Armitage testified that

he diagnosed Petitioner with a non-specified personality disorder, Tr. 2399, and that Petitioner exhibited some traits found in the schizotypal diagnosis but did not have enough characteristics to rise to the full diagnostic level. Tr. 2401. Dr. Rose agreed with Dr. Armitage's assessment. Tr. 2450.

These diagnoses were wrong. Had effective counsel provided these experts with a life history, the proper diagnoses could have been provided. The Bipolar diagnosis, in conjunction with life history mitigation, organic brain damage and Post-traumatic Stress Disorder, explains the true nature of Petitioner's mental illness and resulting behavior. This would have been powerful mitigation, as Dr. Stewart explains:

> Mr. Gray suffers from Bipolar Disorder, Manic type. He was afflicted by an extended and Severe Manic Episode With Mood-Congruent Psychotic Features beginning in 1986 and ending after his arrest in 1987. Declarants report that during that time he had boundless energy, could not sit still, needed little if any sleep each night, was hyper-sexual, demonstrated extreme mood lability, went on spending sprees, suffered headaches, and self-medicated with alcohol.

Ex. 6-2, Stewart Decl. ¶ 26. The debilitating effects of Bipolar Disorder are extreme:

> Mr. Gray's Manic Episode was Severe, because he would have needed almost continual supervision to prevent harm to self or others and because he suffered from Psychotic Features. Mr. Gray's psychoses took the form of religious delusions and ideas of reference, for example, that he was the Saul of Tarsus and the Son of God and that

> everything he did was to "serve Yahweh." He believed that God gave him special powers to interpret the Bible, which allowed him, for example, to predict future events. His delusions also led him to believe that he was no longer the other or the "old Ron Gray", but instead had been reborn as the "new Ron Gray" and that his new self had been forgiven by God for his crimes. He heard voices and saw visions of "Yahweh" that guided his actions. Further, his repeated suffering of headaches, while also consistent with brain damage, is common in those suffering from hallucinations. The evidence thus demonstrates that Mr. Gray suffered psychoses that undermined his ability to distinguish fantasy from reality.

Id. at ¶ 30.

Petitioner's Bipolar Disorder was magnified by his early childhood history, which was marred by violence, abuse, and neglect:

> [C]hildren who develop Bipolar Disorder require enormous support to overcome and manage the dramatic impacts of this illness. Needless to say, Mr. Gray did not receive such support. To the contrary, his traumatic upbringing worsened the impact of his disease.

Id. at ¶ 16.

Dr. Warren, who testified at the penalty phase, has now had an opportunity to review Petitioner's life history, which was never before made available to him. He agrees with Dr. Stewart's diagnoses:

> To a reasonable degree of certainty, it is clear to me that Mr. Gray suffered from major mental disorders at the time of the offenses in the mid-to-late 1980's. Specifically, he suffered from undiagnosed Bipolar Disorder and undiagnosed Post-traumatic Stress Disorder in addition to the diagnoses noted in the evaluations of myself and Drs. Armitage and Rose. This accurate assessment was not made then

because of the lack of collateral data from his counsel.

Ex. 6-4, Warren Decl. ¶ 12.

Dr. Warren explains that he and the other doctors who testified at the penalty phase were not able to diagnose Petitioner with Bipolar Disorder because they were not provided with sufficient background information from counsel:

> At the time of Mr. Gray's trial, we did not appreciate that Mr. Gray's psychoses were secondary to and dictated by manic episodes. Had we known that Mr. Gray exhibited symptoms of manic and hypomanic episodes as a child, that he exhibited symptoms of a severe manic episode in the months before his arrest, and that his family had a history of psychotic illnesses, we would have diagnosed Mr. Gray with Bipolar Disorder.

Id. at ¶ 15. He goes on to explain how this information would have been powerfully mitigating:

> This diagnosis would have explained how Mr. Gray lost touch with reality and lost control of himself at certain times, while acting in relatively normal and appropriate ways at other times. This would have explained his behavior at the time of the offenses. Our assessment of his mental state was flawed due to the lack of collateral data. I would have provided the opinion that he lacked the mental state necessary for conviction had trial counsel provided me with the needed collateral data about him. We would have been able to accurately describe his impaired mental state, resulting from mental illness, and explained that he had a diminished capacity, had counsel informed us of Mr. Gray's history.

Id. Available evidence from family and friends would have established the symptoms the doctors needed for accurate assessment of Petitioner's mental state.

But again, the panel and appellate courts were never given a thorough accounting of Petitioner's mental problems because of counsel's deficient performance.

A feature of Bipolar Disorder is the fluctuation of manic episodes which, in Petitioner's case, often manifested in psychotic symptomatology. *See* Ex. 6-2, Stewart Decl. ¶ ("Episodes can last a few days or for months at a time."). This diagnosis fully explains Dr. Rose's experience with Petitioner. After Dr. Rose's first meeting with Petitioner, he described Petitioner's behavior as exhibiting severe psychosis and formed the opinion that Petitioner was not "presently mentally competent to stand trial." Ex. 6-51, Selwyn Rose Letter to Brewer (11/4/87) at 1. Later, Dr. Rose indicated that those symptoms were gone:

> The first time I saw Ron I thought he was very severely mentally ill. The first time I saw him he appeared delusional, was hallucinating, seemed overly psychotic, and at that time it was my impression he was a paranoid schizophrenic. The second two times I saw him he was much more together, much more aware of reality and much better able to communicate.

Tr. 2450.

Dr. Rose was asked to explain this difference in behavior, but he could not do so: "He seemed to fluctuate from time to time and I can't explain it. He just seemed different the second two times." *Id.* Dr. Rose could not explain this change because he was not provided with sufficient information to make the proper

diagnosis; a Bipolar diagnosis fully explains the fluctuation of manic, psychotic episodes. Ex. 6-3, Dudley Report at 4 ("[S]ince persons who suffer from childhood onset Bipolar Disorder tend to have rapid cycling of episodes when they are adults, this more informed history of the onset, nature and course of Mr. Gray's psychiatric difficulties would have helped the evaluators to understand and then account for the fluctuating nature of Mr. Gray's mental state – a finding which the experts at trial were at a loss to explain."). Had counsel performed effectively, experts could have explained these fluctuations. Instead, the panel was simply left with the impression that Petitioner was exaggerating his symptoms during the initial evaluation.

Petitioner was severely prejudiced by the fact that the panel and appellate courts never heard this diagnosis and never heard evidence that "at the height of his manic, psychotic episodes, Mr. Gray had lost touch with reality and was unable to control himself." Ex. 6-3, Dudley Report at 4. As the Tenth Circuit has explained:

> [D]iagnoses of specific mental illnesses such as schizophrenia or bipolar, which are associated with abnormalities of the brain and can be treated with appropriate medication, are likely to regarded by a jury as more mitigating than generalized personality disorders, which are diagnosed on the basis of reported behavior, are generally inseparable from personal identity, and are often untreatable through medical or neurological means.

Wilson v. Sirmons, 536 F.3d 1064, 1094 (10th Cir. 2008). As in *Wilson*, the panel and appellate courts here only heard misleadingly incomplete evidence of

Petitioner's mental issues and not the accurate diagnoses of severe mental illnesses.

b. Organic Brain Damage. At the time of Petitioner's court martial, there were numerous red flags indicating that Petitioner had cognitive disabilities and organic impairments. However, defense counsel failed to request neuropsychological and other testing that would have allowed this mitigation to be presented to the panel.[7]

Dr. Warren administered the Minnesota Multiphasic Personality Instrument ("MMPI") to Petitioner. The report of the results of this test was furnished to counsel. The report indicated that Petitioner "has a large number of symptoms of the type sometimes associated with organic involvement of the central nervous system." Ex. 6-55, MMPI Report (3/6/88). As Dr. Warren states, this is a red flag for brain damage:

> In addition to the above, there is considerable evidence of organic brain damage that was apparent at the time of the pre-trial evaluations by

[7] This is the one area of mitigation that appellate counsel focused on investigating and presenting on appeal. This fact does not, however, exempt the evidence from this court's prejudice analysis. To the contrary, the court must evaluate *all* of the evidence adduced at trial and thereafter. *See Wiggins*, 539 U.S. at 536 (a reviewing court must "evaluate the totality of the evidence – both that adduced at trial, and the evidence adduced in the habeas proceedings."); *Williams*, 529 U.S. at 397-98 ("the State Supreme Court's prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence in aggravation").

> myself, Drs. Armitage and Rose, and has been well documented since the trial through various psychological, neuropsychological, and imaging tools. Mr. Gray has organic brain damage. Before trial, I administered a personality instrument which showed a high level of organic symptomatology, which would indicate that additional testing for brain damage is appropriate. Counsel did not ask us to further explore Mr. Gray's organic brain damage. Had counsel pursued additional testing, or had we received the background information now available, additional testing could have been administered and we would have made the appropriate diagnosis. Because of the lack of collateral data, and because counsel did not ask us to pursue further testing, Mr. Gray's organic deficits were not identified at the time of trial.

Ex. 6-4, Warren Decl. ¶ 3. Effective counsel would have requested neuropsychological and neurological testing upon seeing these results.

During the direct appeal in this court, counsel proffered the affidavit of Jonathan Pincus, M.D., a physician specializing in neurology and behavioral neurology. He reviewed the reports of the two sanity boards, the neuropsychological report of Fred Brown, and MRI, EEG, and SPECT scan reports. Dr. Pincus concluded that Petitioner has brain damage:

> Based upon my review of the above records, it is my professional opinion that Ronald Gray suffers from organic brain defects. These were manifested on an EEG that was performed in 1990 and showed slowing over the right frontal and temporal regions of the brain. A diffuse abnormality of the brain was discovered on SPECT scanning. This indicated decreased flow throughout the cortex in focal areas.

Ex. 6-55, Pincus Aff. ¶ 13. He indicated that these findings are consistent with the

neuropsychological testing performed on Petitioner. *Id.*

Petitioner was severely prejudiced. Had counsel requested additional testing, the panel would have heard about the severe effects of brain damage. The existence of brain damage and its effect on an individual's functioning is enormously mitigating. Competent counsel could have presented expert testimony about the mitigating effects of brain damage:

> Mr. Gray's brain damage undermined his cognitive functioning, impairing his ability to think through the consequences of behavior, to control impulses and emotions, and to have proper, rational judgment. Organic brain damage is among the strongest mitigating evidence that can be presented at a capital sentencing proceeding. It is easily understood by jurors, describes impairments that are obviously beyond the control of a defendant, and can affect every aspect of a defendant's behavior, causing impaired judgment, impulse dyscontrol, emotional lability, impaired memory, and attention deficits. Further, Mr. Gray's organic brain damage compounded the impairments caused by his Alcohol Dependence, his Bipolar Disorder, his psychoses, and his PTSD. In short, where evidence of brain damage is available, as in Mr. Gray's case, it is imperative that a jury hear such evidence in order to understand the defendant and his crimes.

Ex. 6-2, Stewart Decl. ¶ 46.

Dr. Stewart also discusses how the effects of organic brain damage are magnified by childhood trauma such as that experienced by Petitioner:

> All of the harmful effects of childhood trauma and psychiatric illness are also magnified in children who suffer from underlying brain damage. Before trial, test results obtained by the defense revealed that Mr. Gray suffered from symptoms associated with organic

> involvement of the central nervous system. After trial, testing confirmed the presence of organic brain defects in Mr. Gray. Such organic defects can cause increased impulsivity, self-destructive and violent behavior, depression, and substance abuse. When combined with the trauma of childhood abuse, these effects become even more pronounced and the conduct of the subject even more impulsive, erratic, and unpredictable. Brain damage likewise undermines a child's ability to cope with and overcome the effects of trauma.

Id. at ¶ 17.

The combination of the debilitating effects of organic brain damage, the childhood trauma experienced by Petitioner, and the other evidence of mental illness that could have been presented would have provided the panel and appellate courts with compelling mitigation:

> Mr. Gray's psychiatric impairments, particularly his manic episodes and organic brain damage, are of sufficient severity to warrant inquiry into his ability to appreciate the nature and quality or wrongfulness of his conduct at the time of the crimes and his ability to understand and assist counsel during his military court proceedings.

Ex. 6-3, Dudley Report at 4.

c. Post Traumatic Stress Disorder. Petitioner has also been diagnosed with PTSD. Ex. 6-2, Stewart Decl. ¶ 20. Again, this diagnosis could have been presented if counsel provided his experts with sufficient background materials. *See* Ex. 6-4, Warren Decl. ¶ 12 (concluding that Mr. Gray "suffered from . . . undiagnosed Post-traumatic Stress Disorder").

PTSD is a major mental illness and would have provided additional, powerful mitigation to the panel: "PTSD is a severe, debilitating and, when untreated, chronic psychiatric impairment." Ex. 6-2, Stewart Decl. ¶ 33. The mitigating value of this diagnosis is greatly enhanced because it derives from Petitioner's violent upbringing:

> Mr. Gray has long suffered from chronic PTSD as a result of the severe physical abuse he suffered as a child at the hands of his mother and the men she brought into the home, and as a result of witnessing repeated physical violence both inside and outside the home. These recurrent experiences of suffering and witnessing physical violence were the traumatic events underlying his PTSD. Although there is currently not enough data to establish that suffering or witnessing sexual abuse also underlies Mr. Gray's PTSD, there are strong indications that there was a sexual component to Mr. Gray's childhood trauma.

Id. at ¶ 34.

The experience of his traumatic upbringing and the resultant PTSD have had a profound impact on Petitioner's life:

> Mr. Gray evidenced persistent re-experiencing of his trauma through dissociative flashbacks and through intense physiological reactivity when exposed to reminders of the trauma. His persistent avoidance of stimuli associated with the trauma are demonstrated by his efforts to avoid thoughts and feelings associated with the trauma; in his inability to recall important aspects of his traumatic background; in his feeling and behavior demonstrating estrangement and detachment from others; in his longstanding restricted range of affect; and in his sense of foreshortened future. His symptoms of increased arousal include difficulty falling asleep; irritability and outbursts of anger; hypervigilance; and physiologic reactivity. These symptoms have

lasted much more than a month, and in fact date to his childhood years. *Id.* at ¶ 35.

Additionally, Petitioner's multiple diagnoses intensify and confirm each other. For example, at the time of the trial, "[s]everal studies indicate[d] that preexisting psychopathological conditions predispose to the development of [PTSD]," and "Psychoactive Substance Use Disorders are common complications" of PTSD. Diagnostic and Statistical Manual of Mental Disorders, Third Edition, Revised 249 (1987); *see also* Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision 465 (2000) (PTSD is "associated with increased rates of . . . Substance-Related Disorders . . . and Bipolar Disorder."). Had the panel and appellate courts heard the diagnosis of this major mental illness, particularly in conjunction with the evidence of his violent and traumatic childhood, there is a reasonable probability that the proceedings would have resulted in a life sentence.

The mitigating evidence described above and in the attached exhibits, all of which was reasonably available at trial and on appeal, shows that Petitioner was prejudiced by counsel's failures. The actual mitigation in this case is substantial and undermines confidence in the death sentence. Had counsel been effective, the panel and appellate courts "would have learned of the 'kind of troubled history [that the Supreme Court has] declared relevant to assessing a defendant's moral

culpability.'" *Porter*, 558 U.S. at 41 (quoting *Wiggins*, 539 U.S. at 535). Had counsel presented such mitigation, a reasonable probability exists that Petitioner would have been sentenced to life.

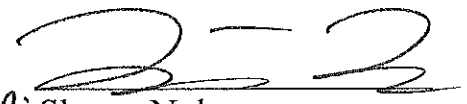
WHEREFORE, Petitioner respectfully requests that this Court:

1. Order a *Dubay* hearing on Claim II;

2. Grant relief from Petitioner's death sentence; and

3. Grant such other relief as may be appropriate.

Respectfully Submitted,



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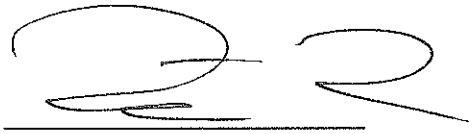

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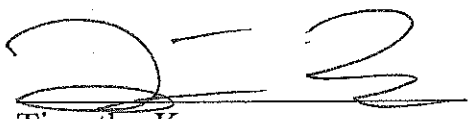

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 7 July 2017 the foregoing *Petition for Extraordinary Relief in the Nature of Coram Nobis*, together with its supporting exhibits, was delivered to FedEx for express delivery and filing with the United States Court of Appeals for the Armed Forces on 10 July 2017, and a copy of the same was served via email and first class mail upon counsel for the United States:

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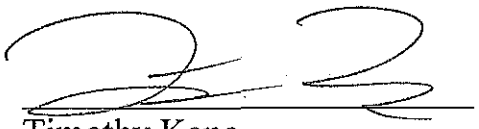

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

RONALD GRAY,
Private, U.S. Army,

Petitioner-Appellant,

v.

UNITED STATES,

Appellee.

USCA Dkt. No. 17-0525/AR

(Army Misc. 20160775)

THIS IS A CAPITAL CASE

WRIT-APPEAL PETITION

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Federal Statutes

Other

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

Petitioner-Appellant RONALD GRAY, with objections to this Court's refusal to construe as previously filed his Notice of Mandatory Review and his Petition for Extraordinary Relief in the Nature of Coram Nobis, respectfully files this Writ-Appeal Petition pursuant to the Court's Order of September 6, 2017.

I

History of the Case

On April 11, 1988, after general court martial, Appellant was convicted of two counts of murder, one count of attempted murder, three counts of rape, two counts of robbery, and two counts of forcible sodomy. On April 12, 1988, Appellant was sentenced to death, dishonorable discharge, forfeitures of pay, and reduction to Private E-1.

The Army Court of Military Review affirmed on December 15, 1992. *United States v. Gray*, 37 M.J. 730 (A.C.M.R. 1992). This Court affirmed on May 28, 1999. *United States v. Gray*, 51 M.J. 1 (C.A.A.F. 1999). On March 19, 2001, the Supreme Court denied certiorari. *Gray v. United States*, 532 U.S. 919 (2001). On July 28, 2008, President Bush approved the death sentence. *See* AR0231.[1]

[1] The "administrative record" of the court martial proceedings is cited as "AR" followed by the relevant page number; the court martial transcript is cited as "Tr."

Appellant filed a habeas corpus petition on April 1, 2009, in the United States District Court for the District of Kansas. On December 18, 2009, Appellant moved to amend the habeas petition. On September 30, 2010, the district court granted Appellant's motion, and on November 1, 2010, the government submitted its response to the amended federal petition. The response asserted the affirmative defense of non-exhaustion to several claims.

As to those claims, on February 11, 2011, Appellant filed a coram nobis petition in the Army Court of Criminal Appeals ("ACCA"). ACCA denied the petition on January 26, 2012, "because there is, as a matter of law, a remedy other than coram nobis available," *i.e.*, federal habeas review. App. 7 at 3. The court concluded that "[t]he merits of petitioner's claims are now for the federal district court, rather than this court, to decide." *Id.*

On February 15, 2012, Appellant filed a writ-appeal petition in this Court. On April 17, 2012, the Court ordered: "[t]hat said writ-appeal petition is hereby denied without prejudice to raising the issue asserted after the U.S. District Court for the District of Kansas rules on the pending habeas petition." App. 8.

On September 29, 2015, the federal district court denied some of Appellant's claims, but dismissed other claims without prejudice. As to those claims, the court

followed by a page number; and the record on appeal is cited as "A" followed by a page number.

explained that "CAAF, the highest military appellate court, left open the door for Petitioner to present these claims to the military courts again upon learning what *this* court would do by denying the petition for coram nobis *without* prejudice." *Gray v. Gray*, No. 5:08-cv-3289-JTM, 2015 WL 5714260 at *35 (D. Kan. 2015) (emphasis by the court). Regarding ACCA's prior ruling that federal habeas review precluded military coram nobis review, the district court found that, "[w]ith the dismissal of the present case, that procedural defect is removed and the ACCA may address the merits of Petitioner's coram nobis claims." *Id*. at *36. The court explained that it was "obliged to pursue the strong preference expressed in *Burns* [*v. Wilson*, 346 U.S. 137 (1953),] that the military courts first be given every reasonable opportunity to address the merits of a military prisoner's post-conviction arguments." *Id*.

Appellant appealed to the Tenth Circuit, and filed a second coram nobis petition in ACCA. The Tenth Circuit, with the consent of both parties, summarily reversed due to the district court's improper "hybrid" disposition of the petition. *Gray v. Gray*, 645 F. App'x 624 (10th Cir. 2016). After stating that "[a] prisoner challenging a court martial conviction through 28 U.S.C. § 2241 must exhaust *all available military remedies*," the appeals court remanded to the district court. *Id.* at 625-26 (emphasis added).

On May 10, 2016, ACCA dismissed the second coram nobis petition. App. 9

at 2. On June 8, 2016, this Court again denied review "without prejudice to re-filing" after the district court ruled on the federal habeas petition. App. 10 at 1-2.

On remand, the federal district court reiterated "the strong preference that the military courts first be given every reasonable opportunity to address" Appellant's claims and dismissed the petition without prejudice. App. 11 at 2-3. The court anticipated that dismissal would "allow petitioner to fully exhaust the unexhausted claims" in military court. *Id.* at 3.

On December 9, 2016, Appellant filed a third coram nobis petition in ACCA. The government filed its response on March 1, 2017. Appellant filed a reply on March 27, 2017. On May 9, 2017, ACCA denied relief. App 1. ACCA denied reconsideration on June 20, 2017.

The government failed to initiate mandatory review by the Judge Advocate General under this Court's Rules 18(a)(3) and 23. On July 12, 2017, Appellant filed a Notice of Mandatory Review pursuant to 10 U.S.C. § 867(a)(1), and also filed a Petition for Extraordinary Relief in the Nature of Coram Nobis. By Order of July 25, 2017, this Court construed the Notice of Mandatory Review as a Writ-Appeal Petition. By Order of September 6, 2017, the Court denied permission to file the coram nobis petition and directed Appellant to file the instant Writ-Appeal Petition.

II

Relief Sought

Appellant seeks merits briefing, argument, and substantive review of his claims for relief, and an evidentiary hearing on claims involving disputed facts. Appellant requests that his convictions and sentences be vacated and a new court martial proceeding be ordered.

III

Issues Presented

A.1. Whether, before federal habeas review, the military courts should exercise jurisdiction to hear a death-sentenced servicemember's unexhausted claims for relief, where the legal and/or factual bases of the claims arose after or in conjunction with the direct appeal and statutory approval of his convictions and sentence?

A.2. Whether the Army Court of Criminal Appeals erred in ruling that coram nobis review is never available to death-sentenced servicemembers because they remain in custody and their death sentences have not yet been served?

A.3. Whether the Army Court of Criminal Appeals erred in ruling that Appellant was required to seek relief earlier where he has diligently sought review in both the federal and military courts since presidential approval of his sentence?

B. Whether prior counsel were ineffective in failing to collect, present, and litigate available evidence that Appellant was not mentally competent during trial and appellate proceedings?

C. Whether Appellant's due process, Eighth Amendment, and public trial rights were violated where the President, acting in a judicial capacity,

approved the death sentence in reliance on reports and recommendations not disclosed to Appellant or his counsel?

D. Whether Appellant's prior counsel were ineffective in failing to collect and present available mitigating evidence?

E. Whether military capital punishment as applied is unconstitutional and Appellant's death sentence the result of racial discrimination?

F. Whether the military death penalty violates evolving standards of decency under the Eighth Amendment?

IV

Statement of Facts

Facts relevant to the gateway procedural questions are set forth in part I, above. Facts relevant to specific claims for relief are set forth, to the extent practicable, in the body of those claims below and in the attached appendices.

V

Reasons Why The Writ Should Issue

A.1. The Military Courts Should Exercise Coram Nobis Jurisdiction

The writ of coram nobis is available to correct constitutional errors, including errors due to ineffective assistance of counsel. *United States v. Denedo*, 556 U.S. 904 (2009) ("*Denedo II*"). The military courts' statutory jurisdiction to "review[] court martial cases," 10 U.S.C. § 866(a), includes jurisdiction to consider petitions for writs of coram nobis in final cases. *Denedo II*, 556 U.S. at 914.

The All Writs Act gives the military courts authority to issue the writ whenever "necessary or appropriate." 28 U.S.C. § 1651(a); *Denedo II*, 556 U.S. at 911-14. This standard is flexible and equitable, and this Court should find that it is met here, for at least three reasons.

First, a death-sentenced servicemember maintains constitutional rights during direct appeal proceedings and during the subsequent statutory approval process. *See, e.g.*, *Martinez v. Ryan*, 566 U.S. 1, 13 (2012) (discussing "the direct-appeal process, where counsel is constitutionally guaranteed"). However, no process currently exists for servicemembers to obtain relief for violations of those constitutional rights. This Court should clarify that death-sentenced servicemembers may receive one round of substantive review of claims of constitutional error arising after or in conjunction with direct appeal. Future litigants and the courts will avoid inefficiency and confusion only if this Court announces a clear procedure for adjudicating such claims.

Second, establishing a single round of post-finality review would conform to the predominant approach used by state courts, and would enable military courts to draw on well-established legal principles and case law in adjudicating post-conviction claims. As this Court has recognized, it is "necessary and appropriate" for the military courts to adopt standards and processes used in state

court post-conviction proceedings. *See Loving v. United States*, 64 M.J. 132, 144-45 (C.A.A.F. 2006) ("*Loving II*").

Third, as this case shows, federal courts are reluctant to review claims before the military courts have done so. *See Gray*, 645 F. App'x at 625-26; *Gray*, No. 5:08-cv-3289-JTM, 2015 WL 5714260 at *35-36. Federal courts are *required* to await completion of *all* available military remedies before adjudicating claims of error in military proceedings. *See Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975); *Gusik v. Schilder*, 340 U.S. 128, 131-32 (1950); *Hemphill v. Moseley*, 443 F.2d 322, 325 (10th Cir. 1971). In light of this precedent, this Court should adopt a process to ensure military court adjudication of claims of constitutional error that arise during direct appeal.

A.2. ACCA Erred in Ruling That Coram Nobis Relief Is Never Available to Death-Sentenced Servicemembers in Military Custody

ACCA ruled that coram nobis relief is unavailable because Appellant's "sentence has not been served." App. 1 at 16. ACCA's reasoning would preclude coram nobis relief for all death-sentenced and life-sentenced prisoners. This ruling failed to apply the "necessary or appropriate" standard of the All Writs Act. The ruling failed to give effect to the rule that military courts should police their own errors. *See supra*. The ruling also overlooked that this Court's previous

dismissals without prejudice essentially invited Appellant to seek coram nobis relief after resolution of the federal habeas petition. *See* App. 2, Exs. 3 & 4.[2] And the ruling turns on its head the principle that a court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Kyles v. Whitley*, 514 U.S. 419, 422 (1995).

A.3. ACCA Erred in Ruling That Appellant Was Required to Seek Relief Earlier.

As the federal court recognized, Appellant sought habeas relief "quickly" after the President approved his sentence. *Gray v. Gray*, Order at 4 (D. Kan. Dec. 5, 2008) (App. 3); *see also Gray v. Gray*, Order at 2 (D. Kan. Sept. 30, 2010) (App. 4). Then, promptly after the government asserted non-exhaustion as a defense, Appellant filed a coram nobis petition in military court. Appellant has steadfastly sought review of his claims in military and federal court ever since.

ACCA nonetheless ruled that coram nobis relief is unavailable because Appellant "fail[ed] to seek relief earlier." App. 1 at 15. ACCA concluded that *Loving v United States*, 62 M.J. 235, 240 (C.A.A.F. 2005) ("*Loving I*") – wherein this Court first found that a pre-finality habeas petition was cognizable – *required, upon pain of waiver*, that Appellant raise all collateral claims before presidential

[2] Appendix 2 contains Appellant's coram nobis petition and the accompanying exhibits submitted to ACCA on December 7, 2016.

approval of his sentence. ACCA also concluded, without any factual inquiry, that the Defense Appellate Division ("DAD") was "not burdened by any conflict-of-interest considerations" that hampered DAD counsel from investigating and alleging the ineffectiveness of the DAD chief or other DAD attorneys who represented Appellant on appeal.

ACCA's rulings were novel and erroneous. Appellant did not raise his post-conviction claims between certiorari and presidential approval because there was no requirement that he do so; because the Army refused to authorize funding for his counsel to investigate the case or meet with Appellant; and because Appellant did not know that the time period would extend for seven years, where no previous approval proceedings took nearly so long. Under these circumstances, there is no lawful basis to conclude that Appellant waived or forfeited his claims.

When the Supreme Court denied certiorari on direct appeal, the law recognized no mechanism for post-conviction review pending presidential approval of a military death sentence. *See Loving I,* 62 M.J. at 240, 242.

On March 24, 2003, the Judge Advocate General ("TJAG") notified Appellant that his case was being transferred "to the Secretary of the Army for the action of the President"; that his case would "not be held in abeyance" after May 3, 2003; and that military defense counsel could be detailed to assist with *federal*

habeas corpus proceedings. AR0216-17.

In April 2003, TJAG denied Appellant's request for funding for a mitigation investigator. AR0203. In March 2005 or 2006, the Army denied Appellant's pro bono counsel's request for funding to travel to Leavenworth to meet with Appellant. AR0220-22.

On July 28, 2008, the President approved Appellant's death sentence, and in November 2008, Appellant initiated federal habeas corpus proceedings. *See* Order, Case No. 08-3289-RDR at 3 (D. Kan. Nov. 26, 2008) (App. 5).

In the middle of this seven-year interval, on December 20, 2005, this Court for the first time ruled that military courts may exercise jurisdiction to review capital post-conviction claims filed after certiorari but before presidential approval. *Loving I*, 62 M.J. 235. But the Court neither adopted nor considered a rule whereby a prisoner would waive military review of any claims *not* raised during that time period. *See id*. And since *Loving I*, this Court has never endorsed such a rule. To the contrary, this Court's rulings in Appellant's prior coram nobis proceedings reflect that military post-conviction review remains available after presidential approval. *See* App. 2, Exs. 3-4.

Even if this Court adopts such a rule prospectively, it would undermine basic principles of equity to enforce the rule retroactively against Appellant. Procedural

default of collateral review is equitable only where the procedural rule is "firmly established" and "consistently and regularly applied." *Johnson v. Mississippi*, 486 U.S. 578, 587 (1986). Procedural default may not be enforced based on a rule that was not in effect at the time the default purportedly occurred. *See Terrell v. Morris*, 493 U.S. 1, 2 (1989) (per curiam). This principle should apply equally in military court because "[n]ovelty in procedural requirements cannot be permitted to thwart review." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958).

This conclusion is especially clear given that the military system does not provide counsel or other resources to enable death row prisoners to pursue such review. Appellant's counsel was denied the resources to investigate post-conviction claims. The availability of military post-conviction relief in capital cases should not depend on the luck of a death row prisoner, like Mr. Loving, in obtaining pro bono post-conviction counsel who can afford to investigate and litigate claims for relief.

ACCA's rule would also be impracticable given that a capital petitioner lacks clear notice of, or control over, the length of time that this procedural window may remain open. At any point after certiorari is denied, the President may approve a capital case. Here, Appellant was informed that his "case will not be held in abeyance after 8 May 2003," AR0216, yet the approval process lasted for another

five years. Before this case, the entire statutory approval process typically lasted about a year. *See, e.g.*, *Bennett v. Davis*, 267 F.2d 15 (10th Cir. 1959) (thirteen-month approval process). ACCA's rule is simply unworkable and, if enforced against Appellant, entirely inequitable.

ACCA was likewise misguided in concluding, without any factual inquiry, that DAD counsel were not burdened in investigating and alleging the ineffectiveness of other DAD counsel in this case. On 8 August 1988, ACCA ordered "the Chief, Defense Appellate Division, and such additional or other appellate counsel as he may assign [to] represent the accused in these proceedings and in any further or related proceedings in the United States Court of Military Appeals." *See* App. 6; *see also* 10 U.S.C. § 870(c) (providing that appellate defense counsel shall represent defendants at all levels of review). The Chief obeyed the order and DAD continued representing Appellant through the President's approval of sentence. As a DAD Chief stated in 2008, the "Defense Appellate Division has represented petitioner, along with civilian counsel, since his original court-martial." *See* App. 1 at 13. ACCA erred in summarily concluding that new DAD attorneys who worked on the case "were not burdened by any conflict-of-interest considerations that would have hampered criticism of their predecessors." *Id*. at 15. To the contrary, attorneys would be materially

constrained from investigating and alleging that their chief and other division attorneys provided ineffective assistance. *See* 32 C.F.R. § 776.26(a) (counsel "shall not represent a client if . . . [t]here is a significant risk that the representation of one or more clients will be materially limited by the covered attorney's responsibilities to . . . a third person or by a personal interest").

* * * * * *

CLAIM 1 APPELLANT WAS DENIED HIS RIGHTS UNDER THE SIXTH AND EIGHTH AMENDMENTS WHEN HE WAS TRIED WHILE INCOMPETENT TO PROCEED AND WHEN HE WAS INCOMPETENT DURING APPELLATE PROCEEDINGS; PRIOR COUNSEL WERE INEFFECTIVE FOR FAILING TO LITIGATE APPELLANT'S INCOMPETENCE

Appellant was incompetent during his trial and appellate proceedings. He suffered from severe mental illness and was incapable of cooperating with and assisting counsel. Appellant suffered Bipolar Disorder, Manic type, with severe psychotic episodes, organic brain damage, and Post Traumatic Stress Disorder ("PTSD"). These diagnoses, and their severely debilitating impact on Appellant, have now been confirmed by Appellant's trial psychologist, App. 2, Ex. 6-4[3]; two of the three experts who evaluated Appellant in a post-trial sanity board, Exs. 6-5 and

[3] Included with the pleading contained in Appendix 2 is Exhibit 6, which contains the seventy-five exhibits that Petitioner filed in ACCA. Those exhibits are cited herein as "Ex. 6-##." A complete index of the exhibits begins at page 211 of Exhibit 6.

6-6; and defense experts retained by current counsel, Exs. 6-2 and 6-3. Appellant has never had a court hearing to consider his competency or to consider the ineffective assistance of counsel he received with respect to this issue.

A. Legal Principles

The Supreme Court has "repeatedly and consistently recognized that the criminal trial of an incompetent defendant violates due process." *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996); *see Drope v. Missouri*, 420 U.S. 162, 171-72 (1975). This right is so fundamental that it must be "protect[ed] even if the defendant has failed to make a timely request for a competency determination." *Cooper*, 517 U.S. at 354 n.4. The "trial court must always be alert to circumstances suggesting . . . [that] the accused [is] unable to meet the standards of competence to stand trial." *Drope*, 420 U.S. at 181. When there are indicia of incompetency, *the court must hold a competency hearing*. *Pate v. Robinson*, 383 U.S. 375, 385 (1966).

Trial courts "rel[y] on counsel to bring these matters to [the court's] attention. . . . If counsel fails . . . to alert the court to the defendant's mental status the fault is unlikely to be made up." *Bouchillon v. Collins*, 907 F.2d 589, 597 (5th Cir. 1990). Accordingly, "counsel has a duty to investigate a client's competency" and is ineffective if he fails to do so. *Agan v. Singletary*, 12 F.3d 1012, 1018 (11th Cir.

1994); *see also Williamson v. Ward*, 110 F.3d 1508, 1518 (10th Cir. 1997). Because incompetency is often "not visible to a layman," counsel's thorough investigation and consultation with mental health experts is often "the sole hope that it will be brought to the attention of the court." *Bouchillon*, 907 F.2d at 597.

Military courts guarantee that service members who are not competent to stand trial will not do so. *See* Rule for Courts-Martial ("R.C.M.") 909(a); *United States v. McGuire*, 63 M.J. 678, 680 (A. Ct. Crim. App. 2006). Such facts arose here.

As an alternative basis for relief, much of the evidence of incompetence now being presented to this Court is newly discovered. Ordinarily, military courts grant petitions for new trials "only if a manifest injustice would result absent a new trial . . . based on proffered newly discovered evidence." *United States v. Williams*, 37 M.J. 352, 356 (C.M.A. 1993). The Court may permit a new trial on the basis of newly discovered evidence when: (1) the evidence was discovered after trial; (2) the evidence is not such that it would have been discovered by petitioner at the time of trial in the exercise of due diligence; and (3) the newly discovered evidence would probably produce a substantially more favorable result for the accused. R.C.M. 1210(f)(2). To the extent that prior counsel were *not* ineffective in failing to collect available evidence in this case, all three of Rule 1210's requirements are met here.

See United States v. Harris, 61 M.J. 391 (C.A.A.F. 2005).

B. Appellant Was Incompetent During Trial and Appeal

"The test for determining competency [is] . . . 'whether [defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him.'" *McGregor v. Gibson*, 248 F.3d 946, 952 (10th Cir. 2001) (quoting *Dusky v. United States*, 362 U.S. 402 (1960)). From the first time that he saw Appellant, trial expert Selwyn Rose, M.D., reported Appellant's incompetency:

> It is my opinion that Mr. Gray is not presently mentally competent to stand trial. I can't determine whether he knows the nature of the charges against him, but I am convinced he is unable to cooperate with counsel in a rational manner.

Ex. 6-51, at 1. Yet counsel never requested a competency hearing before the court. Instead, counsel requested a government sanity board and accepted its findings without adequate investigation and without seeking an adversarial hearing.

Two weeks after the request, General Stiner, the convening authority, ordered a sanity board and assigned four members. *See* Ex. 6-53. The full board never actually convened. Defense counsel agreed to accept the findings of only one member of the board, Colonel Armitage. *See* Ex. 6-54, ¶ 1. Because defense counsel failed to conduct a thorough mitigation and mental health investigation,

Colonel Armitage had little or no life history information regarding Appellant, and based his conclusions on a clinical interview and discovery materials related to the crimes. As a result, his findings were severely hampered. *See* Ex. 6-4, John Warren, Ph.D., Decl. ¶ 9.

John Warren, Ph.D., who testified at penalty phase, has now reviewed the collateral data that could have been made available to experts at the court martial. Had he been provided background information, he would have had substantial doubts about Appellant's competency. *See id.* ¶ 16.

Moreover, defense counsel had first-hand knowledge of Appellant's incompetence:

> He frequently talked about hearing voices that told him what to do. . . . As a whole, based upon my discussions with Mr. Gray over a period of months, I personally thought he was insane. His behavior was such that he was of little help in assisting in his own defense, often being uncooperative, silent, belligerent or unable or unwilling to focus on his case.

Ex. 6-38, Craig Teller Decl. ¶¶ 3-4. Appellant could not cooperate with counsel and could not understand the nature of the trial proceedings.

Appellant was likewise incompetent during appellate proceedings. Appellant was evaluated by William Kea, Ph.D. then the chief psychologist at Fort Leavenworth. Dr. Kea determined that Appellant was not competent then or at the time of his court martial. Ex. 6-5, Kea Decl. ¶ 3; *see also* A2857. Thereafter, Dr.

Kea participated in a post-trial sanity board with Drs. Edwards and Marceau. Dr. Kea's initial findings of incompetence were changed in the final report. Dr. Edwards never saw Dr. Kea's initial report and did not know of those findings. She now has reviewed new background material and has averred: "This new information highlights for me that the conclusions in the initial, undisclosed report of Dr. Kea were correct, i.e., that Mr. Gray was mentally ill and not competent." Ex. 6-6, Edwards Decl. ¶ 7. Dr. Kea has also now concluded that his original assessment of Appellant was correct, that the subsequent sanity board findings were flawed, and that Appellant was not competent. Ex. 6-5, Kea Decl. ¶ 10.

Appellant has more recently been evaluated by two mental health professionals – Pablo Stewart, M.D., and Richard Dudley, M.D. Appellant has been diagnosed with Bipolar Disorder, Manic type, causing psychotic episodes, a severe mental illness that existed at the time of the crimes, the trial, and the appeal. Dr. Stewart concluded that Appellant "was afflicted by an extended and severe manic episode with mood-congruent psychotic features beginning in 1986 and ending after his arrest in 1987." Ex. 6-2, Stewart Decl. ¶ 26. Appellant's psychosis and delusions "undermined his ability to distinguish fantasy from reality." *Id.* ¶ 30. Dr. Dudley concurred: "at the height of his manic, psychotic episodes, Mr. Gray had lost touch with reality and was unable to control himself." Ex. 6-3,

Dudley Report at 4. Appellant has also been diagnosed with organic brain damage and PTSD, which constitute severe mental impairments and implicate issues of competency. Ex. 6-2, Stewart Decl. ¶¶ 33. 46. Drs. Dudley and Stewart concluded that Appellant's competency was in serious doubt. Ex. 6-2, Stewart Decl. ¶ 48; Ex. 6-3, Dudley Report at 4-5.

The record is troubling: Appellant had serious mental health impairments that prevented him from understanding the proceedings and assisting counsel. Although experts at trial and on appeal initially recognized these severe impairments, Appellant's competency was never assessed after thorough investigation by a neutral factfinder in an adversarial hearing. A *DuBay* hearing should be ordered at which the defense will prove that Appellant was incompetent at the time of trial and appeal. *See United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

C. Trial and Appellate Counsel Were Ineffective for Failing to Request a Competency Hearing, and the Military Courts Erred in Not Ordering Such a Hearing

Appellant's indicia of incompetency during trial were such that counsel should have conducted a thorough investigation and requested a hearing; their failure to do so was not based on reasonable strategic considerations and instead was deficient performance. Appellant was prejudiced.

The trial court was also required to conduct a competency proceeding, because it was aware, or reasonably should have been aware, of indicia of incompetence. *McGregor*, 248 F.3d at 952; *see, e.g.*, Ex. 6-52 at 3; Tr. 99. Despite stark questions about Appellant's competency, the court failed to properly monitor Appellant and failed to hold a competency hearing.

Appellate counsel were ineffective for failing to raise a claim that Appellant was incompetent at the time of his trial and on appeal. There were substantial doubts about Appellant's competence at his court martial, and additional evidence of incompetency came to light during the appeal. *See* Ex. 6-5, Kea Decl. ¶ 3; A2857, Kea Initial Report. Appellate counsel have admitted that they should have raised a competency claim and that they had no strategic reason for this failure. *See* Ex. 6-40, Michael Berrigan Decl. ¶ 7; Ex. 6-41, Michael Smith Decl. ¶ 5; Ex. 6-39, Jon Stentz Decl. ¶¶ 2, 4.

Trial and appellate counsel should have challenged the findings of the sanity boards. The conclusions drawn by the boards were erroneous, in conflict with initial impressions of experts, and based on inadequate background information and investigation. Counsel had a professional duty to challenge Appellant's competency as findings of a sanity board "do not bind the court-martial in its determination of . . . competency." *United States v. Best*, 61 M.J. 376 (C.A.A.F.

2005).

Appellant was prejudiced. Had counsel raised this claim at trial or on appeal, there is a reasonable probability that the military courts would have vacated Appellant's convictions, or, at the very least, the sentences of death.

CLAIM 2 APPELLANT WAS DENIED HIS RIGHTS TO DUE PROCESS, TO A FAIR SENTENCING PROCEEDING, TO A PUBLIC TRIAL, AND AGAINST CRUEL AND UNUSUAL PUNISHMENT, WHERE THE PRESIDENT, ACTING IN A JUDICIAL ROLE, APPROVED APPELLANT'S DEATH SENTENCE IN RELIANCE UPON CONFIDENTIAL REPORTS AND EVIDENCE THAT WERE NOT DISCLOSED TO APPELLANT

A. The Undisclosed Evidence

The UCMJ provides that where "the sentence of the court martial extends to death, that part of the sentence providing for death may not be executed until approved by the President." 10 U.S.C. § 871(a). As part of this statutory approval process, and pursuant to Rule for Courts-Martial 1204(c)(2), TJAG was required to submit a report to the Secretary of the Army recommending that the President either disapprove or approve Appellant's death sentence. The Secretary of the Army then forwarded this report to the President, together with the Secretary's own recommendation. The Secretary of Defense submitted a similar report to the President, and other officials may have submitted such reports as well.

These reports were submitted during the seven-year statutory approval

process that occurred after the denial of certiorari on March 19, 2001. These reports were never disclosed to Appellant or his counsel, despite express requests, *see* AR0225, and Appellant therefore never had an opportunity to deny, contest, or explain the information contained therein.

B. The Judicial Nature of the Statutory Approval Process

As the highest official overseeing the Article I military courts, the President's approval or disapproval of a court martial sentence is a judicial act. *United States v. Fletcher*, 148 U.S. 84, 88-89 (1893) ("[T]he action required of the President in respect of the proceedings and sentences of courts martial is judicial. . . ."); *accord United States v. Page*, 137 U.S. 673, 678 (1891); *Runkle v. United States*, 122 U.S. 543, 557 (1887). An Opinion of the Attorney General has explained that, "[u]ndoubtedly the President, in passing upon the sentence of a court martial, and giving to it the approval without which it cannot be executed, acts judicially." 11 Op. Att'y Gen. 19, 21 (1864). More recent Supreme Court decisions buttress the conclusion that, in acting to approve or disapprove a jury's death verdict, an official performs the judicial role of a "sentencer." *See Espinosa v. Florida*, 505 U.S. 1079, 1082 (1992) (where a statutory scheme places "capital sentencing authority in two actors rather than one," both actors are subject to applicable constitutional standards); *Lambrix v. Singletary*, 520 U.S. 518, 533-34 (1997) (explaining that the

trial judge acts as "the sentencer" or as "at least a constituent part of the sentencer" where the statutory scheme permits judicial override of a jury's advisory death sentence) (quotation omitted); *see also Proffitt v. Florida*, 428 U.S. 242, 249 (1976).

Presidential review and approval of a court martial death sentence under 10 U.S.C. § 871(a) shares the judicial nature of other sentencing proceedings. The President's action is not optional, but is compelled by statute. The President's decision is discretionary. In exercising his discretion, the President must honor a defendant's constitutional rights in the same manner as any other judicial sentencing authority. The Presidential approval process failed to do so here.

C. The Constitutional Violations

In *Gardner v. Florida*, 430 U.S. 349, 362 (1977), the Supreme Court held that a death sentence is unconstitutional when partially based on information in a presentence report that was not disclosed to the defense. The Court found that due process is violated "when the death sentence was imposed, at least in part, on the basis of information which [the defendant] had no opportunity to deny or explain." *Id*. Without full disclosure of the basis for the death sentence, a capital sentencing procedure invites arbitrary application, in violation of the Eighth Amendment. *See id.* at 361; *see also id.* at 363-64 (White, J., concurring).

The *Gardner* Court found that consideration of a "secret" report compromised

the integrity of capital sentencing proceedings and warned that "[t]he risk that some of the information accepted in confidence may be erroneous, or may be misinterpreted . . . is manifest." *Id.* at 359; *see also Paxton v. Ward*, 199 F.3d 1197, 1216 (10th Cir. 1999); *Osborn v. Shillinger*, 861 F.2d 612, 627 (10th Cir. 1988).

The statutory approval process of Appellant's death sentence violated *Gardner*. The President approved Appellant's sentence in reliance, in whole or part, on secret reports and evidence submitted by JAG, the Secretary of the Army, the Secretary of Defense, and perhaps others. Appellant had no effective means of rebutting information in reports that were kept secret from him, despite his explicit requests *See* AR0225.

Although this is the first and only military death sentence approved in a half-century, and thus the first statutory approval since *Gardner* was decided, the type of reports kept secret here *have previously been disclosed to the defense and made public in military capital cases*. *See, e.g.*, JAG Memo to the Secretary of the Air Force ("SecAF") re *Herman P. Dennis, Jr.* (Nov. 14, 1950) *in* 4 C.M.R. (A.F.) 904-07 (recommending President approve death sentence). The historical record reflects that secrecy in the approval process is novel and unwarranted.

A *Gardner* violation is *per se* reversible error, because imposing a death sentence in partial reliance on information that was not disclosed to the defendant

fundamentally undermines the adversary process and precludes a fair sentencing proceeding. *Harvard v. Florida*, 459 U.S. 1128, 1133 (1983); *see also Gardner*, 430 U.S. at 362. A showing of prejudice is therefore unnecessary, and Appellant's death sentence must be vacated.

Further, because the approval process amounted to judicial proceedings, Appellant's Sixth Amendment public trial right was violated by the secrecy in which the process was conducted. Criminal judicial proceedings must be conducted publicly in order to assure fairness. *Press-Enterprise Co. v. Superior Court of Cal.*, 478 U.S. 1, 7 (1986). The Sixth Amendment guarantees a presumption of openness that may be overcome only when the government demonstrates an overriding interest that secrecy is essential to preserve higher values, and where the secrecy is narrowly tailored to serve that interest. *Waller v. Georgia*, 467 U.S. 39, 45 (1984). The secrecy of the Presidential approval process does not meet that standard here. As the history of this process demonstrates, these proceedings are amenable to openness and traditionally have been conducted openly, and the recent *carte blanche* exclusion of capital defendants and the public from this process is not a narrowly tailored remedy to any overriding interest in secrecy. Because public trial violations are structural errors, *see id*. at 49 n.9, the Court should vacate Appellant's death sentence on this ground as well.

CLAIM 3 APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT HIS CAPITAL SENTENCING WHERE COUNSEL FAILED TO COLLECT AND PRESENT AVAILABLE MITIGATING EVIDENCE; PRIOR COUNSEL, INCLUDING APPELLATE COUNSEL, WERE LIKEWISE INEFFECTIVE

In ACCA (Claims 4 and 5, therein), Appellant alleged that his counsel at trial and on appeal were ineffective in failing to investigate, collect, and present available mitigating evidence. Appellant proffered voluminous new evidence from lay and expert witnesses detailing his depraved upbringing, trauma, and lifelong mental illnesses. ACCA did not analyze the proffer, however, because it believed that the same claim had been raised on direct appeal. *See* App. 1 at 22. ACCA erred.

While it is true that Appellant asserted the same legal ground on direct appeal – the right to effective assistance of counsel – the factual bases for that claim are almost entirely different, as Appellant's proffer makes clear. Under these circumstances, federal law squarely rejects the notion that the "same claim" was raised. *See Cone v. Bell*, 556 U.S. 449, 459-60, 466-67 (2009); *see also Fairchild v. Workman*, 579 F.3d 1134, 1148-49 (10th Cir. 2009) (finding "new claim" where proffer was "of a substantially different nature, based on evidence and arguments that were not previously considered"); *accord Malone v. Workman*, 282 F. App'x 686, 689 n.4 (10th Cir. 2008); *Ward v. Stevens*, 777 F.3d 250, 258 (5th Cir. 2015); *Dickens v. Ryan*, 740 F.3d 1302, 1318 (9th Cir. 2014).

Included in Appendix 2, Exhibit 6 is an extensive factual proffer of mitigating evidence that was available at the time of trial and appeal. The military courts have never considered this evidence because of an unbroken chain of ineffective assistance of defense and appellate counsel. Appellant was thus prevented from presenting this claim of trial counsel ineffectiveness during direct appeal, thus establishing cause and prejudice for any default of this claim.

An evidentiary hearing and consideration of the proffered evidence are also appropriate in light of *Loving II* and *Loving v. United States*, 68 M.J. 1 (C.A.A.F. 2009) ("*Loving III*"). There, this Court acknowledged that its earlier consideration of penalty phase ineffectiveness claims – which by implication included its consideration of Appellant's claim on direct appeal – did not address the adequacy of counsel's mitigation investigation under *Wiggins v. Smith*, 539 U.S. 510 (2003). *Loving II*, 64 M.J. at 134-35, 150-53; *Loving III*, 68 M.J. at 3-5. The Court therefore ordered a *DuBay* hearing and consideration of the new factual proffer under the Supreme Court's latest precedent. *Loving II*, 64 M.J. at 152-53. The same situation is present here, and the same steps are appropriate.

In *Gray*, 51 M.J. 1, this Court did not have the benefit of any of the Supreme Court's subsequent jurisprudence applying *Strickland* analysis to penalty phase ineffectiveness of counsel claims. *See Williams v. Taylor*, 529 U.S. 362, 396

(2000); *Wiggins*, 539 U.S. at 524; *Rompilla v. Beard*, 545 U.S. 374, 381-82 (2005); *Porter v. McCollum*, 558 U.S. 30, 39 (2009); *Sears v. Upton*, 561 U.S. 945, 954 (2010). Accordingly, in light of intervening precedent and the instant factual proffer, this Court erroneously found that counsel was not deficient, unreasonably applied federal law, and unreasonably determined the facts.

The Court gave three reasons that counsel's performance was not deficient. First, the Court reasoned that Appellant "equates failure to discover certain facts with failure to conduct a proper investigation." *See Gray*, 51 M.J. at 18. But Appellant alleges squarely here that defense counsel failed to conduct a proper investigation. And it is now clear that a "proper investigation" requires collecting "all reasonably available mitigating evidence." *Wiggins*, 539 U.S. at 524. There is little question that the information collected by current counsel was at least as available in 1988 as it was decades later.

Second, this Court found that counsel was not deficient because Appellant "ignores any role he himself may have played in remaining silent and failing to make full disclosure to his attorney on these matters." *Gray*, 51 M.J. at 18. The Court's reasoning was factually misguided and legally erroneous. In the months leading up to trial, Appellant was incoherent and psychotic. *See* Ex. 6-52, at 3. In these circumstances, counsel was not reasonable in relying on Appellant's failure "to

make full disclosure" on matters of trauma, abuse, and mental health history. Further, as a matter of constitutional law, this Court's prior reasoning has since been squarely rejected. *See Porter*, 558 U.S. at 40 (finding counsel deficient despite a "fatalistic and uncooperative" defendant); *Rompilla*, 545 U.S. at 381 (similar).

Third, this Court found that Appellant "overlooks the substantial mitigating evidence presented in this case." *Gray*, 51 M.J. at 18. This finding runs afoul of Supreme Court precedent holding that counsel have an "obligation to conduct a thorough investigation of the defendant's background" for "*all reasonably available mitigating evidenc*e." *Wiggins*, 539 U.S. at 522, 524 (emphasis added). Because the dispositive inquiry is whether counsel failed to discover mitigating evidence that was "reasonably available," counsel's performance can be deficient even where they presented "substantial mitigating evidence." *See Williams*, *Wiggins*, *Rompilla*, *supra*.

This Court's finding of "substantial mitigating evidence," Gray, 51 M.J. at 18, was also an unreasonable factual determination, as Appellant's own counsel told the panel, "there's not a whole lot of mitigation you can bring forth in a case like this," Tr. 2548. That was simply wrong. Because counsel unreasonably cut short their investigation, they did not present available evidence of Appellant's prenatal trauma; his mother's repeated neglect and abandonment; Appellant's improper

exposure to sexuality as a young child; Appellant's brain damage; Appellant's family history of psychotic illness; Appellant's childhood mental illness; or Appellant's severe and intensifying mental illness while in the Army.

Further, counsel presented only a meager and misleading hint of the child abuse actually suffered by Appellant. Appellant's mother testified to only one incident of abuse, in which Willie Hurd hit Appellant. Tr. 2326. Far from being "substantial mitigating evidence," the incident was an overlooked red flag. Proper investigation would have revealed that his mother, Mr. Hurd, and other boyfriends beat, whipped, and otherwise assaulted Appellant severely throughout his childhood.

Similarly, counsel presented the briefest testimony through Col. Armitage about Appellant's neighborhood – essentially that Appellant grew up in the projects in poverty. *See* Tr. 2432. This information was another red flag that could have led to readily available information about Appellant's daily childhood exposure to extreme violence, crimes, and sexuality on the streets, as discussed below.

As an alternative basis for consideration, most of the evidence presented in support of this claim is new. The Court can grant a new sentencing hearing "based on proffered newly discovered evidence." *Williams*, 37 M.J. at 356. A new hearing is appropriate where: (1) the evidence was discovered after the trial; (2) the

evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and (3) the newly discovered evidence would probably produce a substantially more favorable result for the accused. R.C.M. 1210(f)(2). In this case, assuming, *arguendo*, that counsel was diligent and not deficient, all three requirements are met. *See Harris*, 61 M.J. 391.

A. Prior Counsel Failed to Conduct a Thorough Investigation

Capital defense counsel must "fulfill their obligation to conduct a thorough investigation of the defendant's background." *Williams*, 529 U.S. at 396; *see Wiggins*, 539 U.S. at 524. Here, counsel did not reasonably investigate Appellant's life history, and, as a result, provided no background materials to any experts. Counsel did request funding for a defense investigator, but these requests were denied. Tr. 161. Counsel was deficient in failing to apprise the military court of the need for investigative assistance to collect the significant mitigating evidence available in Appellant's case. At the time of the final funding request on March 7, 1988, counsel had been representing Appellant for approximately one year. That was ample time for counsel either to collect the mitigating evidence described below or to apprise the military court of the red flags indicating childhood abuse, neglect and abandonment, organic brain damage, and major psychiatric illnesses. In the funding requests, however, defense counsel made no such proffer. *See, e.g.*, Tr. at

159-61. Counsel's failure to apprise the military courts of the need for investigative assistance to collect mitigating evidence was deficient performance.

In the absence of investigative funding, defense counsel should have undertaken the mitigation investigation themselves, but failed to do so. Defense counsel Mark Brewer has stated: "the defense investigative work that was done consisted primarily of my phone calls and letters and a side trip from a CLE I was attending in Florida to meet with SPC Gray's family in Miami." Ex. 6-49, Brewer Aff. (Feb. 3, 1992). Mr. Brewer met only with Appellant's mother and sister on that trip to Florida.

The few small steps taken by defense counsel to collect mitigating evidence were not an adequate substitute for the comprehensive investigation required under the Sixth Amendment. At the penalty phase, counsel presented the testimony of three family members. Their entire combined testimony, including cross-examination and questions from panel members, consisted of *a total of thirty transcript pages*. *See* Tr. 2320-27; Tr. 2327-36; Tr. 2350-64.

Because counsel failed to investigate thoroughly, these witnesses did not describe the abusive, violent, and dysfunctional childhood endured by Appellant. Defense counsel in his summation mentioned only in passing that Appellant was from a poor, crime-ridden neighborhood. Tr. 2546-47. He instead argued that

Appellant was "an average, normal, good kid, nice to his mother, does good work around the house, helps his uncle . . . ." Tr. 2549. This inaccurate portrait does not come close to showing the compelling mitigation that was available.

The other life history evidence presented to the panel was the testimony of various co-workers, who uniformly described Appellant as a good worker. This, too, was a misleadingly incomplete picture of a profoundly mentally ill man. Appellant's manic behavior at work supports the mental health diagnoses that have now been made and could have been made at trial. Indeed, witnesses who testified were aware of symptoms of mental illness from which Appellant suffered – information that has now been relied upon by Appellant's experts but was never developed by defense counsel at trial. *See* Ex. 6-28, Section Decl. ¶¶ 3-4; Ex. 6-29, Eric Smith Decl. ¶¶ 3-7.

Capital counsel must ensure that the client receives full and meaningful expert assistance on mitigation issues. *See Wiggins*, 539 U.S. at 524-25. Simply retaining experts is not enough. Counsel must provide experts with sufficient background materials to conduct a meaningful evaluation. Here, experts received almost no background materials whatsoever.

Because defense counsel failed to conduct a reasonable mitigation investigation, Colonel Armitage had little or no life history information regarding

Appellant, and based his conclusions on a clinical interview with Appellant and discovery materials related to the crimes. Colonel Armitage was called at the penalty phase and diagnosed Appellant with personality disorder not otherwise specified, Tr. 2399, schizotypal personality disorder, Tr. 2401, and alcohol dependence, Tr. 2407. On cross-examination, he testified that there were sadistic features to Appellant's diagnosis and an anti-social aspect to Appellant's personality. Tr. 2424-25.

Defense counsel retained Selwyn Rose, M.D., and John Warren, Ph.D. Counsel again provided these experts with minimal background materials and with no social history information whatsoever. *See* Tr. 2467; *see also* Ex. 6-4, Warren Decl. ¶ 9 ("We were provided with none of the requisite information from background sources by Gray's counsel. Gray's counsel gave us nothing. We had no collateral personal or social or family history, no such medical history and no such mental health history."). Counsel did not discuss mitigation or ask the experts to collect background information.

The testimony of these experts barely scratched the surface of Appellant's severe and debilitating mental illnesses. Because of counsel's failure to conduct meaningful life history investigation, these doctors misdiagnosed Appellant. Had these experts been provided with adequate background information, the panel would

have heard the proper diagnoses of severe mental illnesses.

Here, as in *Wiggins*, "counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources. . . . The scope of their investigation was also unreasonable in light of what counsel actually [knew about Appellant]." *Wiggins*, 539 U.S. at 524-25. Counsel's investigation was indistinguishable from those where the Supreme Court has found capital counsel ineffective. *See Rompilla*, 545 U.S. at 381-82; *Wiggins*, 539 U.S. at 523-24; *Williams*, 529 U.S. at 369, 395-96.

Appellate counsel was similarly deficient. Several DAD attorneys worked on Appellant's case. Most of those attorneys did not investigate Appellant's background at all. *See* Ex. 6-41, Michael Smith Decl. ¶ 4; Ex. 6-39, Jon Stentz Decl. ¶ 5. Only one appellate attorney, Michael Berrigan, did any investigation, and he focused on Appellant's organic brain damage. Ex. 6-40, Berrigan Decl. ¶ 4. Appellate counsel did not investigate and develop the available information in the many areas that have now been identified. *See infra.*

Appellate counsel had no strategic reason for failing to investigate these areas. Ex. 6-40, Berrigan Decl. ¶ 4; Ex. 6-41, Michael Smith Decl. ¶ 6; Ex. 6-39, Stentz Decl. ¶ 4. Failure to investigate these areas amounted to deficient performance. *See, e.g.*, *Canales v. Stephens*, 765 F.3d 551, 569 (5th Cir. 2014); ABA Guidelines

for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 11.9.3 (1989); *see generally Strickland v. Washington*, 466 U.S. 668, 687 (1984).

During the appeals, counsel did make repeated requests for funding in order to have a mitigation specialist conduct an investigation, and for expert assistance. These requests were denied.[4] Prior to current counsel's representation of Appellant, there has never been a thorough life history investigation during the thirty-year pendency of his case. *Appellant is the only service member facing a sentence of death in which these funds were denied by the military*. *See* Dwight H. Sullivan, *Raising the Bar: Mitigation Specialists in Military Capital Litigation*, 12 Geo. Mason U. Civ. Rts. L. J. 199, 226-27 (2002). Appellant's "status as the lone military death row inmate never to have the services of a government-funded mitigation specialist raises obvious constitutional concerns." *Id.* at 227 n.177.

Appellate counsel were nonetheless deficient for failing to conduct that investigation themselves, and in failing to conduct even an initial investigation to identify specific areas of available evidence and to use that information to support their funding requests. To the extent that appellate counsel were *not* deficient in failing to conduct a mitigation investigation, the military's denial of funds rendered

[4] *See, e.g.*, AR205-07, Request for Funding for Mitigation Expert (Apr. 21, 2003) (denied Apr. 23, 2003, *see* AR203-06).

them deficient.

B. Appellant Was Prejudiced

The mitigating evidence described below, all of which was available at sentencing and appeal, shows that Appellant was prejudiced by counsel's failures. Effective counsel would have conducted a thorough life history investigation and would have provided the results of that investigation to experts. Had counsel done so, the panel and appellate courts would have heard that Appellant's entire life was marked with abuse, neglect, and abandonment, and that he suffered severe mental illnesses beginning early in life and manifesting fully in early adulthood. Had the panel and appellate courts heard this powerful mitigation, there is a reasonable probability that Appellant would not be under sentence of death.

1. Appellant's Life History

Appellant's entire life was marred by trauma, abuse, neglect, and abandonment. As a child, he exhibited symptoms predictive of and consistent with his psychiatric diagnoses, but he never received treatment for those impairments. Because prior counsel did not thoroughly investigate his history, neither the testifying experts, the panel, nor the appellate courts heard this compelling mitigation evidence, which is briefly summarized below and is set forth in detail in Appendix 2, Exhibit 6.

a. Prenatal Trauma. Appellant's trauma began even before his birth when, during his mother's pregnancy, he was subjected to heightened risks for brain damage and other cognitive deficits. His father, Wilbert Washington, violently beat his mother, Lizzie Gray, while she was pregnant with Appellant. Ex. 6-8, Eula Mae Smith Decl. ¶ 7; Ex. 6-9, Robert Wilmore Decl. ¶ 5; Ex. 6-10, Rosebud Roby Decl. ¶ 2. A close friend of Wilbert and Lizzie's describes the beatings:

> He would rage on her for no reason, punching and stomping her, screaming at her and threatening to kill her. I seen him beat her hard with my own eyes more than once. He would snap and just lose control of himself and take it out on her. Early on in her time with Wilbert, Lizzie got pregnant with Ronald. Everyone knew she was pregnant, but that didn't stop Wilbert from beating her. Like I said, he just couldn't control himself. It wouldn't surprise me if the baby got injured that way since Wilbert was so rough on her.

Ex. 6-9, Wilmore Decl. ¶¶ 5-6.

In addition to being exposed to physical violence in the womb, Appellant was exposed to his mother's alcohol abuse. *Id*. ¶ 4. Both of these factors significantly increased the likelihood that Appellant would suffer from brain damage and other cognitive impairments. *See* Stewart Decl. ¶ 36. Neither the mental health experts at trial nor the panel heard this evidence.

b. Physical Abuse and Violence in the Home. Family members describe Appellant's upbringing as a living hell. Ex. 6-11, Deborah

Fuller Decl. ¶ 10. His mother brought numerous men into the home who were frequently violent with her and the children. Ron and his siblings watched as these men raged, violently beating their mother, even when she was pregnant. *Id.* ¶¶ 4, 8; Ex. 6-12, Dorothy Gray Decl. ¶¶ 10, 18; Ex. 6-13, Lizzie Bonner Decl. ¶¶ 5-6. Lizzie fought back violently and even tried to stab one of her boyfriends in front of the children. Ex. 6-14, Quincy Bonney Decl. ¶ 5.

These men frequently turned their abuse on Appellant and the other children, hitting them, beating them, and whipping them with belts. Ex. 6-11, Fuller Decl. ¶¶ 4-6, 9; Ex. 6-12, Dorothy Gray Decl. ¶ 18. As one of these men concedes, "I was not afraid to put something on their tail if Ron or the other kids acted up. I took a belt to Ron and to his sister too. If they misbehaved I put the boom down on them." Ex. 6-15, Perry Johnson Decl. ¶ 4.

Lizzie Gray was physically abusive as well. She hit Ron and beat him with belts. Ex. 6-11, Fuller Decl. ¶¶ 4-6, 9. These beatings often happened after Lizzie was in a fight with one of her men, as if Ron and his siblings "got her leftover rage." Ex. 6-14, Bonney Decl. ¶ 6; *see also id*. ¶¶ 6-7. When she was with her children, Lizzie taught them that problems should be solved with violence. *See, e.g.*, Ex. 6-13, Bonner Decl. ¶ 3. The panel and appellate courts never heard this compelling evidence.

c. Violence Outside the Home. In addition to violence in the home, Appellant witnessed all manner of violence outside the home, including gang shootings, stabbings, and beatings. Ex. 6-17, David Ford Decl. ¶¶ 2, 9; Ex. 6-11, Fuller Decl. ¶¶ 12-14; Ex. 6-18, Eric Brown Decl. ¶ 4; Ex. 6-13, Bonner Decl. ¶ 7. This violence occurred on a near daily basis. Ex. 6-19, Freddie Smith Decl. ¶ 5; Ex. 6-20, Henry Cooley Decl. ¶ 4; Ex. 6-21, Theresa McKenzie Decl. ¶ 9. To be safe in their homes, the children frequently had to stay low and avoid being near the windows. Ex. 6-23, Ivery Brown Decl. ¶ 6.

Walking to school was like being in a war zone. In one neighborhood where Appellant grew up, it was so violent that the police rarely patrolled there. Dr. Marvin Dunn, an expert in urban issues in Miami, describes the conditions:

> During one period in the late 1970s and early 80s, the police refused to enter the Liberty Square projects with fewer than three patrol units - one car to lead, another to cover the rear, while the center car responded to the call. Police feared riots, snipers, and stray bullets. Fire and Rescue, and any social service agency, simply refused to go in without police escort. It was, to be blunt, a war zone. Mr. Gray came of age in the midst of this tumult.

Ex. 6-7, Dunn Decl. ¶ 8. Later, Appellant lived in another violent and tumultuous neighborhood, Goulds. Dr. Dunn also describes the horrific conditions of that area. *Id.* ¶ 14.

In the summer of 1980, Appellant's family moved to projects in the Liberty

City neighborhood of Miami. That summer, Liberty City was devastated by large-scale riots and violence following a verdict acquitting white police officers in the shooting death of an unarmed black motorist. The rioting was "centered" in the "Liberty City area." *Guard Reinforced to Curb Miami Riot; 15 Dead over 3 Days*, N.Y. Times, May 20, 1980 at A1.

> By noon today, many buildings there were still smoldering, most of them commercial shops and retail businesses. The police said that many had been looted before they were set afire. National Guardsman cradling automatic weapons stood on nearly every corner, and in the heart of the ravaged neighborhoods scarcely a block seemed to have been left untouched by the rioters. On some blocks, every building was a smoking, burned-out shell.

Id. Even months later, violence continued to plague the neighborhood and the projects in particular. Outsiders were targeted, stores were looted, robberies and vandalism continued. Ex. 6-1, Colleen Francis Decl. ¶ 35; Ex. 6-25, Dennis Ford Decl. ¶ 9. Appellant grew up in the midst of this violence, but the panel and appellate courts never heard this evidence.

d. Improper Childhood Exposure to Sexuality. During the late 1970s, Appellant's mother was married to Willie Hurd, a violent and abusive drunk. In addition to physically abusing mother and children, Hurd exhibited abusive and improper sexual behavior, to which Appellant was directly exposed. Appellant's brother, Anthony Johnson, recalls that Hurd showered with the

bathroom door open in full view of the children (the shower did not have a shower curtain). Ex. 6-16, Johnson Decl. ¶ 2. When Anthony was a young boy, Hurd showered with him and would lay in bed naked with Lizzie Gray in full view of the children. *Id*. Appellant's cousin, who was raised in the same home, confided that Mr. Hurd molested her on a regular basis. Ex. 6-24, Lisa Howard Decl. ¶ 6; *see also* Ex. 6-13, Bonner Decl. ¶ 2 (describing Appellant's mother's promiscuity).

In addition to his exposure to sexual misconduct, Ron and the other children could literally look outside and see prostitutes having sex in the lot next to their house. Ex. 6-11, Fuller Decl. ¶ 13; Ex. 6-24, Howard Decl. ¶ 5. As a family friend describes:

> Prostitutes used to work the corner right next to the house where Ronald Gray and his family lived. The prostitutes would be out there at all times of the day and night with their pimps. We couldn't help but see prostitutes turn tricks in the empty lot right next to Lizzie Mae's house.

Ex. 6-24, Howard Decl. ¶ 5.

In short, Appellant was raised in an environment where improper and illegal sexual activity was the norm. The emotional and psychiatric impact of being improperly exposed to sexuality as a child affected Appellant's mental well-being. Ex. 6-3, Richard Dudley, M.D., Report at 5. This evidence would have been compelling mitigation. *Id*.; *see also* Stewart Decl. ¶ 34. The panel and appellate

courts never heard this evidence.

e. Neglect and Abandonment. Appellant's childhood was also marked by more subtle, but still damaging, mistreatment. His mother periodically abandoned Appellant and her other children for days, weeks, and months without explanation. She would leave them at home to fend for themselves while she went out partying at night, or she would send them to live with relatives. Ex. 6-11, Fuller Decl. ¶¶ 3, 10; Ex. 6-12, Dorothy Gray Decl. ¶ 9; Ex. 6-10, Roby Decl. ¶ 6; Ex. 6-13, Bonner Decl. ¶ 2; Ex. 6-1, Francis Decl. ¶ 23. She seemed to care more about men than about her children. Ex. 6-11, Fuller Decl. ¶ 10; Ex. 6-13, Bonner Decl. ¶ 2.

Appellant's mother did not provide adequately for her children. During much of Appellant's childhood, eight family members lived in small, rat and bug infested projects. Ex. 6-16, Johnson Decl. ¶¶ 2-3; *see also* Ex. 6-11, Fuller Decl. ¶¶ 2-3. Appellant frequently went to school in worn out, hand-me-down clothes. Ex. 6-25, Dennis Ford Decl. ¶ 2; Ex. 6-12, Bonner Decl. ¶ 5. At times, they went hungry and had to beg relatives for food. *See* Ex. 6-12, Dorothy Gray Decl. ¶¶ 16-17. Perhaps most damagingly, despite his burgeoning mental problems, Appellant's family never sought out treatment for him. Ex. 6-19, Freddie Smith Decl. ¶ 7. The panel and appellate courts never heard this compelling mitigating

evidence.

f. Childhood Mental Illness. As a child, Appellant's behavior and thought processes were strange. Much of the time, he was a loner, spending time by himself in his room. Ex. 6-20, Cooley Decl. ¶ 4; Ex. 6-23, Ivery Brown Decl. ¶ 5. He would be silent for long periods of time, not responding when spoken to, appearing anxious and worried but otherwise devoid of emotion. Ex. 6-12, Dorothy Gray Decl. ¶¶ 11-12; Ex. 6-18, Eric Brown Decl. ¶ 2; Ex. 6-8, Eula Mae Smith Decl. ¶ 2; Ex. 6-19, Freddie Smith Decl. ¶ 2; Ex. 6-26, Joanne Smith Decl. ¶ 3; Ex. 6-21, McKenzie Decl. ¶ 4.

Other times, he would become hyperactive and upbeat, exercising intensely and acting out fantasies. Ex. 6-18, Eric Brown Decl. ¶ 2; Ex. 6-1, Francis Decl. ¶ 37; Ex. 6-25, Dennis Ford Decl ¶ 5. He would be seen sitting up in his bed, wide awake in the middle of the night. Ex. 6-19, Freddie Smith Decl. ¶ 5. He thought of himself as a ninja and would strike trees until his hands bled. Ex. 6-16, Anthony Johnson Decl. ¶¶ 2-3; Ex. 6-25, Dennis Ford Decl. ¶ 5. He became obsessed with martial arts and wore a ninja suit to school. Ex. 6-25, Dennis Ford Decl. ¶ 4. He was unable to separate reality from fantasy. *Id*. ¶¶ 5-6.; Ex. 6-27, Roger Smith Decl. ¶ 4. He would talk to himself and to the sky. Ex. 6-12, Dorothy Gray Decl. ¶¶ 11-12; Ex. 6-19, Freddie Smith Decl. ¶ 5.

During his episodes of hyperactivity, Appellant worked out intensely, running and working out alone while other kids teased and heckled him. Ex. 6-25, Dennis Ford Decl. ¶ 4. His exercises became most intense when something had happened that made him angry. *Id.* ¶ 5.

He frequently pretended to be Batman or Superman, and thought he could fly if he wore a cape. Ex. 6-26, Joanne Smith Decl. ¶ 4. He would jump off of roofs. Ex. 6-19, Freddie Smith Decl. ¶ 4. As a young child, he once fell from a second floor balcony, landed on his head and was unconscious. Ex. 6-14, Bonney Decl. ¶ 4; Ex. 6-12, Dorothy Gray Decl. ¶ 12. His family did not take him for medical treatment. *Id.* His childhood fantasies did not end at a normal age. He continued to wear a cape, play with and talk to action figures, and dress up like a ninja during his teenage years. Ex. 6-14, Bonney Decl. ¶ 4; Ex. 6-21, McKenzie Decl. ¶ 6.

Because Appellant's counsel never investigated his life history, the panel never heard this compelling evidence. Further, the mental health experts at trial never learned of Appellant's childhood mental illness and thus were unable to accurately diagnose Appellant.

g. Manic Episodes in the Army. Relatives and friends were astounded to hear that the Army had accepted Ron despite his mental problems. *See* Ex. 6-26, Joanne Smith Decl. ¶ 6; Ex. 6-27, Roger Smith Decl. ¶ 4.

The Army at that time did not have any reliable method for screening and detecting mental health illness. Ex. 6-28, Lee Section Decl. ¶ 5. The Army's macho, heavy-drinking culture seemed to encourage Appellant's increasingly pathological behavior. *Id.* ¶ 5; Ex. 6-29, Eric Smith Decl. ¶ 6. Appellant's mental illness went largely unnoticed and completely untreated in the Army.

By 1986, Appellant's mental illness had become extreme. While on leave in Miami, friends and family members quickly noticed that his behavior had changed drastically. He was expansive, talkative, and arrogant, and was lifting weights or running nearly all the time. Ex. 6-16, Anthony Johnson Decl. ¶ 7. He could not sit still. Ex. 6-17, David Ford Decl. ¶ 6. He had never drank or smoked before joining the Army, but now he was drinking alcohol and smoking cigarettes and marijuana. *Id.* ¶ 6. Friends observed him losing control of his mind and exhibiting strange, unpredictable behavior. *See id.* ¶¶ 6-7.

He was unable to sit still, was frequently covered in sweat, and became obsessive about his work. Ex. 6-29, Eric Smith Decl. ¶¶ 3-4; Ex. 6-28, Section Decl. ¶ 3. In the months before his arrest, he complained frequently about headaches, became increasingly dependent on alcohol, had unpredictable mood swings, and slept rarely. Ex. 6-30, Earlene Vierra Decl. ¶¶ 2-4. A friend described his "split personality." Ex. 6-31, Penny Garcia Decl. ¶¶ 7-8.

As now recognized by Appellant's current experts and experts who evaluated him in the military, information regarding Appellant's mental state in the months leading up to the crimes was crucial both for an accurate psychiatric diagnosis and to understand Appellant's behavior. *See* Ex. 6-2, Stewart Decl. ¶ 42; Ex. 6-4, Warren Decl. ¶¶ 8-12, 15; Ex. 6-5, William Kea, Ph.D., Decl. ¶ 10. But neither the panel nor the mental health experts learned of this evidence.

h. Family History of Psychotic Illness. The mental health experts were also hampered by a lack of information about Appellant's extensive family history of psychotic illness. Such a history is a crucial prerequisite for a comprehensive mental health evaluation. *See* Ex. 6-2, Stewart Decl. ¶ 8. Numerous family members on both his mother's and father's sides of the family have suffered psychotic mental illnesses for generations.

Appellant's father exhibited symptoms of severe mental illness, including psychosis. *See* Ex. 6-33, Patricia Washington Decl. ¶¶ 2-5; Ex. 6-10, Roby Decl. ¶ 2; Ex. 6-32, Tiffany Washington Decl. ¶¶ 2-3; Ex. 6-35, Tommie Lee Washington Decl. ¶¶ 2-6. Relatives described him as "two people in one." Ex. 6-9, Wilmore Decl. ¶ 3. One of his paternal half-brothers has been diagnosed with Schizoaffective Disorder - Bipolar Disorder, and the other has been diagnosed with Schizophrenia - Paranoid Type. Ex. 6-1, Francis Decl. ¶¶ 11-12; *see also* Ex. 6-32,

Tiffany Washington Decl. ¶ 7; Ex. 6-34, Tracey Washington Decl. ¶¶ 2-3. Aunts and uncles, among other paternal relatives, likewise exhibited symptoms of psychotic illnesses. Ex. 6-10, Roby Decl. ¶ 5; Ex. 6-35, Tommie Lee Washington Decl. ¶¶ 10-11.

Appellant's maternal half-brother has been diagnosed with Bipolar Disorder. Ex. 6-1, Francis Decl. ¶ 13; Ex. 6-12, Dorothy Gray Decl. ¶ 15. Appellant's maternal grandfather exhibited similar symptoms of mental illness. *Id.* ¶¶ 3-4; Francis Decl. ¶ 16.

* * * * *

Appellant's life history, in and of itself, provides ample mitigation evidence to establish prejudice for his counsel's failure to fully investigate the mitigation available in his case. There is a reasonable likelihood that this evidence would have resulted in a life sentence. Further, had counsel provided experts with this history, the debilitating psychiatric effects of such a childhood could have been explained to the panel and the appellate courts.

2. Mental Health Mitigation

Dr. Pablo Stewart describes the psychiatric effects of a traumatic upbringing:

> The adverse mental health effects of being subjected to such a traumatic childhood are well established. As discussed in more detail below, Mr. Gray exhibits the symptoms typically seen in survivors of severe childhood abuse. Children who are forced to endure such

trauma are left with long-term debilitating psychological impairments.

Ex. 6-2, Stewart Decl. ¶¶ 6. Such an explanation of the mental health results of the type of childhood development endured by Appellant would have been powerful mitigation.

Appellant's childhood exposure to inappropriate sexual conduct also had a tremendous impact on his development. Ex. 6-3, Dudley Report at 5. The impact of this exposure would have been compelling mitigation:

> An accurate and comprehensive psychiatric profile of Mr. Gray would have helped the jury to understand that, particularly during the manic psychotic episodes of his Bipolar Disorder, Mr. Gray was unable to control his sexual impulses and lived in a fantasy world where those impulses governed both his thought processes and his behavior.

Id.

The psychological impact of growing up in the midst of a violent and impoverished community is likewise devastating:

> The emotional and psychological effects of growing up in the midst of such extreme chaos and violence are well established in the field of psychology. The impact of living under these conditions tends to be especially problematic for young black males, especially those who grew up in unstable family conditions. Among the effects are low self-esteem, high drop-out rates from school, depression, post-traumatic stress disorder, anger control problems, drug addiction and involvement in crime (usually related to drugs or domestic issues).

Ex. 6-7, Dunn Decl. ¶ 17.

Further, because of counsel's failure to conduct a proper investigation,

Appellant was misdiagnosed at trial. The mental health mitigation presented to the panel was that Appellant suffered from personality disorders. Had counsel conducted a life history investigation and provided that investigation to his experts, they could have presented compelling evidence that Appellant suffered from far more severe and debilitating mental illnesses. The panel never heard, and the appellate courts only heard in small part, that Appellant suffers from Bipolar Disorder, organic brain damage, and PTSD. Nor did they hear of his diminished mental state at the time of the crimes. Had they heard this evidence there is a reasonable probability that the sentencing outcome would have been different at trial and/or on appeal.

a. Bipolar Disorder, Manic (including Severe Manic Episode with Mood-congruent Psychotic Features). Col. Armitage diagnosed Appellant with a non-specified personality disorder, Tr. 2399, and found that Appellant exhibited some traits of the schizotypal diagnosis but did not rise to the full diagnostic level. Tr. 2401. Dr. Rose agreed. Tr. 2450.

These diagnoses were wrong. Had effective counsel provided these experts with a life history, the proper diagnoses could have been provided. The Bipolar diagnosis, in conjunction with life history mitigation, organic brain damage and PTSD, explains the true nature of Appellant's mental illness and resulting behavior.

This would have been powerful mitigation. Ex. 6-2, Stewart Decl. ¶ 26. Indeed, the debilitating effects of Bipolar Disorder are extreme, and were magnified by Appellant's childhood history, which was marred by violence, abuse, and neglect. *Id.* ¶¶ 16, 30.

Dr. Warren has now had an opportunity to review Appellant's life history, which was never before made available at trial. He agrees with Dr. Stewart's diagnoses, and explains that "[t]his accurate assessment was not made [at trial] because of the lack of collateral data from his counsel." Ex. 6-4, Warren Decl. ¶¶ 12, 15. He goes on to explain how this information would have been mitigating:

> This diagnosis would have explained how Mr. Gray lost touch with reality and lost control of himself at certain times, while acting in relatively normal and appropriate ways at other times. This would have explained his behavior at the time of the offenses. . . . We would have been able to accurately describe his impaired mental state, resulting from mental illness, and explained that he had a diminished capacity, had counsel informed us of Mr. Gray's history.

Id.

A feature of Bipolar Disorder is the fluctuation of manic episodes which, in Appellant's case, often manifested in psychotic symptomatology. *See* Ex. 6-2, Stewart Decl. ¶ 25. This diagnosis fully explains Dr. Rose's experience with Appellant. After Dr. Rose's first meeting with Appellant, he described Appellant's behavior as exhibiting severe psychosis and opined that Appellant was not

"presently mentally competent to stand trial." Ex. 6-51, Selwyn Rose Letter to Brewer (11/4/87) at 1. Later, Dr. Rose indicated that those symptoms were gone. Tr. 2450. Dr. Rose was asked to explain this variance, but he could not do so: "He seemed to fluctuate from time to time and I can't explain it. He just seemed different the second two times." *Id.* Dr. Rose could not explain this change because he was not provided with sufficient information to make the proper diagnosis; a Bipolar diagnosis fully explains the fluctuation of manic, psychotic episodes. *See* Ex. 6-3, Dudley Report at 4. Had counsel performed effectively, experts could have explained these fluctuations. Instead, the panel was simply left with the impression that Appellant was exaggerating his symptoms during the initial evaluation.

Appellant was prejudiced by the fact that the panel and appellate courts never heard this diagnosis and never heard evidence that "at the height of his manic, psychotic episodes, Mr. Gray had lost touch with reality and was unable to control himself." Ex. 6-3, Dudley Report at 4. As the Tenth Circuit has explained:

> Diagnoses of specific mental illnesses such as schizophrenia or bipolar, which are associated with abnormalities of the brain and can be treated with appropriate medication, are likely to [be] regarded by a jury as more mitigating than generalized personality disorders, which are diagnosed on the basis of reported behavior, are generally inseparable from personal identity, and are often untreatable through medical or neurological means.

Wilson v. Sirmons, 536 F.3d 1064, 1094 (10th Cir. 2008). As in *Wilson*, the panel and appellate courts here only heard misleadingly incomplete evidence of Appellant's mental issues.

b. Organic Brain Damage. At the time of Appellant's court martial, there were numerous red flags indicating that Appellant had cognitive disabilities and organic impairments. However, defense counsel failed to request neuropsychological and other testing.[5]

Dr. Warren administered the Minnesota Multiphasic Personality Instrument to Appellant before trial. The report indicated that Appellant "has a large number of symptoms of the type sometimes associated with organic involvement of the central nervous system." Ex. 6-55. This was a clear red flag for brain damage. Ex. 6-4, Warren Decl. ¶ 3. Effective counsel would have requested neuropsychological and neurological testing upon seeing these results.

During the direct appeal, counsel proffered the affidavit of Jonathan Pincus, M.D., a physician specializing in neurology and behavioral neurology. He

[5] This is the area of mitigation that appellate counsel focused on investigating and presenting on appeal. This fact does not, however, exempt the evidence from this court's prejudice analysis. To the contrary, the court must evaluate *all* of the evidence adduced at trial and thereafter. *See Wiggins*, 539 U.S. at 536 (a reviewing court must "evaluate the totality of the evidence – both that adduced at trial, and the evidence adduced in the habeas proceedings."); *accord Williams*, 529 U.S. at 397-98.

reviewed the reports of the two sanity boards, the neuropsychological report of Fred Brown, and MRI, EEG, and SPECT scan reports. Dr. Pincus concluded that Appellant has brain damage. Ex. 6-55, Pincus Aff. ¶ 13.

Appellant was prejudiced. Had counsel requested additional testing, the panel would have heard about the severe effects of brain damage. The existence of brain damage and its effect on an individual's functioning are enormously mitigating. *See* Ex. 6-2, Stewart Decl. ¶ 46. Further, the effects of organic brain damage were magnified by the childhood trauma experienced by Appellant. *Id*. ¶ 17. The combination of organic brain damage, childhood trauma, and other evidence of mental illness would have provided the panel and appellate courts with compelling mitigation:

> Mr. Gray's psychiatric impairments, particularly his manic episodes and organic brain damage, are of sufficient severity to warrant inquiry into his ability to appreciate the nature and quality or wrongfulness of his conduct at the time of the crimes and his ability to understand and assist counsel during his military court proceedings.

Ex. 6-3, Dudley Report at 4.

c. Post Traumatic Stress Disorder. Appellant has also been diagnosed with PTSD. Ex. 6-2, Stewart Decl. ¶ 20. Again, this diagnosis could have been presented if counsel provided his experts with sufficient background materials. *See* Ex. 6-4, Warren Decl. ¶ 12.

PTSD is a major mental illness and would have provided additional, powerful mitigation. Ex. 6-2, Stewart Decl. ¶ 33. The mitigating value is greatly enhanced because it derives directly from Appellant's violent upbringing. *Id.* ¶ 34. The experience of his traumatic upbringing and the resultant PTSD have had a profound impact on Appellant's life, including dissociative flashbacks, intense physiological reactivity, memory lapses, estrangement and detachment. *Id*. ¶ 35. Additionally, Appellant's multiple diagnoses intensify and confirm each other. *See* Diagnostic and Statistical Manual of Mental Disorders, Third Edition, Revised 249 (1987). Had the panel and appellate courts heard these diagnoses, particularly in conjunction with the evidence of his violent and traumatic childhood, there is a reasonable probability that the proceedings would have resulted in a life sentence.

CLAIM 4 APPELLANT'S DEATH SENTENCE MUST BE REVERSED BECAUSE THE MILITARY DEATH SENTENCING SYSTEM AS APPLIED IS UNCONSTITUTIONAL AND HIS SENTENCE WAS THE RESULT OF RACIAL DISCRIMINATION

Appellant, an African American, was sentenced to death by a military capital punishment system that has long been plagued by racial inequities. Evidence demonstrates that the military death penalty system does not fulfil its mandate under *Furman v. Georgia*, 408 U.S. 238 (1972), to limit arbitrariness. Such evidence was proffered below and would be presented and proven at a *DuBay* hearing.

Military tribunals are significantly more likely to sentence minority

defendants to death than white defendants, and to issue death sentences in cases involving white victims. These discriminatory effects are multiplied where the defendant is non-white and victims are white, as in this case. When the specter of arbitrariness and racially unequal treatment so infects a death penalty system that sentencing outcomes do not result solely from the consideration of legitimate factors, a death sentence may not stand. Additional evidence published since the petition was filed below further confirms that the military criminal justice system is plagued by racial inequities. *See* Don Christensen, Col. (Ret.) & Yelena Tsilker, *Racial Disparities in Military Justice: Finding of Substantial and Persistent Racial Disparities Within the United States Military Justice System*, (Protect Our Defenders), May 5, 2017, at i-ii,13, 15.

Appellant's death sentence violates Article 66, due process, and the Eighth Amendment, as the sentence derives from a constitutionally impermissible level of arbitrariness. Due process and equal protection were violated because race was likely a determinative factor in Appellant's death sentence; similarly-situated white defendants and cases involving non-white victims received death sentences at significantly lower rates.

A. Appellant's Proof of Discrimination

Data was collected on all 104 death eligible cases prosecuted by the Armed

Forces between 1984 and 2005. For each case, the data collection encompassed more than 200 variables relating to the characteristics of the accused and victim, the nature of the crime, the case presented against the accused, the defense pursued, as well as any mitigation presented. Each procedural step was tracked so as to permit precise analysis of key decision points in the military capital punishment system.

The study included analysis of subsets of cases that shared attributes with Appellant's case. The study found significant racial disparities:

- A death verdict was returned against minorities (non-whites) in 26% of death eligible cases but only 9% of cases where the defendant was white. After controlling for the level of aggravation, minorities were still more than twice as likely to receive a death sentence than whites (23% v. 11%). Ex. 6-74, Tbl. 3.

- White-victim cases resulted in a death sentence 18% of the time, whereas in non-white victim cases the rate was only 6%. *Id.*

In the subsets of cases most like Appellant's, the effects remained substantial:

- When a defendant was non-white and one or more of the victims were white, a death verdict resulted 37% of the time whereas in all other cases the rate was 8%. These disparities remained substantial after controlling for case severity (27% v. 12%). *Id*.

- In multiple victim cases, minorities received death 78% of the time and whites only 14% of the time, a 64 percent disparity. The disparities remain substantial after adjusting for case severity (67% v. 28%). Ex. 6-74, Tbl. 12.

- Removing the race effects from the analysis for defendants in Appellant's culpability level reduce the likelihood of death by 31

percentage points (87% v. 56%). Ex. 6-74, Tbl. 3.

B. Appellant's Death Sentence Violates Due Process and the Eighth Amendment

In 1972, the Supreme Court ruled that the death penalty could not be constitutionally imposed under sentencing schemes that result in arbitrary and capricious death sentences. *See Furman*, 408 U.S. 238. Since *Furman*, the Eighth Amendment has required that a capital sentencing scheme "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983). Death penalty systems must be constitutional in design and application. *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980).

In *McCleskey v. Kemp*, 481 U.S. 279 (1987), the Supreme Court rejected a claim that race discrimination in capital prosecutions in Georgia violated the Eighth Amendment because McCleskey failed to demonstrate "a constitutionally significant risk of racial bias." *Id.* at 313. Appellant's evidence here overcomes the deficiencies identified in *McCleskey*. The *McCleskey* Court found the evidence regarding Georgia's system "at most" showed a "discrepancy that appear[ed] to correlate with race" and concluded such "[a]pparent disparities in sentencing are an inevitable part of our criminal justice system." *Id.* at 312-13. Conversely, Appellant's evidence permits analysis of each discretionary procedural step and

permits identification of the points in the military system where discrimination is greatest. The disparities demonstrated in this case are not "apparent disparities" nor "inevitable" ones; they are stark and intolerable, and reflect actual discrimination against racial minorities.

Moreover, the safeguards in the Georgia system – particularly the jury system – that were noted by the *McCleskey* Court are far weaker in the military system. *See id.* at 310-11. The "representative community" so crucial to the *McCleskey* Court is, in the military, hand-picked by the very commanding officer who deems the defendant deserving of the death penalty. The "diffused impartiality" of a twelve-person jury of one's peers was here reduced to only six military personnel. Even the pools from which the court martial members were drawn were racially and gender-skewed, and thus are not representative of Appellant's "community."

In military capital cases, the status of being a minority is tantamount to an aggravating factor, saddling an entire class of defendants with a risk of a death sentence based on their race and ethnicity, and on the race and ethnicity of the victims. In *Zant*, the Supreme Court cautioned that if a state "attached the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as . . . the race . . . of the defendant . . . due process of law would require that the jury's decision to impose death be set aside."

462 U.S. at 885. The same practical effect has been demonstrated here.

C. Appellant's Death Sentence Violates Equal Protection and Due Process

Appellant's proffered evidence demonstrates not only significant discrimination by race of the defendant and victim, but also persistence of these disparities in cases most similar to this one. "[T]o prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose." *McCleskey*, 481 U.S. at 292.

Appellant's proof overcomes the deficiencies identified in *McCleskey* by focusing acutely on how discrimination affected this case at *each* stage. Appellant's evidence permits an analysis focused on each sentencing decision-maker. Appellant's proof – multiple measures showing that minorities who have committed murders of severity comparable to Appellant's are sentenced to death at a significantly higher rate than whites – overcomes the concerns expressed in *McCleskey* and compels a finding of, or at least a formal hearing and inquiry into, purposeful discrimination.

CLAIM 5 THE MILITARY DEATH PENALTY VIOLATES EVOLVING STANDARDS OF DECENCY UNDER THE EIGHTH AMENDMENT

Punishments violate the Eighth Amendment when they "are incompatible with the evolving standards of decency that mark the progress of a maturing society,

or which involve the unnecessary and wanton infliction of pain." *United States v. Lovett*, 63 M.J. 211, 214 (C.A.A.F. 2006) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976)). The military capital punishment system violates evolving standards of decency for at least three reasons. First, racial disparities beset military capital punishment and remain a major predictor of death sentences. *See* Claim 4, *supra*. Second, excessive delays undermine any legitimate penological goal in conducting executions. Third, the increasing rarity of executions nationwide – the military has not conducted an execution in more than a half-century – anticipates the abolition of capital punishment in the United States, as has already occurred throughout other Western civilized societies. Appellant's execution would be contrary to evolving standards of decency.

WHEREFORE, Petitioner-Appellant respectfully requests that this court:

1. Grant review and order merits briefing and oral argument;

2. Remand for a *DuBay* hearing on Appellant's claims;

3. Vacate Appellant's convictions and sentences; and

4. Grant such other relief as may be appropriate.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This filing complies with the type-volume limitation of Rule 24(c) because:

This filing contains 13,992 words.

This filing complies with the typeface and type style requirements of Rule 37.

/s/ Timothy Kane Dated: September 18, 2017

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this September 18, 2017 the foregoing *Writ-Appeal Petition* and appendices were submitted electronically for immediate filing to the United States Court of Appeals for the Armed Forces, and the same were served via email upon counsel for the United States:

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

RONALD GRAY Private, U.S. Army, *Appellant*, v. UNITED STATES, *Appellee*.	)	UNITED STATES' ANSWER TO WRIT-APPEAL PETITION Crim. App. Misc. Dkt. No. 20160775 USCA Misc. Dkt. No. 17-0525

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

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Preamble

The United States Army Court of Criminal Appeals (ACCA) denied Appellant's petition for a writ of error coram nobis. *Gray v. United States*, 76 M.J. 579 (A. Ct. Crim. App. 2017) (*en banc*) (*Gray IV*). This Court reviews decisions of a service court on a petition for extraordinary relief as a writ-appeal petition, under Rules 4(b)(2) and 18(a)(4) of this Court's Rules of Practice and Procedure (Rules). *Ellis v. Jacob*, 26 M.J. 90, 91 n.2 (C.M.A. 1988). The United States files this answer pursuant to Rules 27(b) and 28(b)(2).

I
History of the Case

Appellant's case has a long and complicated procedural history which is captured most exhaustively in *Gray v. Gray*, No. 5:08-CV-3289-JTM, 2015 U.S. Dist. LEXIS 131345 (Dist. Kan. Sep. 29, 2015) (memorandum and order). Appellant was convicted and sentenced to death by a general court-martial in 1988 for the rape and murder of two women and the rape and attempted murder of a third woman, among other offenses. *United States v. Gray*, 51 M.J. 1, 10

(C.A.A.F. 1999) (*Gray III*). He was also convicted in 1987 of two counts of second degree murder, five counts of rape, and a number of other offenses, all of which related to different victims, in a North Carolina court. *United States v. Gray*, 37 M.J. 730, 733 n.1 (A.C.M.R. 1992) (*Gray I*). That court sentenced him to three consecutive life terms and five concurrent life terms. *Id*. Appellant exhausted his direct military appeals. *Gray I*, 37 M.J. 730, *aff'd*, *Gray III*, 51 M.J. 1, *cert. denied*, 532 U.S. 919 (2001). In 2008, the President approved Appellant's sentence.

On April 1, 2009, Appellant filed a petition for a writ of habeas corpus in the United States District Court for the District of Kansas. Next, Appellant filed a petition for a writ of error coram nobis in the ACCA. *Gray v. Belcher*, 70 M.J. 646 (A. Ct. Crim. App. 2012) (*Belcher I*). The ACCA denied the petition on the ground that Appellant was not eligible for military coram nobis review because civilian habeas relief was available to him. *Id*. at 648. To support this holding, the court wrote, "In fact, petitioner has filed a writ of habeas corpus in federal district court and the government does not dispute the jurisdictional basis for doing so." *Id*. Appellant appealed, and this Court denied the writ-appeal petition "without prejudice to raising the issue asserted after the U.S. District Court for the District of Kansas rules on the pending habeas petition." *Gray v. Belcher*, 71 M.J. 300 (C.A.A.F. 2012) (*Belcher II*).

On September 29, 2015, the district court dismissed certain of Appellant's claims with prejudice and certain of them without prejudice. *Gray v. Gray*, 2015 U.S. Dist. LEXIS 131345. On February 18, 2016, Appellant filed another petition for a writ of error coram nobis in the ACCA. On April 8, 2016, the United States Court of Appeals for the Tenth Circuit reversed the district court for having effected a "hybrid dismissal" and remanded. *Gray v. Gray*, 645 Fed. Appx. 624 (10th Cir. Apr. 8, 2016) (order and judgment). The ACCA then dismissed the petition before it, noting, without further explanation, that "[t]he district court's decision on remand [was] pending." *Gray v. Nelson*, ARMY MISC 20160086 (A. Ct. Crim. App. May 10, 2016) (order). Appellant again filed a writ-appeal petition with this Court and this Court again denied it "without prejudice to re-filing after the United States District Court for the District of Kansas rules on the pending petition for [a] writ of habeas corpus." *Gray v. Nelson*, 75 M.J. 369 (C.A.A.F. 2016). Then, on remand, the district court dismissed the entire petition without prejudice. *Gray v. Belcher*, No. 5:08-cv-03289-JTM, 2016 U.S. Dist. LEXIS 149574 (Dist. Kan. 27 Oct. 2016) (memorandum and order).

On December 9, 2016, Appellant filed in the ACCA a petition for extraordinary relief in the nature of a writ of error coram nobis, the petition that is the subject of this writ-appeal petition. The petition sought relief on the basis of seven enumerated claims. *Gray IV*, 76 M.J. at 581. In this appeal, Appellant

abandons what was numbered in ACCA Claim 2.[1] As to what was Claim 3, the ACCA held it lacked jurisdiction to entertain the claim. *Id*. at 592. As to Claim 1 and Claims 4-7, the ACCA determined that they were procedurally barred by the third and sixth threshold requirements of *United States v. Denedo*, 66 M.J. 114 (C.A.A.F. 2008) (*Denedo I*), *aff'd*, *United States v. Denedo*, 556 U.S. 904 (2009) (*Denedo II*). *Id*. at 588. Next, as alternative grounds for denying the petition, the ACCA considered the claims individually. The court denied Claim 1, Claim 5, Claim 6, and Claim 7 on their merits. *Id*. at 590-92. The court denied Claim 4 on its merits and on the ground that it was procedurally barred by the fifth *Denedo I* requirement. *Id*. at 592.

Appellant is currently confined pending the execution of his sentence. *Id*. at 581; s*ee* Rule for Courts-Martial [hereinafter R.C.M.] 1004(e).

II
Issues Presented

1.

WHETHER THIS COURT HAS JURISDICTION TO ENTERTAIN A PETITION FOR A WRIT OF ERROR CORAM NOBIS TO CORRECT AN ERROR CLAIMED TO HAVE OCCURRED DURING THE PRESIDENT'S REVIEW OF A DEATH SENTENCE.

[1] In this Court, Appellant has renumbered and consolidated his claims as Claims 1-5.

2.

WHETHER APPELLANT HAS MET THE "STRINGENT THRESHOLD REQUIREMENTS" FOR THE ISSUANCE OF A WRIT OF ERROR CORAM NOBIS WHERE (1) HE IS ENTITLED TO SEEK A CIVILIAN WRIT OF HABEAS CORPUS; (2) HE HAS NOT SERVED HIS SENTENCE; AND (3) HE SEEKS TO REEVALUATE PREVIOUSLY CONSIDERED LEGAL ISSUES, NO VALID REASON EXISTS FOR NOT SEEKING RELIEF EARLIER, AND HE COULD HAVE DISCOVERED ANY NEW INFORMATION THROUGH REASONABLE DILIGENCE.

III
Statement of Facts

In January 1987, appellant was identified and arrested for the rape of a woman in the vicinity of Fairlane Acres, a trailer park near Fort Bragg, North Carolina. The next day the body of Ms. [KAR] was found near that area on Fort Bragg. "She had received multiple stab wounds" and had "suffered bruises on her eyebrow, bruises on her nose, and a laceration on her lip." She had been raped and anally sodomized. Evidence in her vehicle and in his possession implicated appellant.

Later the same month, the body of Private (PVT) [LLV-C] was found. "She had been shot four times (while she was alive), in the neck, forehead, chest, and back of the head. Also, she had suffered blunt force trauma to the right cheek, the left side of her face, around her left eye, her left breast, abdomen, and both legs and arms." PVT [V-C] "had been raped and anally sodomized." Evidence on her car and the murder weapon implicated appellant.

Subsequent media coverage of appellant's arrest for these crimes produced another victim (PVT N), who recognized his face from photographs of appellant on

> television and in the newspaper. She reported that appellant had "raped her, and stabbed her repeatedly in the neck and side"; she "suffered a laceration of the trachea and a collapsed or punctured lung." 37 M.J. at 732.
>
> The above crimes were tried by court-martial which found appellant guilty and gave him the death penalty. Appellant was also convicted in a North Carolina state court of the murders and rapes of two other young women, and he was given sentences of life in prison. Appellant entered a guilty pleas [sic] to the murders tried in State court. *See* 37 M.J. at 733 n.1.

Gray III, 51 M.J. at 10-11.

IV
Reasons Why the Writ Should Not Issue

This Court should deny the writ-appeal petition because Appellant is entitled to civilian habeas review, because he has not served his sentence, because he has no valid reason for failing to seek relief sooner, and because any new information he now presents was available to him during direct appeal or trial. Additionally, this Court lacks jurisdiction to hear Claim 2, and Claim 3 was already litigated in this Court and the Army Court of Military Review (ACMR).

A writ of coram nobis is "a belated extension of the original proceeding during which the error allegedly transpired." *Denedo II*, 556 U.S. at 913. A military appellate court may issue a writ of error coram nobis if the petitioner meets six "stringent threshold requirements . . . ." *Denedo I*, 66 M.J. at 126. Those requirements are:

> (1) the alleged error is of the most fundamental character; (2) no remedy other than coram nobis is available to rectify the consequences of the error; (3) valid reasons exist for not seeking relief earlier; (4) the new information presented in the petition could not have been discovered through the exercise of reasonable diligence prior to the original judgment; (5) the writ does not seek to reevaluate previously considered evidence or legal issues; and (6) the sentence has been served, but the consequences of the erroneous conviction persist.

Id. (citing *United States v. Morgan*, 346 U.S. 502, 512-13 (1954) (other citations omitted). [2] A petitioner who does not establish the threshold requirements is not eligible for coram nobis review. *Id*. at 127.

A. This Court has no jurisdiction to hear Claim 2.

This Court lacks jurisdiction to entertain Claim 2 because the claimed harm does not affect the findings and sentence as approved by *the convening authority*, it affects the findings and sentence as approved by *the President*. As courts of limited jurisdiction, federal courts possess only that jurisdiction provided by the Constitution or a statute, and the burden is on the party asserting jurisdiction to

[2] Appellant has elsewhere argued that the *Denedo I* requirements are not good law because they were not adopted by the Supreme Court in *Denedo II*. That argument is incorrect because the requirements were only a distillation of the facts relied upon in another Supreme Court case, *Morgan*, into a neat, numbered list. *See Morgan*, 346 U.S. at 512-13; *Loving v. United States*, 62 M.J. 235, 253 n.120 (C.A.A.F. 2004) (*Loving I*) (distilling the *Morgan* analysis into five requirements). Lower courts have continued to treat the *Denedo I* requirements as mandatory following *Denedo II*. *Belcher I*, 70 M.J. at 647 (citing *Denedo I*, 66 M.J. at 126); *Chapman v. United States*, 75 M.J. 598, 601 (A.F. Ct. Crim. App. 2016) (citing *Denedo I*, 66 M.J. at 126).

overcome the presumption that a case falls outside this limited jurisdiction. *Ctr. for Constitutional Rights v. United States*, 72 M.J. 126, 128 (C.A.A.F. 2013) (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). As Article I courts, military appellate courts' jurisdiction is particularly circumscribed:

> When Congress exercised its power to govern and regulate the Armed Forces by establishing the CAAF, *see* U.S. Const. Art. I, § 8, cl. 14; 10 U.S.C. § 941; *see generally Weiss v. United States*, 510 U.S. 163, 166-69 (1994), it confined the court's jurisdiction to the review of specified sentences imposed by courts-martial: the CAAF has the power to act "only with respect to the findings and sentence as approved by the court-martial's] convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals." 10 U.S.C. § 867(c).

Clinton v. Goldsmith, 526 U.S. 529, 533-34 (1999).

Under the All Writs Act, "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (2012). The power to issue writs under the Act extends to military courts. *See Noyd v. Bond*, 395 U.S. 683, 695 n.7 (1969). However, the requested writ must be "in aid of" the issuing court's *existing* jurisdiction; the Act does not enlarge that jurisdiction in any way. *Goldsmith*, 526 U.S. at 534-35.

Importantly, military courts are "not given authority, by the All Writs Act or otherwise, to oversee all matters arguably related to military justice, or to act as a plenary administrator even of criminal judgments it has affirmed." *Id*. at 536. In

Goldsmith, following a court-martial conviction and direct appellate review, the Air Force took steps to drop the petitioner from the rolls administratively. *Id*. at 532. Goldsmith petitioned the Air Force Court of Criminal Appeals, and then the CAAF, to enjoin this action. *Id*. at 532-33. Invoking the All Writs Act and its purported supervisory authority over military justice matters, the CAAF issued the requested writ. *Id*. Reasoning that the CAAF had no such supervisory jurisdiction, and that the requested writ fell outside the court's statutory jurisdiction under Article 67, UCMJ, the Supreme Court held that the CAAF lacked jurisdiction to issue the writ. *Id*. at 531.

Accordingly, whether this Court has jurisdiction to entertain Appellant's claim relating to the circumstances under which the President approved his death sentence turns on the scope of this Court's existing statutory jurisdiction. This Court's jurisdiction is provided—and limited—by Article 67, UCMJ. *Goldsmith*, 526 U.S. at 533-34. Under that statute, this Court may review cases "in which the sentence, as affirmed by the Court of Criminal Appeals, extends to death . . . ." UCMJ art. 67(a)(1). However, this Court "may act only with respect to the findings and sentence *as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals*." UCMJ art. 67(c) (emphasis added). The convening authority approves a sentence under Article 60,

UCMJ. Here, the convening authority approved the sentence and the ACCA affirmed long before the actions complained about in Claim 2.

Approval of a death sentence by the President, on the other hand, is an entirely different matter, governed by Article 71, UCMJ. Article 71 limits the timing of the execution of a death sentence: "If the sentence of the court-martial extends to death, that part of the sentence providing for death may not be executed until approved by the President." UCMJ art. 71(a). Neither Article 67 nor any other statute provides military courts with jurisdiction to review the procedures by which the President considers a death sentence. To the contrary, this court's jurisdiction is limited to the findings and sentence "as approved by the convening authority . . . ." UCMJ art. 67(c). Because of this, this case is like *Goldsmith*. The petition asks this Court to review the actions of the Executive taken after direct review of the court-martial has ended. But, as *Goldsmith* established, this Court has no freewheeling, plenary jurisdiction over military justice matters. Instead, this Court is limited to review of the findings and sentence as approved by the convening authority. When the convening authority approved the sentence in this case and the ACCA and this Court affirmed, the events Appellant now complains of had not even occurred. Coram nobis review constitutes "a belated extension of the original proceeding during which the error allegedly transpired[,]" not a new review of issues that arose after the original proceeding had ended. *Denedo II*, 556

U.S. at 913. For these reasons, this Court has no jurisdiction to entertain Claim 2, and should dismiss the writ-appeal petition.

B. Appellant is not eligible for military coram nobis review because he is entitled to civilian habeas review.

> Once a criminal conviction has been finally reviewed within the military system, and a servicemember in custody has exhausted other avenues provided under the [Uniform Code of Military Justice] to seek relief from conviction, he is entitled to bring a habeas corpus petition, *see* 28 U.S.C. § 2241(c), claiming that his conviction is affected by a fundamental defect that requires that it be set aside.

Goldsmith, 526 U.S. at 537 n.11; *Loving I*, 62 M.J. at 248.[3]

Where a petitioner is entitled to petition for a writ of habeas corpus in a U.S. district court, he fails to show that no other remedy other than military coram nobis is available to rectify the consequences of the error, and thus is not entitled to coram nobis review in military courts. *Chapman*, 75 M.J. at 601-02 (citations omitted); *see Denedo II*, 556 U.S. at 911 ("[A]n extraordinary remedy may not issue when alternative remedies, such as habeas corpus, are available."). In *Loving I*, this Court engaged in a lengthy analysis of whether a writ of coram nobis was necessary and appropriate in a death penalty case, given that the petitioner was

[3] The court below declined to conclude that military coram nobis review was unavailable in this case because it was hesitant to determine the scope of civilian habeas review. *Gray IV*, 76 M.J. at 288. Given the clarity of *Goldsmith* and *Loving I* on this question, this Court should have no similar hesitance.

entitled to eventual habeas review in an Article III court. 62 M.J. at 248-51. This Court concluded that in that case Article III review was not an adequate alternative remedy, but only because the President had not yet acted on the death sentence. *Id*. The logical implication of this discussion is that if the President had approved the death sentence, such that civilian habeas review would have been available, the petitioner in *Loving I* would not have been entitled to coram nobis review in this Court.

Here, Appellant is confined pending his death sentence. The President has also finally reviewed that death sentence. An appropriate U.S. district court is open to Appellant for habeas review. Therefore, under *Loving I* and *Denedo I*, Appellant is not eligible for coram nobis review in this Court. Accordingly, this Court should deny the petition.

The United States has not sought to create a "Catch 22" by raising the defense of non-exhaustion in the district court, and then arguing that the availability of coram nobis review is precluded by the availability of district court review, as the court below suggested. *Gray IV*, 76 M.J. at 588. Generally, coram nobis review is unavailable if habeas review is available, even if the *success* of the potential habeas petition is doubtful because of the existence of procedural defenses. *See Loving I*, 62 M.J. at 254. If this Court denies Appellant's petition because Article III review is available to him, when he brings a new action in a

district court the defense of non-exhaustion will be unavailable to the United States, because he will have exhausted his coram nobis remedy (even though he did not receive substantive review). This is hardly a "Catch 22."

Importantly, the question is whether Article III habeas relief is *available*, not whether it is *currently being pursued*. Nothing in *Denedo I* or *Loving I* suggests that the question focuses on whether a request for the potential alternative remedy is then pending. In *Loving I*, the petitioner was not pursuing Article III relief, but this Court considered whether he *could* do so. *Loving I*, 62 M.J. at 251-55. *See also Chapman*, 75 M.J. at 601-02 (denying coram nobis petition where Article III relief was available to the petitioner, even though it was not then being pursued). To be sure, this Court denied Appellant's previous petitions without prejudice to his bringing the petition again after the district court proceedings terminated. But these summary dispositions denying writ-appeal petitions do not constitute holdings that the then-pending nature of an Article III remedy is what makes the difference. Instead, under *Denedo I*, military coram nobis review is not available when Article III habeas review is available. Civilian habeas relief will *always* be available to Appellant until his sentence is executed, even after he has exhausted his civilian appeals, because he will always be in custody. *See Loving I*, 62 M.J. at 254 ("This is true whether or not habeas relief is a realistic possibility. In other words, even if the coram nobis petitioner will be barred from habeas relief due to

time limits, the rules on successive petitions, or other limitations of § 2255, coram nobis is still not available.") (footnote omitted). Accordingly, this Court should dismiss the petition with prejudice.

B. Appellant is not eligible for coram nobis review because he has not served his sentence.

Appellant has also failed to meet the sixth of the *Denedo I* "stringent" threshold requirements for coram nobis review. *Denedo I*, 66 M.J. at 126. Simply put, a writ of error coram nobis is not available to capital petitioners, all of whom have not yet served their sentences.

As noted above, because Appellant is confined, he is entitled to seek relief from Article III courts under § 2241 and therefore cannot satisfy the second of the *Denedo I* requirements. However, his current confinement is only "a necessary incident of [his] sentence of death," and it is "not a part of" the sentence to death. R.C.M. 1004(e). Thus, separate and apart from the argument above, Appellant can never satisfy this sixth threshold requirement because he is facing a sentence of death that has not been served. *See Loving I*, 62 M.J. at 253 n.120 ("The Court's opinion [in *Morgan*] can reasonably be read to say that coram nobis is safely available only: (1) after the term has been served . . . ."); *see also Chapman*, 75 M.J. at 602 (denying a coram nobis petition in part because the petitioner had not served his life sentence).

Of course, the sixth *Denedo I* requirement will always apply to all capital prisoners, who will always be ineligible for coram nobis review by virtue of either not having served the death sentence or mootness. However, any apparent harshness of that result should give this Court no pause, for three reasons. First, because a capital prisoner will always be confined, he has no need for recourse to military coram nobis review because he will always have access to Article III habeas review. Thus, operation of the sixth *Denedo I* requirement does not grant capital prisoners less judicial review than non-capital prisoners following direct appeal. The non-capital prisoner who has served his sentence does not have available to him habeas review because he is no longer in custody, and so must resort to military coram nobis and satisfy all of the *Denedo I* requirements to be eligible for judicial review. The capital prisoner need not meet the *Denedo I* requirements to obtain judicial review, because he can simply seek Article III habeas review, available to him by statute by virtue of his confinement.

Second, as *Loving I* effectively recognized, Appellant's judicial review will come to an end at some point. In *Loving I*, this Court noted that the availability of Article III habeas review prevents coram nobis review even when there is no realistic chance of relief in the potential habeas proceedings. *Loving I*, 62 M.J. at 254. The bar to coram nobis review includes when Article III habeas relief is technically available, though barred by the prohibition against successive habeas

petitions. *Id*. Thus, if no Article III court grants him relief on his current claims, Appellant will still have no recourse to judicial review by operation of the second *Denedo I* requirement: if the district court denies his petition and the appellate courts affirm, he will be barred from filing another habeas petition in an Article III court by the rule against successive petitions and barred from filing a petition for a writ of error coram nobis in a military court by *Loving I*. It makes little difference that the sixth *Denedo I* requirement bars review as well. No authority, constitutional or otherwise, entitles petitioner to endless judicial review.

Finally, putting aside *judicial* review, Appellant will always have available *executive* review. U.S. CONST. art. II, § 2, cl. 1. If, for example, following the denial of Appellant's Article III petition and appeals, some circumstance arises that counsels toward relief for Appellant, he may apply for pardon or commutation with the present president or any future president, and may do so successively. *See Schick v. Reed*, 419 U.S. 256, 268 (1974). Thus, the sixth *Denedo I* requirement does not prevent all review of a capital prisoner's claims for relief, it merely prevents military coram nobis review. Because Appellant's case does not meet the sixth *Denedo I* requirement and never will, this Court should dismiss the petition with prejudice.

C. Claim 3 is not eligible for coram nobis review because it raises legal issues previously considered on appeal.

The fifth *Denedo I* requirement is that the petition cannot seek to reevaluate previously considered evidence or legal issues. *Denedo I*, 66 M.J. at 126. Claim 3 was already considered in the course of direct appeal by this Court and the ACMR. At the ACMR, Appellant assigned twenty-three errors and filed a new trial petition, and each issue was addressed in the court's 1992 opinion. *Gray I*, 37 M.J. 730. Among the issues considered was Appellant's Sixth Amendment right to the effective assistance of counsel. *Id*. at 745-47, 742-44. The ACMR analyzed each issue and found they did not merit relief. Appellant also filed a brief in this Court, then the Court of Military Appeals (CMA), with sixty-nine assigned errors, to include the aforementioned counsel issue. This Court similarly found the claim to be without merit in a 168-page opinion. *Gray III*, 51 M.J. at 15.

In Claim 3, Appellant argues that his trial defense counsel failed to discover certain evidence that could have been used as mitigation. Appellant already raised this claim in this Court. Appellant's brief in this Court read:

> APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL DEFENSE COUNSEL'S FAILURE 1) TO INVESTIGATE THE MITIGATING CIRCUMSTANCES OF APPELLANT'S TRAUMATIC FAMILY, SOCIAL, AND MEDICAL HISTORIES AND APPELLANT'S INTOXICATION AT THE TIME OF THE OFFENSE; 2) TO CHALLENGE THE PROFESSIONAL COMPETENCE OF THE PRETRIAL

> EVALUATIONS OF APPELLANT BY THE TWO FORENSIC PSYCHIATRIST'S AND TO ENSURE A COMPLETE AND COMPETENT MENTAL HEALTH EVALUATION OF APPELLANT WAS PERFORMED BEFORE TRIAL; 3) TO DEVELOP AND PRESENT AN AVAILABLE DEFENSE ON THE MERITS; 4) TO PRESENT AN ADEQUATE CASE DURING THE SENTENCING HEARING.

(Appellant's CMA Br. 65). This Court resolved that claim against him. *Gray III*, 51 M.J. at 18-20.

Any "new" evidence Appellant points to nearly two decades later does not so change the nature of this claim so as to render it an entirely new claim. For example, the factual proffer that different experts have examined additional background information and concluded that Appellant had Post-Traumatic Stress Disorder (PTSD) and bipolar disease does not present a new claim. That a petitioner has marshalled some new evidence to support an old claim does not render the claim "new." *Cf. Fairchild v. Workman*, 579 F.3d 1134, 1148-49 (10th Cir. 2009) (citing *Gardner v. Galetka*, 568 F.3d 862, 882 (10th Cir. 2009)). A claim is not new when the purportedly new evidence merely "adds color" to the old claim or the difference between the new and old evidence is "purely a matter of degree." *Id*. Instead, new evidence renders a claim new only when it "so changes the legal landscape that" the prior court's "analysis no longer addresses the substance of petitioner's claim . . . ." *Id*. at 1149. Here, for example, that a new expert has examined the evidence and come to a new conclusion does not so

change the legal landscape so as to render this a new claim of ineffective assistance. The same is true for all of the other mitigating evidence counsel purportedly failed to collect and present. Accordingly, this Court should deny the petition.

D. For all of his claims, Appellant has not shown that valid reasons exist for not seeking relief earlier, nor has he demonstrated that any purported new information presented in his petition could not have been discovered through the exercise of reasonable diligence prior to the original judgment.

To the extent he has not already sought relief as described above, Appellant has presented no valid reasons why he has not sought relief on these claims prior to now, nor has he presented any new information in his petition that "could not have been discovered through the exercise of reasonable diligence prior to the original judgment." *Denedo I*, 66 M.J. at 126; *see also Loving I*, 62 M.J. at 252 ("A distinctive feature of [coram nobis] is that it alleges no error by the original court or its findings, but invites the original court's attention to *new facts or law that were not known to the court at the time* and that may change the result.") (emphasis added)).

1. Claims 1 and 3.

Despite the extensive amount of mental health evidence Appellant submitted to the ACMR and this Court on direct appeal[4], he now seeks to have this Court

[4] *See* (Supplementary Assignment of Errors and Br. on Behalf of Appellant in Response to Court Order, Assignments of Error (AE) XIX, XX, XXI, and XXII at

consider "new" claims regarding his mental health both in the context of his competency at the time of trial and on appeal (Claim 1), as well as to illustrate the failure of his trial defense counsel to investigate his background and mental health history for purposes of mitigation during his capital sentencing (Claim 3). Additionally, Appellant now claims that his appellate defense counsel failed to conduct a proper investigation into his background and mental health history, hampering their ability to fully assert the ineffectiveness of his trial defense counsel (Claim 3).

The United States recognizes that Appellant has now presented "new" claims that in addition to suffering from organic brain damage,[5] he also suffers from bipolar disease and PTSD, diagnoses that allegedly only came after a "proper" investigation was done. However, these diagnoses could have been discovered through the exercise of reasonable diligence prior to direct appeal. Thus, Appellant has failed to provide valid reasons for not raising these claims prior to this petition.

2, 21, 26, and 32 filed before the Army Court of Military Review (ACMR) on 26 February 1992 [hereinafter Supp. ACMR Br.]; Appellant's Br. in Mandatory Review Case filed before the CMA on 30 June 1994 20, 45 and 52 [hereinafter CMA Br.]); *Gray I*, 37 M.J. at 742-745; *Gray III*, 51 M.J. at 12-14.

[5] As the question of Appellant's claim of organic brain damage was indisputably fully raised and litigated on direct appeal, this response focuses only on the alleged "new" information. (*See* Supp. ACMR Br. 2, 21, 26, 32; CMA Br. 20, 45, 52); *Gray I*, 37 M.J. at 742-745; *Gray III*, 51 M.J. at 12-14.

First, all of the information about Appellant's background and family history that he now claims led to discovery of these "new" afflictions was available *and* known to his attorneys on direct appeal. Nevertheless, Appellant now claims that much of the evidence presented in support of this claim is newly discovered and different than submitted previously. This is simply not correct. Specifically, appellate counsel were aware of and presented to the ACMR and this Court evidence of prenatal trauma, (Supp. ACMR Br. 45; CMA Br. 67 & nn.16-17); childhood neglect and abandonment, (Supp. ACMR Br. 46; CMA Br. 67-68 & n.17); the physical abuse and violence in Appellant's childhood home, (Supp. ACMR Br. 45-46; CMA Br. 68 & n.17); exposure to violence outside the home, (Supp. ACMR Br. 46; CMA Br. 68 & n.21, 213); improper exposure to sexuality, (Supp. ACMR Br. Defense Appellate Exhibit T, Affidavit from Appellant's mother, Mrs. Lizzie Hurd, paragraph 5); brain damage, (Supp. ACMR Br. AE XIX; CMA Br. 68 & nn.16, 18-19); family history of psychotic illness, (Supp. ACMR Br. 45; CMA Br. 67 & n.17); childhood mental illness, (Supp. ACMR Br. 46; CMA Br. 68 & n.17); and Appellant's mental illness in the Army, (CMA Br. 68). *See also Gray I*, 37 M.J. at 745-746; *Gray III*, 51 M.J. at 39-41.

Second, if Appellant suffered from bipolar disorder and PTSD at the time of trial and appeal his experts had the background information necessary and the ability to make these diagnoses of bipolar disorder and PTSD prior to his direct

appeal. The fact that they did not does not make it "new" information that could not have been discovered with due diligence. Accordingly, with respect to Claim 1, Appellant fails to meet the third and fourth "stringent threshold requirements" as articulated by this Court in *Denedo I*.

Appellant complains that he was denied his right to effective assistance of counsel by his attorneys both at trial and on appeal because, at both stages, counsel failed to properly investigate his life history, mental illness, and mental health history. However, as detailed above, on direct appeal both before the ACMR and this Court, Appellant fully litigated this assertion and thus cannot satisfy the fifth *Denedo I* requirement because he is now seeking to have this Court reevaluate previously considered evidence and legal issues. *Denedo I*, 66 M.J. at 126; (*See* Supp. ACMR Br. 42; CMA Br. 65).

In an attempt to get around this fifth *Denedo I* requirement, Appellant complains that, during his direct appeal, this Court did not have the benefit of any of the Supreme Court's subsequent jurisprudence applying the *Strickland v. Washington*, 466 U.S. 668 (1984), analysis to penalty phase ineffectiveness of counsel claims.[6] (Appellant's Br. 28-29). However, although these Supreme Court cases were decided after Appellant's direct appeals were over, they do not

[6] Appellant has cited *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Porter v. McCollum*, 558 U.S. 30 (2009), and *Sears v. Upton*, 561 U.S. 945 (2010).

provide him with "new" information that could not have been raised through due diligence prior to this petition. Thus, to the extent that Appellant now raises arguments with respect to ineffectiveness of counsel that he did not raise on direct appeal, he has not provided valid reasons for not raising these assertions prior to this petition.

First, Appellant misstates the holding and importance of *Wiggins v. Smith*, 539 U.S. 510 (2003). He claims that *Wiggins* made it newly clear that in capital cases a "proper investigation" requires collecting "all reasonably available mitigating evidence." However, this language was not created by the *Wiggins* Court; rather it came from the American Bar Association (ABA) guidelines at the time of Wiggins' trial and was cited by the Court as an example of the "well-defined norms" that Wiggins' counsel abandoned in their pretrial investigations. *Wiggins*, 539 U.S. at 524 (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989)).

To the contrary, the *Wiggins* Court was clear that in resolving Wiggins' ineffectiveness claim, as it did in *Williams v. Taylor*, 529 U.S. 362 (2000), it "made no new law" and applied the "'clearly established' precedent of *Strickland*" in reaching the conclusion that the performance of Wiggins' counsel was deficient. *Wiggins*, 539 U.S. at 522. The Court emphasized that "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how

unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case." *Wiggins*, 539 U.S. at 533. Rather, the Court based its conclusion in that case "on the much more limited principle that 'strategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation.'" *Id.* (quoting *Strickland*, 466 U.S. at 690-691). Thus, "[a] decision not to investigate . . .'must be directly assessed for reasonableness in all the circumstances.'" *Wiggins*, 539 U.S. at 533 (quoting *Strickland*, 466 U.S. at 691). *Strickland* was then and is still the definitive standard for appellate review of claims of ineffective assistance of counsel, even in capital cases. *See United States v. Akbar*, 74 M.J. 364, 370 (C.A.A.F. 2015); *see also Loving v. United States*, 64 M.J. 132, 163 (C.A.A.F. 2006) (*Loving II*) (Crawford, J., dissenting) ("*Wiggins* is a fact-based decision and did not change the law with regard to evaluating ineffective assistance of counsel claims.").

In short, the holding and discussion in *Wiggins* is based in large part on the concepts discussed in *Strickland*, and these concepts were available to Appellant to assert on direct appeal. A close reading of his assignments of error on direct appeal shows he made exactly these assertions before this Court. (*See* CMA Br. 66-67 ["No attempt was made to demonstrate that appellant suffered from a mental

disease or defect, organic brain damage, alcoholism, or a severely dysfunctional family background. Appellant submits that the sole reason this valuable evidence was not provided to the finder of fact was because trial defense counsel failed to conduct a reasonable investigation into these areas."], 71 ["Appellant's claim of ineffective assistance challenges his counsel's failure to conduct a reasonable investigation, and the resulting strategic choices made on appellant's behalf."]). (*See also* Supp. ACMR Br. 42-53).

Second, even should this Court determine, as it did in *Loving II*, 64 M.J. at 148, that in light of *Wiggins*, neither the ACMR nor this Court on direct appeal "adequately focus[ed] on [the] reasonableness of the defense investigation," Appellant has still failed to provide valid reasons why he did not seek this relief at a time when a writ of habeas corpus via the All Writs Act under 28 U.S.C. § 1651(a) (2012) was available to him. *See Loving I*, 62 M.J. at 255-256. On March 19, 2001, the U.S. Supreme Court denied certiorari in Appellant's case. *Gray v. United States*, 532 U.S. 919 (2001). This marked "a final judgment as to the legality of the proceedings" as established in Article 71(c), Uniform Code of Military Justice, 10 U.S.C. § 871(c) (2012) [hereinafter UCMJ], and rendered Appellant's death sentence "ripe for approval by the President." *Loving I*, 62 M.J. at 244. This, however, did not end Appellant's access to the court-martial system. *Id.* Until July 28, 2008, the date the President approved Appellant's death

sentence, Appellant unequivocally had a petition for a writ of habeas corpus available to him in the military courts to address any challenges to his death sentence. *Id.* at 257. However, between March 19, 2001 and July 28, 2008, despite the availability and the clear authority from this Court to file such a petition, Appellant did not file a petition of any sort alleging any issues with either a military court or with a federal court. *See Gray v. Gray*, 2015 U.S. Dist. LEXIS 131345 (detailing the entire procedural history of Appellant's case including "Clemency Proceedings" between the Supreme Court's denial of certiorari and the presidential approval of the death sentence). While Appellant was represented by counsel in this period, he did not even attempt to raise the issues he now complains of in the current petition. *Id.*

Moreover, the exact claims Appellant is raising in his current petition were unmistakably available to him prior to the presidential approval of his sentence to death. Appellant has relied heavily on the Supreme Court's decision in *Wiggins* to argue that he is entitled to a hearing under *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967), yet *Wiggins* was decided on June 26, 2003, almost exactly five years *before* his sentence was approved.[7] Even if there were a

[7] Appellant has compared the investigation done in his case with that done in *Rompilla*. This case was decided on June 20, 2005, again long before the President approved Appellant's sentence and well within the time he had a writ of habeas corpus available.

question as to whether or not Appellant had recourse in the military courts at that time, this Court fully and clearly answered that question on December 20, 2005 when it decided *Loving I.* At that time Appellant was in the same situation as the petitioner in *Loving I*: his case was complete on direct review, but was not yet final under Article 76, UCMJ. *See Loving I*, 62 M.J. at 243, 246. Yet, Appellant did not file a petition for a writ of habeas corpus, as this Court invited the petitioner in *Loving I* to do. In addition, on September 29, 2006, this Court held that the petitioner in *Loving I* was "entitled to an evidentiary hearing to establish the factual predicate for his claim" of ineffective assistance of counsel. *Loving II*, 64 M.J. at 152. Specifically, "in light of *Wiggins*" this Court "order[ed] an evidentiary hearing pursuant to *DuBay* to address the matters related to the defense investigation of petitioner's background and other matters that may have produced evidence in either extenuation or mitigation during the capital sentencing proceeding." *Loving II*, 64 M.J. at 152.

In sum, just under two years prior to the presidential approval of his sentence to death, Appellant had available to him all of the information necessary to raise his current claims of ineffective assistance of counsel. He had the Supreme Court case law in *Wiggins* in 2003, he had specific guidance from this Court as to how to style his claims as a petition for a writ of habeas corpus via the All Writs Act under 28 U.S.C. § 1651(a) from *Loving I* in 2005, and he saw the exact issue

he is now raising obtain relief from this Court in *Loving II* in 2006. He presents no valid reason as to why he did not seek relief on his current claims at that time. Accordingly, with respect to Claim 3, Appellant has failed to meet the third and fourth "stringent threshold requirements" as articulated by this Court in *Denedo I* and thus a writ of coram nobis should not issue. *See Denedo I*, 66 M.J. at 126.

2. Claims 4 and 5.

In Claims 4 and 5, Appellant launches various attacks on the constitutionality of the military death penalty, claiming overall that it violates our society's evolving standards of decency. He names three reasons for this assertion: 1) racial disparities in military death sentences; 2) excessive delays between sentencing and executions; and 3) the "increasing rarity of executions nationwide." (Appellant's Br. 44). All three of these assertions were available to Appellant at the time of his direct appeal and he offers no valid reasons for not seeking relief on these bases at that time.[8] *Denedo I*, 66 M.J. at 126. Nor does he present any new

[8] In fact, Appellant *did* raise numerous attacks on the constitutionality of the military death penalty, including a general argument that his death sentence violated the Eighth Amendment, both before the ACMR and this Court. *See United States v. Gray*, 37 M.J. 751, 759 (A.C.M.R. 1993) (*Gray II*) (addressing supplemental assignments of error XXVIII through LVI, in particular AE L: "Appellant's Death Sentence Violates the Eighth Amendment's prohibition against cruel and unusual punishment."); *see also* (CMA Br. 349, 383); *Gray III*, 51 M.J. at 62.

information that could not have been raised through due diligence at the time of his direct appeals. *Id.*

As to racial discrimination, Appellant relies heavily on a study which he claims shows the military system produces highly disparate results in which minority defendants are sentenced to death at a much higher rate than white defendants. While Appellant may not have had the benefit of this study while presenting his direct appeals, his ultimate argument—that he was arbitrarily and thus unfairly sentenced to death because of his race—is not "new" information and his current assertions in his writ could have been raised through due diligence on direct appeal or during the period in which military habeas was available to him, as discussed above. Appellant presents no valid reason why he has not sought relief on his claim of racial discrimination prior to this writ.

The argument that a statistical study can provide proof of racial discrimination in capital sentencing decisions, rendering a sentence to death unconstitutional in violation of the Eighth Amendment, was raised and discussed in detail (but ultimately rejected) by the U.S. Supreme Court in *McCleskey v. Kemp*, 481 U.S. 279 (1987). Obviously, this decision, and its rationale, was available to petitioner to argue during his direct appeals before the ACMR and this Court.

Indeed, Appellant *did* argue before this court and before the CMA that R.C.M. 1004 failed to "incorporate congressionally mandated protections to prevent racially motivated imposition of the death penalty in violation of UCMJ Article 55 and the Eighth Amendment to the Constitution." (Br. on Behalf of Appellant filed before the ACMR on 15 September 1989 [hereinafter ACMR Br.] 44; CMA Br. 369). *See United States Gray*, 37 M.J. 751, 760 (A.C.M.R. 1993) (*Gray II*) ("There is no evidence the sentence to death in appellant's case was racially motivated."); *Gray III*, 51 M.J. at 59. Likewise, Appellant argued before this Court that the military judge committed plain error when he failed to instruct the panel that race could not be considered as a factor in their sentencing decision. (CMA Br. 369); *Gray III*, 51 M.J. at 59. Appellant's brief even cited *McCleskey* in support of this argument. (CMA Br. 373). Finally, although he did not have the benefit of his current study, Appellant did argue in this Court on direct appeal that "the greatest statistical likelihood of racial discrimination typically exists when the convicted perpetrator is African-American and his alleged victims are white," citing *McCleskey*. (*Id.*). Appellant's specific argument in his petition is that the military death penalty scheme is unconstitutional because it permits a constitutionally impermissible level of arbitrariness because of his race. Given the concepts available in *McCleskey* and the arguments already made by his counsel

on direct appeal, Appellant now provides no valid reasons for not previously seeking relief on this claim.

Finally, as to excessive delays and the rarity of executions, Appellant argues that the average delay between capital sentencing and execution has increased over time and that there is an increasing rarity of executions nationwide, both leading to the conclusion that the death penalty is contrary to evolving standards of decency and in general violates the Eighth Amendment's prohibition against cruel and unusual punishment. The contention that the death penalty violates the Eighth Amendment is not a recent development and this argument was available to Appellant both at the time of his direct appeal and during the period military habeas review was available to him. *See generally Trop v. Dulles*, 356 U.S. 86, 101 (1958) ("[T]he words of the [Eighth] Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."). He has provided no valid reason for not seeking relief on this claim prior to this petition.[9]

Moreover, a writ of coram nobis is simply not the proper avenue for Appellant to raise general arguments about the overall constitutionality of the death

[9] Although not exactly as phrased in his current petition, petitioner *did* make a generalized plea in opposition to the death penalty before the ACMR. He specifically argued that "the death penalty constitutes cruel and unusual punishment in all circumstances." (ACMR Br. 47; s*ee also* CMA Br. 383). His arguments in his current petition are no different.

penalty when the Supreme Court has not held the military death penalty to be unconstitutional on these grounds. To the contrary, in its decision on Appellant's direct appeal, this Court specifically declined to hold that a death sentence per se violates the Eighth Amendment as cruel and unusual punishment, reasoning that "Supreme Court case law does not support this argument as a matter of law." *Gray III,* 51 M.J. at 61. To entertain these arguments at this point in the procedural history of Appellant's case would sanction allowing an indefinite amount of time to continually review claims each passing year as standards continue to "evolve." This is simply not a proper use of a writ of coram nobis. *See generally Morgan*, 346 U.S. at 511 ("Continuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice."); *Denedo II*, 556 U.S. at 912-913 (citing *Morgan*, 346 U.S. at 505 n.4) ("Because coram nobis is but an extraordinary tool to correct a legal or factual error, an application for the writ is properly viewed as a belated extension of the original proceeding during which the error allegedly transpired."). Accordingly, a writ of error coram nobis should not lie with respect to Claims 4 and 5.

Conclusion

Wherefore, the United States respectfully requests this Honorable Court deny Appellant's writ-appeal petition.

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RULE 24(d)CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Rule 24(c) because:

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Certificate of Filing and Service

I certify that the foregoing response to Appellant's writ-appeal petition, *Gray v. United States*, Crim. App.. Dkt. No. 20160775, USCA Dkt. No. 17-0525/AR, was electronically filed with the Court (efiling@armfor.uscourts.gov) on September 28, 2017 and contemporaneously served on counsel for Appellant.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

RONALD GRAY,
Private, U.S. Army,

Petitioner-Appellant,

v.

UNITED STATES,

Respondent-Appellee.

REPLY TO UNITED STATES' ANSWER TO WRIT-APPEAL PETITION

USCA Dkt. No. 17-0525/AR

Crim. App. Misc. Dkt. No. 20160775

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

Petitioner-Appellant Ronald Gray, through counsel, respectfully submits this reply to the United States' Answer to Writ-Appeal Petition (the "Answer").

There is good cause for the Court to grant review: this case presents novel and important questions regarding whether, under what circumstances, and subject to what standard a military death row prisoner may obtain collateral review of claims that arose after or in conjunction with direct appeal proceedings. The Court's answers to these questions will likely determine the course of future litigation in military capital cases, and the Court should resolve such questions after full briefing and argument.

In its Answer, the government advances bright-line rules that military death row prisoners may never obtain coram nobis (or any other post-finality) review; incorrectly characterizes claims as previously litigated; and conversely characterizes claims as available to, but unraised by, prior counsel. The government's arguments misconstrue governing law and mischaracterize the prior litigation in this case. The government's arguments also studiously ignore the principle that the federal courts found dispositive in deferring federal habeas review of this case: that the military court system should utilize *all* available procedures to address claims of constitutional error before involvement by the federal courts. At a minimum, these

issues warrant substantive review by the Court after briefing and argument.

A. Coram nobis review can be "necessary or appropriate" where the petitioner is in custody under sentence of death.

The All Writs Act gives military courts the authority and duty to issue a writ of coram nobis when "necessary or appropriate." 28 U.S.C. § 1651(a); *United States v. Denedo*, 556 U.S. 904, 911 (2009) ("*Denedo II*"). Despite this flexible standard, the government advances two bright-line rules that would preclude coram nobis review for all capital petitioners under all circumstances. *See* Answer at 13-18. The government first argues that "military coram nobis review is not available when Article III habeas review is available[, and c]ivilian habeas relief will *always* be available to Appellant until his sentence is executed, even after he has exhausted his civilian appeals, because he will always be in custody." Answer at 15 (emphasis by the government). The government next argues, in a similar vein, that "a writ of error coram nobis is not available to capital petitioners, all of whom have not yet served their sentences." Answer at 16. The government's proposed rules are inconsistent with the All Writs Act; fail to adhere to the bedrock principle that military courts must exercise primary responsibility for addressing claims of error in military proceedings; and are based on a misreading of the applicable precedent.

The "necessary or appropriate" language of the All Writs Act is flexible, permissive, and equitable. *See United States v. George*, 676 F.3d 249, 253 (1st Cir.

2012) ("There is a generally accepted understanding that the All Writs Act imbues courts with flexible, inherently equitable powers.") (citations omitted). The Act is plainly inconsistent with bright-line exclusionary rules – especially rules that would preclude collateral review under any circumstances in the most serious cases. Rather, as even the government appears to recognize, Supreme Court precedent requires courts to apply the All Writs Act by considering the circumstances of each case, *see* Answer at 9 n.2 (citing *United States v. Morgan*, 346 U.S. 502, 512-13 (1954)), and by balancing the rights of the petitioner against the interests of finality. *See Loving v. United States*, 64 M.J. 132, 145 (C.A.A.F. 2006) ("*Loving II*") (considering "what standard best meets the 'necessary or appropriate' requirements in the All Writs Act for collateral review within the military justice system" and adopting the standard set forth in 28 U.S.C. § 2254(d)).

In military capital cases, the "necessary or appropriate" standard also requires deference to the principle that "the [federal] court is obliged to pursue the strong preference . . . that the military courts first be given every reasonable opportunity to address the merits of a military prisoner's post-conviction arguments," and "only afterwards [should those claims be] presented by habeas corpus to civilian courts." *Gray v. Gray*, No. 5:08-cv-3289-JTM, 2015 WL 5714260, at *36 (D. Kan. Sept. 29, 2015) (App. A). Although neither the government nor the Army Court of Criminal

Appeals have accorded it any weight, the federal courts specifically declined to review Appellant's claims in light of this bedrock principle. *See id*.; *see also Gray v. Gray*, 645 F. App'x 624, 625 (10th Cir. 2016).

The case law establishing this principle is legion. *See Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975) ("[I]mplicit in the congressional scheme embodied in the [UCMJ] is the view that the military court system generally is adequate to and responsibly will perform its assigned task" and the federal courts therefore "will not entertain habeas petitions by military prisoners until *all available military remedies* have been exhausted.") (emphasis added; quotations omitted); *Burns v. Wilson*, 346 U.S. 137, 142 (1953) (federal courts defer to "the fair determinations of the military tribunals after *all military remedies* have been exhausted") (emphasis added); *Gusik v. Schilder*, 340 U.S. 128, 131-32 (1950) ("If *an available procedure has not been employed* to rectify the alleged error which the federal court is asked to correct, any interference by the federal court may be wholly needless.") (emphasis added); *Hemphill v. Moseley*, 443 F.2d 322, 325 (10th Cir. 1971) ("Ordinarily habeas corpus petitions from military prisoners must not be entertained by federal civilian courts until *all available remedies* within the military court system have been invoked in vain.") (quoting *Noyd v. Bond*, 395 U.S. 683, 693 (1969) (emphasis added)); *Piotrowski v. Commandant, USDB*, No.

08-cv-3143-RDR, 2009 WL 5171780, at *13 (D. Kan. Dec. 22, 2009) (App. B) ("It has long been the established and effective practice of the military appellate courts, like state and federal courts, to exert their authority not only to hear direct appeals but to collaterally review constitutional challenges to their decisions regarding convictions and sentences as well. . . . As a matter of comity and judicial efficiency, if nothing else, the military courts should continue to decide collateral challenges in the first instance and have the opportunity to correct their own errors, while applying their expertise in military law.").

And contrary to the government's proposed bright-light rules, the military courts' duty to police their own errors is heightened – not precluded – in *capital* post-conviction cases. *See Loving v. United States*, 62 M.J. 235, 236-37 (C.A.A.F. 2005) ("*Loving I*") ("'Death is different' . . . reflects the unique severity and irrevocable nature of capital punishment . . . and mandates a plenary and meaningful judicial review before the execution of a citizen."); *United States v. Curtis*, 32 M.J. 252, 255-56 (C.M.A. 1991) (similar); *cf. Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (a court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case") (quotation omitted); *Douglas v. Workman*, 560 F.3d 1156, 1194 (10th Cir. 2009) (recognizing that procedural limitations to review of post-conviction claims should be less strictly applied in capital case); *Fahy v.*

Horn, 240 F.3d 239, 245 (3d. Cir. 2001) (same).

The government's proposed rules are also based on a misreading of the applicable case law. The government contends that under *Loving I* and the six-factor test of *Denedo v. United States*, 66 M.J. 114, 126 (C.A.A.F. 2008) ("*Denedo I*"),[1] "coram nobis review is unavailable if habeas review is available, even if the *success* of the potential habeas petition is doubtful because of the existence of procedural defenses." Answer at 14 (emphasis by the government). In other words, according to the government, the test for whether coram nobis review is "necessary or appropriate" is entirely formalistic.

The government misreads *Loving I*. *Loving I* addressed only the question of military coram nobis review when substantive habeas review was available *in the military courts*, but this case presents the fundamentally different question of whether habeas review that is technically always available in federal court necessarily precludes the military courts from conducting coram nobis review of military cases. In *Loving I*, this Court explained that the mere possibility of habeas

[1] In *Denedo II*, 556 U.S. 904, the Supreme Court did not endorse the six-factor test set forth by this Court in *Denedo I*. And since *Denedo II*, this Court has never reaffirmed either the five-factor test of *Loving I* or the six-factor test of *Denedo I*. As the government acknowledges, these tests "were only a distillation of the facts relied upon in another Supreme Court case, *Morgan*, into a neat, numbered list." Answer at 9 n.2. The overarching "necessary or appropriate" standard should accordingly guide the Court here.

review in a federal court does *not* suffice to render military court review unnecessary or inappropriate under the All Writs Act. *Loving I*, 62 M.J. at 248. Simply because an Article III court has jurisdiction to hear a habeas petition, the Court reasoned, "does not necessarily mean that this eventual review is an adequate remedy at law" that would render coram nobis review inappropriate. *Id.*[2]

This Court instead assessed the likelihood of substantive federal habeas review when determining whether such a remedy is, in fact, "available," and ruled that where such review is "unlikely," military court consideration is appropriate. The Court explained that, because "Article III intervention presently is unlikely (in light of the application of doctrines of exhaustion or abstention)," this unlikelihood "render[s] our continued involvement in this case as 'necessary or appropriate' under the All Writs Act." *Id*. at 249; *see also id.* at 251 ("[P]resent review by an Article III court is unlikely. Accordingly, our review is necessary and proper . . . .").

[2] The view that federal habeas review provides an adequate remedy to justify withholding military collateral review under the All Writs Act has never commanded a majority of this Court. *See, e.g.*, *Loving v. United States*, 68 M.J. 1, 27 (C.A.A.F. 2009) ("*Loving III*") (Ryan, J., dissenting) (alone espousing the view that the military courts "may not entertain Loving's petition because an Article III court could properly consider a military prisoner's habeas corpus petition and the All Writs Act does not allow this Court to act in the face of another, specific statute").

The same reasoning applies here and counsels in favor of substantive review.[3]

The government attempts to answer this concern by positing that these coram nobis proceedings obviate the *Loving I*'s concern that non-exhaustion would render federal habeas review "unlikely":

> If this Court denies Appellant's petition because Article III review is available to him, when he brings a new action in a district court the defense of non-exhaustion will be unavailable to the United States, because he will have exhausted his coram nobis remedy (even though he did not receive substantive review). This is hardly a "Catch 22."

Answer at 14-15. Among the problems with the government's approach is that it would compel future litigants to futilely pursue coram nobis relief in military court so that "the defense of non-exhaustion will be unavailable" to the government in federal habeas. Such a procedure would turn judicial economy on its head while simultaneously subverting the principle that military courts should maintain primary responsibility for military court errors.

In *Denedo I*, this Court was even more explicit in explaining the need for

[3] This Court recognized in *Loving I* that Supreme Court precedent "is not clear about whether or not a petitioner who is in custody is barred from all coram nobis relief." *Loving I*, 62 M.J. at 252 n.120. The Court explained that its own "coram nobis decisions have involved petitioners both in and out of custody," and that a petitioner's custody has never been "treated as dispositive" in determining the availability of relief. *Id.* at 254. *Loving I*'s subsequent ruling that collateral review was necessary and appropriate under the All Writs Act where the capital petitioner was obviously in custody suggests that no bar exists, at least in military capital cases.

military courts to decide all issues completely – using coram nobis, if necessary – when a federal court is unlikely to act due to procedural constraints. The Court specifically described the constraints on federal collateral review, including exhaustion requirements, and described a process by which prisoners first take claims through military post-conviction proceedings before asking a federal court for relief. This process "underscor[es] the need for other courts to refrain from review until *all military remedies* have been exhausted." *Denedo I*, 66 M.J. at 122 (emphasis added). The Court has likewise explained that, where a petitioner's military remedies "have not been exhausted – a critical component of any effort to obtain review in the Article III courts," federal review "is not *reasonably available*." *Loving III*, 68 M.J. at 3 (emphasis added). Contrary to the government's arguments, this Court's precedents establish that the question of habeas "availability" is one of substance and not of mere form.

Further, in *Denedo I*, the Court relied on *Garrett v. Lowe*, 39 M.J. 293 (C.A.A.F. 1994), wherein the Court had granted a coram nobis petition even though the petitioner was incarcerated at the time, i.e., when federal habeas relief was technically available. *See Denedo I*, 66 M.J. at 123 (citing *Garrett*, 39 M.J. at 297, to explain that federal habeas courts properly withhold action pending military collateral review). As a matter of course, other military courts have also considered

coram nobis petitions on the merits when filed by incarcerated servicemembers who challenge the constitutional adequacy of their appellate counsel, just as Appellant seeks to do here. *See, e.g.*, *Fisher v. Commander*, 56 M.J. 691, 695 (N.M. Ct. Crim. App. 2001); *Nkosi v. Lowe*, 1994 WL 175766, No. 94-03 (A.F.C.M.R. 1994); *accord Loving I*, 62 M.J. at 254.[4] Thus, although the government advances bright-line rules that coram nobis is never available to death-sentenced petitioners, both this Court's reasoning and the military court practice squarely contradict the argument.

B. Claim 3 was not previously litigated.

The government contends that Appellant previously litigated his claim that prior counsel were ineffective in collecting mitigating evidence. The government errs.

Appellant alleges that his prior counsel at trial and on appeal were ineffective

[4] Article III courts, like the federal court in this case, have dismissed petitions to facilitate military court coram nobis review of post-finality collateral claims, including where the petitioner was in custody. *See, e.g.*, *Piotrowski*, 2009 WL 5171780, at *13-14 (dismissing habeas claims without prejudice to permit military coram nobis review); *MacLean v. United States*, No. 02-CV-2250-K, 2003 U.S. Dist. LEXIS 27219, at *13-15 (S.D. Cal. June 6, 2003) (App. C) (dismissing coram nobis petition and noting availability of such relief in military court). Article III courts have also recognized the availability of coram nobis relief in nonmilitary cases where the prisoner is in custody. *See, e.g.*, *United States v. Dawes*, 895 F.2d 1581, 1582 (10th Cir. 1990) (finding coram nobis relief appropriate "in spite of the fact that the defendants are currently in custody").

in failing to collect and present extensive, available evidence of the brutal upbringing Appellant endured and of the lifelong mental problems he suffered. *See* Writ-Appeal Pet. at 27-56. The government correctly points out that appellate counsel raised a claim of ineffectiveness at penalty phase. Answer at 19-20. The direct appeal claim, however, focused on Appellant's brain damage, and the claim currently before the Court relies on extensive evidence of abuse, trauma, and severe psychiatric illnesses – evidence that has been not been previously addressed by this or any other court. *See United States v. Gray*, 51 M.J. 1, 18-19 (C.A.A.F. 1999) (denying prior penalty phase ineffectiveness claim without considering the mitigating evidence now before the Court).

The government nonetheless reasons that "[*a*]*ny 'new' evidence* Appellant points to nearly two decades later does not so change the nature of this claim so as to render it an entirely new claim." Answer at 20 (emphasis added). But again, the government's proposed bright-light rule is contrary to federal law. *See, e.g., Fairchild v. Workman*, 579 F.3d 1134, 1148-49 (10th Cir. 2009) ("[A]t a certain point, when new evidence so changes the legal landscape that the state court's prior analysis no longer addresses the substance of the petitioner's claim, [the court] must necessarily say that the new evidence effectively makes a new claim"); *see also Ward v. Stevens*, 777 F.3d 250, 258 (5th Cir. 2015) (new claim where "the additional

evidence in federal court puts the claim in a significantly different and stronger position") (internal quotation omitted); *Dickens v. Ryan*, 740 F.3d 1302, 1318 (9th Cir. 2014) (new claim where "new factual allegations either 'fundamentally alter the legal claim already considered by the state courts,' or 'place the case in a significantly different and stronger evidentiary posture than it was when [previously] considered'") (internal citations omitted).

In its later "due diligence" section, the government also argues that appellate counsel was aware of and presented various categories of mitigating evidence, and that Appellant's current proffer simply repeats the same. Answer at 23 (citing to Supp. ACMR Br. at 45-46 and CMA Br. at 67-68). The cited material and exhibits, however, plainly focused on the fact and etiology of Appellant's brain damage. *See* Supp. ACMR Br., Exs. R-X. As appellate counsel has stated in sworn declarations, that is the one area of mitigation that *was* investigated on appeal. *See* Writ-Appeal Pet., Ex. 6-40, Berrigan Decl. ¶ 4; Ex. 6-41, Michael Smith Decl. ¶ 4; Ex. 6-39, Jon Stentz Decl. ¶ 5.

As to other categories of mitigation, in the course of investigating Appellant's brain damage, appellate counsel uncovered red flags that should have been, but were not, further investigated. For example, an affidavit cited by the government suggested that a single incident of pre-natal trauma "may have" accidentally

occurred during a struggle involving Appellant's parents, *see* Supp. ACMR Br., Ex. R; that same affidavit indicated an unidentified and attenuated history of paternal family mental illness, *see id*.; another cited affidavit reported *one* incident of community violence that Appellant did *not* witness, *see* Supp. ACMR Br., Ex. T; other affidavits reported a *single* incident of domestic violence, *see* Supp. ACMR Br., Exs. T, U, V, W, which was consistent with the inaccurate portrayal presented at trial. *See* Tr. 2326.

Had appellate counsel investigated these red flags, they would have discovered and could have presented the evidence now before the Court, including: multiple, unambiguous, first-hand accounts of the vicious violence that Appellant's mother suffered at the hands of Appellant's father while Appellant was *in utero*, *see* Writ-Appeal Pet. at 38 & Exs. 6-8, 6-9, 6-10; multiple, first-hand accounts and medical records documenting the specific, severe, and debilitating mental illnesses suffered by close family members on both sides of the family, including by Appellant's siblings; *see* Writ-Appeal Pet. at 48-49 & Exs. 6-1, 6-2, 6-9, 6-10, 6-12, 6-32, 6-33, 6-34, 6-35; multiple, detailed, first-hand accounts of the lifelong violence Appellant suffered personally and witnessed family members being subjected to in the home, *see* Writ-Appeal Pet. at 39-40 & Exs. 6-1, 6-11, 6-12, 6-13, 6-14, 6-15; and multiple, detailed, first-hand accounts of the extreme violence

Appellant personally witnessed in the neighborhood throughout his childhood, *see* Writ-Appeal Pet. at 41-42 & Exs. 6-1, 6-7, 6-11, 6-13, 6-17, 6-18, 6-19, 6-20, 6-21, 6-23, 6-25. This evidence, in turn, would have led counsel to discover additional mitigation, including evidence of Appellant's improper childhood exposure to sexuality and his own childhood mental illness. *See* Writ-Appeal Pet. at 42-48. In short, in citing the terse accounts in the direct appeal briefs, the government merely demonstrates that appellate counsel was on notice of red flags indicating, yet ineffectively failed to investigate, extensive mitigating evidence from Appellant's childhood.

In such circumstances, appellate counsel failed to "fulfill their obligation to conduct a thorough investigation of the defendant's background." *Williams v. Taylor*, 529 U.S. 362, 396 (2000). Indeed, the Supreme Court "certainly has never held that counsel's effort to present some mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant." *Sears v. Upton*, 561 U.S. 945, 955 (2010). Here, no court has ever considered prior counsel's ineffectiveness with the benefit of a thorough mitigation investigation, which undersigned counsel first conducted promptly upon their appointment by the federal court in 2009. *See* Writ-Appeal Pet. at 37 (explaining that Appellant is the only death-sentenced servicemember to

have been denied funding for mitigation investigation by the military courts). This Court should grant review to consider this claim.

C. Appellant diligently sought relief.

The government argues that Appellant waived any right to raise his claims by not litigating them in the time period between the denial of certiorari on direct appeal and the President's approval of his death sentence. *See* Answer at 21-34. The government thus embraces ACCA's ruling requiring a death row prisoner to raise all post-conviction claims after denial of certiorari but before the President's statutory approval of a death sentence, *and* applying that new rule to Appellant retroactively. *See id*.

As Appellant has explained, he did not raise his post-conviction claims in the time period between certiorari and presidential approval because there was no requirement that he do so; because the military refused to authorize funding for his counsel to investigate the case or even meet with Appellant; and because Appellant had no way of knowing that the time period would extend for seven years, where no previous approval proceedings had taken so long. *See* Writ-Appeal Petition at 10. Under these circumstances, and even if this Court were to adopt the government's proposed rule for future capital cases, there is no lawful basis to conclude that Appellant waived or forfeited his claims. *See id*. at 11-12; *see also Beard v.*

Kindler, 558 U.S. 53, 63-64 (2009) (Kennedy, J., concurring) ("We have not allowed state courts to bar review of federal claims by invoking new procedural rules without adequate notice to litigants who, in asserting their federal rights, have in good faith complied with existing state procedural law.").

In addition, the Supreme Court has recently taken significant steps to guard against the forfeiture of ineffective assistance of trial counsel claims where such forfeiture is attributable to the ineffectiveness of post-conviction counsel. *See Trevino v. Thaler*, 133 S. Ct. 1911 (2013); *Martinez v. Ryan*, 556 U.S. 1 (2012). The Supreme Court has thus adopted a rule whereby the procedural default of an ineffectiveness claim is overcome by evidence of the ineffectiveness of the petitioner's initial state post-conviction counsel. *Martinez*, 556 U.S. at 17. Because, in the military's unitary direct appeal system, appellate counsel performs the role of first post-conviction counsel, forfeiture of Appellant's ineffectiveness claims here would be inconsistent with *Martinez*. In fact, Appellant retained his Sixth Amendment right to effective counsel throughout direct appeal, whereas *Martinez* addressed state post-conviction proceedings where the Sixth Amendment did not even apply. *See id.* at 16-17. Given the constitutional underpinnings of his right to effective appellate counsel, counsel's errors and failures should not be

imputed to Appellant to cause forfeiture of his claims.[5] *See id.* at 12 ("While confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record.").

D. This Court has jurisdiction to consider Claim 2.

The government argues that this Court lacks jurisdiction to consider Claim 2, in which Appellant challenges the validity of his death sentence in light of the President's reliance, in statutorily approving the sentence, on confidential reports and evidence to which Appellant had no opportunity to respond. *See* Answer at 9-13. The government's jurisdictional argument is meritless.[6]

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[5] Although Claims 4 and 5 do not allege ineffective assistance of appellate counsel, the study upon which Claim 4 is primarily based was not available until after direct appeal, as the government recognizes. *See* Answer at 31. Claim 5 likewise relies largely on facts that post-date the direct appeal. *See* Writ-Appeal Petition at 61-63. Moreover, the constitutional basis for Claim 5 – "the evolving standards of decency" under the Eighth Amendment – by definition changes over time, and the Eighth Amendment principles governing capital cases have evolved dramatically since Appellant's direct appeal. *See, e.g., Roper v. Simmons*, 543 U.S. 551 (2005) (ruling that capital punishment for crimes committed while defendant was a juvenile violates society's evolving standards of decency); *Atkins v. Virginia*, 536 U.S. 304 (2002) (ruling that society's evolving standards of decency prohibit capital punishment of defendants with mental retardation); *Hurst v. State*, 202 So. 3d 40, 57 (Fla. 2016) (ruling that society's evolving standards of decency prohibit capital punishment except where a jury unanimously finds all facts necessary for death sentence beyond a reasonable doubt).

[6] The government's argument also contradicts its assertion in federal court that

Article 67 of the UCMJ gives this Court mandatory jurisdiction over capital cases. *See* 10 U.S.C. § 867(a)(1). The All Writs Act, in turn, gives the Court the power to "issue all writs necessary or appropriate in aid of [its] jurisdiction." 28 U.S.C. § 1651(a). The Supreme Court has held that such jurisdiction includes "jurisdiction to entertain coram nobis petitions to consider allegations that an earlier judgment of conviction was flawed in a fundamental respect." *Denedo II*, 556 U.S. at 917. This Court has similarly recognized that its jurisdiction continues regardless of a capital case's finality. *Loving I*, 62 M.J. at 246 n.75 ("Simply stated, whether this case is 'final' under Article 71(c) or not, this Court has subject matter jurisdiction under Article 67(a)(1), over this capital case. On this point, we state that there is nothing in the legislative history of Article 71(c) that indicates the congressional purpose to terminate this Court's jurisdiction over a capital case. . . . Had Congress intended to deprive this Court of all jurisdiction after complete review by the Supreme Court, we believe in light of this Court's mandatory jurisdiction over every capital case in Article 67(a)(1), Congress would have made its purpose clear and unequivocal.").[7]

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habeas review of this claim was waived because Appellant had not exhausted military court remedies.

[7] *See also id.* at 244 ("[W]e conclude that this Court's subject matter jurisdiction continues even after the Supreme Court's decision affirming Petitioner's death

The government nonetheless seizes on the language of § 867(c), which states that "'the Court of Criminal Appeals may act only with respect to the findings and sentence *as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals*.'" Answer at 11 (emphasis by the government). The government misreads this provision as limiting the Court's authority to address only errors that occurred *in the time period* before approval by the convening authority. *See* Answer at 11-12. The plain and broad language of § 867(c), however, does not limit the Court's jurisdiction according to *when* an error occurred but merely to those errors that are "with respect to" a sentence that has been approved by the convening authority. And there is simply no basis to conclude that Appellant's death sentence as approved by the convening authority is somehow different than – or not "with respect to" – the death sentence later approved by the President. Accordingly, challenges to the constitutionality of a President's actions are routinely adjudicated in military cases. *See, e.g.*, *Loving v. United States*, 517 U.S. 748, 751 (1996) (affirming this Court's ruling upholding "the authority of the President, in our system of separated powers, to prescribe aggravating factors that permit a court-martial to impose the death penalty upon a member of the Armed Forces convicted of murder").

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sentence[, and t]his conclusion is supported by . . . the plain language and legislative history of Article 67(a)(1). . . .").

The authority cited by the government does not support its argument. *See* Answer at 10-12 (citing *Clinton v. Goldsmith*, 526 U.S. 529 (1999), and *Ctr. for Constitutional Rights (CCR) v. United States*, 72 M.J. 126 (C.A.A.F. 2013)). In *Goldsmith*, this Court invoked its perceived "broad responsibility with respect to administration of military justice" to enjoin the Air Force from expelling Goldsmith and thereby terminating his medical care. *Goldsmith*, 526 U.S. at 534. The Supreme Court reversed, squarely rejecting the theory that this Court has broad supervisory authority over all military justice matters. *Id.* The Supreme Court held that the challenged expulsion derived from an executive action, not from "a finding or sentence that was (or could have been) imposed in a court-martial proceeding." *Id*. at 535.

Here, by contrast, Appellant invokes the Court's mandatory jurisdiction over capital cases, 10 U.S.C. § 867(a)(1), and its authority under the All Writs Act, 28 U.S.C. § 1651, and challenges the President's "judicial" action in this case. *See* Writ-Appeal Pet. at 23 (citing cases). Because Claim 2 challenges Appellant's sentence of death and his sentence has been approved by the convening authority, this Court has jurisdiction. As explained above, the Supreme Court has held that finality of a court-martial proceeding does not deprive the military courts of

continuing jurisdiction to entertain a petition for writ of coram nobis alleging a fundamental constitutional error, as is alleged here. *See Denedo II*, 556 U.S. 904.

In *CCR*, various media organizations petitioned for extraordinary relief seeking disclosure of non-public records. This Court found that it lacked jurisdiction because the petitioners were asking it "to adjudicate what amounts to a civil action, maintained by persons who are strangers to the court-martial, asking for relief – expedited access to certain documents – that has no bearing on any findings and sentence that may eventually be adjudged by the court-martial." *CCR*, 72 M.J. at 129. In other words, the petition was not "with respect to" any court-martial findings or sentence. The Court expressly differentiated that circumstance from one where, as here, the claim for relief had "the potential to directly affect the findings and sentence." *Id*. The Court likewise distinguished the circumstances of *Denedo* where, as here, the petitioner sought coram nobis relief after his judgment was final. *Id*. In Claim 2, Appellant himself seeks relief, and the claim has direct bearing on his death sentence. Thus, the precedent cited by the government actually supports the conclusion that this Court has jurisdiction.

For the reasons set forth above and in his prior submissions, Petitioner-Appellant Ronald Gray respectfully seeks this Court's review of the decision of the Army Court of Criminal Appeals.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This filing complies with the type-volume limitation of Rule 24(c) because:

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/s/ Timothy Kane Dated: October 5, 2017

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CERTIFICATE OF FILING AND SERVICE

I certify that on October 5, 2017, the foregoing *Reply to United States' Answer to Writ-Appeal Petition* was delivered via email to efiling@armfor.uscourts.gov for filing with the United States Court of Appeals for the Armed Forces, and a copy of the same was served via email upon counsel for the United States:

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