LEXSEE 2007 ARMY LAW. 13

Army Lawyer

February, 2007

2007 Army Law. 13

LENGTH: 15998 words

ARTICLE: Death Is Different: Kreutzer and the Right to a Mitigation Specialist in Military Capital Offense Cases

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SUMMARY:
... With no question as to his guilt, advocates of the death penalty likely find Sergeant (SGT) William Kreutzer a poster-child for the ultimate punishment. ... In an article discussing the use of mitigation specialists in death penalty litigation, Jonathan Tomes proposed the following definition: "a person qualified by knowledge, skill, experience, or training as a mental health or sociology professional to investigate, evaluate, and present psychosocial and other mitigating evidence to persuade the sentencing authority in a capital case that a death sentence is an inappropriate punishment for the defendant." ... Wiggins's trial defense counsel, however, claimed they made a tactical decision to "focus their efforts on 'retrying the factual case' and disputing Wiggins's direct responsibility for the murder" rather than conducting a thorough social history investigation. ... The right to the expert assistance of a mitigation specialist in a capital case is determined on a case-by-case basis. ... Judge Crawford disagreed, finding that Kreutzer's defense team failed to meet the *Gonzalez* test despite the evidence relied on by both the lower court and the CAAF's majority. ... In light of the *Kreutzer* decision, prudent military defense counsel in capital cases should request the services of a mitigation specialist and convening authorities should provide funds for the expert assistance absent rare circumstances. ...

HIGHLIGHT: *In the 12 years since Furman v. Georgia, 408 U.S. 238 (1972), every Member of this Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense.* n1

TEXT:

[*13] I. Introduction

With no question as to his guilt, advocates of the death penalty likely find Sergeant (SGT) William Kreutzer a poster-child for the ultimate punishment. On 27 October 1995, as 1,300 members of the 82d Airborne stood in a pre-run formation, SGT Kreutzer hid in a nearby wood line with two automatic weapons and over 500 rounds of ammunition. n2 Before nearby Soldiers heroically subdued Kreutzer, he sent a bullet through the forehead of Major Stephen Badger, leaving a hole the size of a hand in the head of this career Soldier and father of eight. n3 Seventeen others were injured in the attack, including Major Guy Lafaro who was in a coma for forty-five days following the shooting and Chief

Warrant Officer Two Abraham Castillo who was paralyzed after a bullet lodged in his spine. n4 Kreutzer was charged with violating multiple articles of the Uniform Code of Military Justice (UCMJ), including murder under Article 118, *10 U.S.C. § 918* (2000). n5 On 12 June 1996, a twelve member panel unanimously sentenced SGT Kreutzer to death. n6 However, on 16 August 2005, in a four-to-one decision, the Court of Appeals for the Armed Forces (CAAF) affirmed the decision of the Army Court of Criminal Appeals (ACCA), n7 setting aside the death sentence. n8 On facts as clear and horrific as these, how could the highest military court set aside Kreutzer's death sentence?

Affirming the ACCA's decision, the CAAF held the "[e]rroneous denial of Kreutzer's request for a mitigation specialist was error of constitutional magnitude." n9 This article discusses the role of a mitigation specialist and impact of the *Kreutzer* decision on capital cases in military justice.

II. Overview of Capital Punishment in the Military

In 1789, Congress enacted the first Articles of War by adopting the Articles written by the Continental Congress in 1775 and revised in 1776. n10 At that time, the death penalty was authorized for fourteen military offenses; however, civil authorities received jurisdiction over those capital crimes not specific to the military. n11 Since that time, Congress gradually expanded court-martial jurisdiction, culminating with the passage of the UCMJ in 1950. n12 Article 118 of the UCMJ, most recently revised in 2005, covers the crime of murder and provides for the availability of the death penalty for premeditated murder and certain types of felony murder. n13

[*14] The Supreme Court's 1972 decision in *Furman v. Georgia* n14 impacted capital punishment in many states and in the military. The constitutionality of the military capital punishment scheme was challenged in *United States v. Matthews* n15 in 1983. Noting that there are certain occasions where the "rules governing capital punishment of servicemembers will differ from those applicable to civilians," n16 the Court of Military Appeals (COMA) n17 held that military court-martial sentencing procedures must meet "the standards established by the Supreme Court for sentencing in capital cases in civilian courts." n18 Additionally, the court noted that in enacting Article 55 of the UCMJ, n19 Congress "'intended to grant protection covering even wider limits' than 'that afforded by the Eighth Amendment.'" n20

In analyzing "guidance from Supreme Court precedent," n21 the COMA listed certain prerequisites to imposing a death sentence. n22 Looking back to military procedure, the COMA noted that "neither the Code nor the Manual requires that the court members specifically identify the aggravating factors upon which they have relied in choosing to impose the death penalty." n23 Despite finding no prejudicial error on mandatory review, the court held that Matthews's death sentence was improperly adjudged. n24

President Ronald Reagan responded to the *Matthews* decision in 1985 by promulgating by executive order Rule for Courts-Martial (RCM) 1004, requiring a unanimous finding that the accused was guilty of a capital offense, that at least one aggravating factor existed, and that any extenuating or mitigating circumstances are substantially outweighed by aggravating circumstances. n25 In *Loving v. United States*, the Supreme Court held the RCM 1004 capital sentencing scheme constitutional. n26

Trial by military judge alone is not permitted in courts-martial referred as capital cases. n27 Nor is an accused permitted to plead guilty to a capital offense. n28 Absent exigent circumstances, the capital case must be heard before a panel of not less than twelve members. n29 There are four "gates toward death-penalty eligibility" n30 in the military justice system. First, the [*15] members must find the accused guilty of a capital offense. n31 Second, they must find that an aggravating factor exists. n32 Third, the panel members must find that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances. n33 Fourth, the members must unanimously agree on the death penalty. "If at any step along the way there is not a unanimous finding, this eliminates the death penalty as an option." n34 Additionally, the members must vote on the sentence, starting with the least severe to the most severe. n35

Following the court-martial, the convening authority must approve or disapprove the death sentence. n36 The convening authority may choose to commute the death sentence to a lesser sentence, such as life in prison. If the convening authority approves the sentence, there is an automatic appeal to the Court of Criminal Appeals for the accused's service. n37 If the Court of Criminal Appeals affirms the sentence, then there is a mandatory appeal to the CAAF. n38 The Supreme Court of the United States has discretionary certiorari jurisdiction over death penalty sentences heard by the CAAF. n39 Finally, the President must approve a military death sentence before the accused can be executed. n40

The last execution in the military justice system was conducted on 13 April 1961 when the military hanged Army Private (PVT) John A. Bennett following his conviction for rape and attempted murder. n41 Military service members on death row are housed at the U.S. Disciplinary Barracks, Fort Leavenworth, Kansas--the only maximum security prison in the Department of Defense and the oldest penal institution in continuous operation in the federal system. n42

Once convicted of a capital offense, a defendant has the right to present evidence in extenuation and mitigation. n43 Effective development and presentation of this evidence may be the defendant's only chance to avoid a death sentence. As will be discussed below, defense counsel are poorly equipped to perform the extensive investigation into a defendant's background required to prepare an effective case in extenuation and mitigation. Thus, a mitigation specialist is an essential member of the defense team.

III. The Role of a Mitigation Specialist in Capital Cases

A. What Is a Mitigation Specialist?

A variety of definitions of "mitigation specialist," "mitigation expert," or "mitigation investigator" exist throughout both case law and scholarly articles. n44 In an article discussing the use of mitigation specialists in death penalty litigation, Jonathan [*16] Tomes proposed the following definition: "a person qualified by knowledge, skill, experience, or training as a mental health or sociology professional to investigate, evaluate, and present psychosocial and other mitigating evidence to persuade the sentencing authority in a capital case that a death sentence is an inappropriate punishment for the defendant." n45 One court described a mitigation investigator as "an individual who specializes in compiling potentially mitigating information about the accused in a capital case." n46

Currently, there are neither licensing authorities for mitigation specialists, nor prescribed educational criteria for an individual to be considered a mitigation specialist. Indeed, courts have certified sociologists, n47 psychiatrists, n48 and psychologists n49 in the role. Regardless of the lack of specificity as to qualifications for mitigation specialists, they are a vital member of the defense team in a capital case.

B. The Role of a Mitigation Specialist

> The jury in a capital case is instructed to consider the background and life of the defendant. In order to effectively present this information, counsel must prepare a complete social history of the defendant by engaging in a comprehensive investigation dissimilar to routine investigative efforts used in non-capital criminal cases. The time and resources required for a thorough investigation are tremendous. n50

In *United States v. Thomas*, the Navy-Marine Court of Military Review (NMCMR) recognized that conducting this intense psychosocial investigation "is not within the ken of a competent attorney." n51 A mitigation specialist, however, has the training and necessary skill set to do such an investigation. The CAAF relied on a report adopted by the Judicial Conference of the United States to provide the following generalization concerning the role of a mitigation specialist:

> Mitigation specialists typically have graduate degrees, such as a Ph.D. or masters degree in social work, and have extensive training and experience in the defense of capital cases. They are generally hired to coordinate an investigation of the defendant's life history, identify issues requiring evaluation by

> psychologists, psychiatrists or other medical professionals, and assist attorneys in locating experts and providing documentary material for them to review. n52

Useful evidence for mitigation may be found by examining the entire life of the defendant, beginning at conception. A mitigation specialist may even conduct a multi-generational investigation, looking for "genetic predispositions and environmental influences" n53 that may have impacted the defendant's personality or behavior. Generally, the mitigation specialist will look for evidence that:

> (1) portrays any positive qualities the defendant possesses, (2) makes the defendant's violent acts "humanly understandable in light of his past history and the unique circumstances affecting his formative development," (3) tends to show that his life in prison would likely be productive, or at least not be threatening to others, (4) rebuts the prosecutor's evidence of aggravating circumstances, and (5) provides evidence of extenuating circumstances surrounding the capital crime itself. n54

[*17] Maternity and birth records may show problems in pregnancy suggesting the possibility of developmental problems. n55 Other records that must be reviewed, if available, include school records, foster care records, military records, medical records of both the defendant and his family, prison records, and employment records. n56 A criminal record may provide insight into the defendant, and the lack of a criminal record is strong mitigating evidence. n57

In addition to reviewing records, a mitigation specialist will conduct numerous interviews. These interviews will include "the defendant's immediate and extended family, friends, neighbors, teachers, clergy, coaches, employers, co-workers, physicians or other therapists, and any lead suggested by any of the above records." n58 Interviews with the defendant's family can be particularly challenging, because they too are frequently impacted emotionally by the government's choice to pursue the death penalty. n59 Family members may be hesitant to discuss private family matters out of shame and a feeling of responsibility for a loved one's actions. n60 Additionally, they may simply be hiding "dirty laundry" n61 out of embarrassment or fear.

As one commentator noted, "law school prepares one to be an advocate, not an investigator." n62 The defense team simply cannot locate, acquire, and analyze the quantity of potential mitigation evidence that a trained expert can. Perhaps this is why inadequate presentation of mitigation evidence is "the most common basis for claims of ineffective assistance of counsel in death penalty cases across the country." n63

IV. Mitigation Specialists and the Law

A. The Right and Responsibility to Present Mitigation Evidence

> As a practical matter, the defendant probably has little or no chance of avoiding the death sentence unless the defense counsel gives the jury something to counter both the horror of the crime and the limited information the prosecution has introduced about the defendant. Thus, defense counsel must conduct an extensive investigation into the defendant's background n64

The Supreme Court has held "that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." n65 For this reason, the Court struck down as unconstitutional the mandatory sentencing scheme in *Woodson v. North Carolina*, which made death the mandatory sentence for all persons convicted of first-degree murder. n66

[*18] In 1978, the Supreme Court held that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." n67 For that reason, the Court concluded:

> [T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or

> record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. n68

The Supreme Court recently held that "a State cannot preclude the sentencer from considering 'any relevant mitigating evidence' that that defendant proffers in support of a sentence less than death." n69 The Court reaffirmed that the standard for relevance in a capital sentencing proceeding is the same as the general evidentiary standard. n70

The Supreme Court requires that a defendant facing the death penalty be viewed as an individual during sentencing. n71 It is the defense team's responsibility to make this happen. The Eighth Amendment does not require a judge to instruct a jury on the concept of mitigating evidence generally, nor does it require an instruction on particular statutory mitigating factors. n72 The defense team alone must compile and present to the jury reasons for sentencing the defendant to something less than death.

As discussed above, RCM 1004 governs capital punishment in the military. The rule provides that "[t]he accused shall be given broad latitude to present evidence in extenuation and mitigation." n73 Additionally, the military judge "shall instruct the members that they must consider all evidence in extenuation and mitigation before they adjudge death;" n74 a right not required by the Supreme Court. Military accused, like their civilian counterparts, are entitled to effective assistance of counsel. n75 As discussed below, failure to investigate and present mitigating evidence is grounds for reversal of a death sentence.

B. Expert Assistance in Mitigation, Case Law and Statutes

In 1985, the Supreme Court based its decision in *Ake v. Oklahoma* on the "Fourteenth Amendment's due process guarantee of fundamental fairness," n76 holding:

> [W]hen a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. n77

The *Ake* Court realized the importance of expert assistance at the sentencing phase as well: "We have repeatedly recognized the defendant's compelling interest in fair adjudication at the sentencing phase of a capital case." n78 The Court noted a state's [*19] "profound interest" n79 in assuring it executes only the guilty and said "we do not see why monetary considerations should be more persuasive in this context than at trial." n80 The court must look to "the probable value that the assistance of a psychiatrist will have in [sentencing], and the risk attendant on its absence." n81

United States v. Garries established that "as a matter of military due process, servicemembers are entitled to investigative or other expert assistance when necessary for an adequate defense, without regard to indigency." n82 The COMA, however, noted that the servicemember must show "necessity for the services" n83 as required in *Ake*. n84 Recognizing the government resources available to a military accused, the court noted that "[i]n the usual case, the investigative, medical, and other expert services available in the military are sufficient to permit the defense to adequately prepare for trial." n85

Rule for Courts-Martial 703(d) provides the procedure for requesting an expert witness at government expense. n86 While the rule "is silent on how to request other forms of assistance," n87 case law suggests "the process is the same regardless of whether defense counsel is requesting an expert witness or some other form of expert assistance." n88

Under RCM 703(d), when defense counsel seek expert assistance at government expense, counsel must submit the request to the convening authority and provide notice to the prosecution. The request "shall include a complete statement of reasons why employment of the expert is necessary and the estimated cost of employment." n89 If the convening authority denies the assistance, then defense counsel may renew the request before the military judge. The

military judge "shall determine whether the testimony of the expert is relevant and necessary, and, if so, whether the Government has provided or will provide an adequate substitute." n90 If the military judge grants the defense motion and the government fails to comply, then the judge may abate the proceedings. n91

Article 46 of the UCMJ provides that "trial counsel, defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." n92 While not specifically stated, Article 46 applies to expert consultants in addition to witnesses. n93

In *United States v. Allen,* n94 the NMCMR held "[m]ilitary due process entitles a servicemember to the assistance of an expert when necessary to the preparation of an adequate defense." n95 The court noted the servicemember requesting expert assistance has the burden to show necessity. n96 The court listed the following three criteria for evaluating necessity: "First, why the expert assistance is needed. Second, what would the expert assistance accomplish for the accused. Third, why is the [*20] defense counsel unable to gather and present the evidence that the expert assistant would be able to develop." n97 In *United States v. Gonzalez,* n98 the COMA favorably cited the three-part analysis set forth in *Allen.* n99 In addition, the COMA also noted they had "not drawn a distinction between a government or non-government investigator or expert." n100

The CAAF briefly addressed the use of mitigation specialists in capital sentencing in *United States v. Loving.* n101 During a string of robberies, Army PVT Dwight J. Loving murdered two taxicab drivers and attempted to murder a third. n102 Authorities arrested Loving the next day and he confessed to the crimes on videotape. n103 A general court-martial at Fort Hood, Texas, convicted Loving and sentenced him to death. n104 On appeal, Loving raised seventy errors, including ineffective assistance of counsel for failure "to request funds for a mitigation specialist or to present a cohesive, comprehensible background, social, medical, and environmental history for [Loving]." n105

Loving claimed that a mitigation expert is essential to all capital murder cases and that a mitigation expert could have presented evidence more logically and coherently than did his counsel. n106 In response, Loving's defense counsel asserted tactical reasons for not utilizing experts. The CAAF found defense counsel's tactical decisions reasonable, and "decline[d] to hold that such an expert is required." n107 "What is required is a reasonable investigation and competent presentation of mitigation evidence. Presentation of mitigation evidence is primarily the responsibility of counsel, not expert witnesses." n108

In another capital punishment case, the CAAF set aside the death sentence of Army SGT James Murphy on ineffective assistance of counsel grounds. n109 Murphy was found guilty of the heinous premeditated murders of his former wife and two young children. n110 He confessed to using a hammer to bludgeon his former wife and drowning her two children, leaving their bodies to decay in their apartment building. n111 Murphy attempted to plead guilty to the charges, but he was not permitted to do so since he was charged with a capital offense. n112 On appeal, the CAAF concluded "the record of trial and post-trial affidavits leave us with only one rational conclusion: SGT Murphy was defended by two attorneys who were neither educated nor experienced in defending capital cases, and they either were not provided the resources or expertise to enable them to overcome these deficiencies, or they did not request same." n113 Only after the Army Court of Military Review affirmed Murphy's death sentence was a social history conducted. Prior to sentencing, neither defense counsel traveled to Murphy's hometown in North Carolina to investigate his background because they were "burdened by tasks from the trial defense service." n114 Rather, the defense counsel developed Murphy's extenuation and mitigation case by writing letters and making telephone calls to those who responded to the letters. n115

[*21] Five years after his conviction, Murphy's appellate counsel succeeded in obtaining funding from the Judge Advocate General of the Army to hire an expert to investigate his social history. n116 The investigation, completed by a trained forensic social worker, was complemented by reviews of several other medical specialists. The investigations concluded that at the time of the offense, Murphy "suffer[ed] from a personality disorder and other psychological dysfunctions," n117 and that he had "indications of minimal or slight cognitive and neuropsychological dysfunction" n118 as well as "persistent and severe traumatic childhood abuse." n119

The CAAF found "reliability of result" n120 to be the theme espoused by thirty years of Supreme Court death penalty precedent and listed "key ingredients" n121 for the adversarial system to function properly. These ingredients include the following: "competent counsel; full and fair opportunity to present exculpatory evidence; individualized sentencing procedures; fair opportunity to obtain the services of experts; and fair and impartial judges and juries." n122 Finding that Murphy did not get a "full and fair sentencing hearing," n123 due to a number of issues including the "potential mitigating effect of the posttrial evidence," n124 the CAAF refused to affirm Murphy's death sentence and remanded the case to the ACCA. n125

Two years after *Murphy*, the Supreme Court, applying the two-part *Strickland v. Washington* n126 test for ineffective assistance of counsel, overturned the death sentence of Terry Williams. n127 Williams confessed and a Virginia jury convicted him of robbery and capital murder and sentenced him to death. The Supreme Court agreed with Williams that he had been "denied his constitutionally guaranteed right to the effective assistance of counsel when his trial lawyers failed to investigate and to present substantial mitigating evidence to the sentencing jury." n128 In Williams's case, the mitigation evidence was abundant and powerful. n129 His defense attorneys, however, offered only the testimony of his mother, two neighbors, and a portion of a taped statement by a psychiatrist. n130 They failed to provide the jury any of the "extensive records graphically describing Williams' nightmarish childhood." n131 Instead, defense counsel relied solely on witness testimony that Williams was "a 'nice boy' and not a violent person." n132

Evidence uncovered at an evidentiary hearing held as part of state habeas corpus proceedings revealed "documents prepared in connection with Williams' commitment when he was eleven years old that dramatically described mistreatment, abuse, and neglect during his early childhood, as well as testimony that he was 'borderline mentally retarded,' had suffered [*22] repeated head injuries, and might have mental impairments organic in origin." n133 Juvenile records that defense counsel did not obtain could have painted a haunting picture of life in Williams's childhood home. n134

Following the evidentiary hearing, the Virginia trial judge found that Williams's attorneys had been ineffective during the sentencing phase of trial and recommended a rehearing on Williams's sentence. n135 The Supreme Court agreed with the trial judge's conclusion that "there existed 'a reasonable probability that the result of the sentencing phase would have been different' if the jury had heard that evidence." n136 Certainly, this evidence would have been uncovered by an expert trained as a mitigation specialist.

The Supreme Court again reversed a death sentence on ineffective assistance of counsel grounds in *Wiggins v. Smith* n137 when defense counsel failed to properly investigate and present mitigation evidence. A Maryland court convicted Wiggins of first-degree murder, robbery, and two counts of theft. Defense counsel unsuccessfully motioned for a bifurcation of sentencing, intending to first argue that Wiggins was not directly responsible for the death of the seventy-seven-year-old woman and then only present mitigation evidence if necessary. Despite defense counsel's assertion to the jury that they would hear evidence of Wiggins's "difficult life," the defense failed to present such evidence. n138

In preparation for Wiggins's post-conviction proceedings, a licensed social worker prepared a social history report. Just as in *Williams*, the potential mitigation evidence was abundant and "powerful." n139 Wiggins's alcoholic mother severely abused him both physically and sexually and often left him and his siblings home alone for days "forcing them to beg for food and to eat paint chips and garbage." n140 "She had sex with men while her children slept in the same bed and, on one occasion, forced [Wiggins's] hand against a hot stove burner . . . ." n141 Wiggins entered foster care at the age of six, was allegedly raped and abused by multiple foster parents, and lived on the streets from age sixteen. n142

The Court found that "[Wiggins] thus has the kind of troubled history we have declared relevant to assessing a defendant's moral culpability." n143 Wiggins's trial defense counsel, however, claimed they made a tactical decision to "focus their efforts on 'retrying the factual case' and disputing Wiggins's direct responsibility for the murder" n144

rather than conducting a thorough social history investigation. The Court rejected the post-conviction trial court's conclusion that "when the decision not to investigate . . . is a matter of trial tactics, there is no ineffective assistance of counsel." n145 Instead, the Supreme Court noted that under *Strickland*, "'the proper measure of attorney performance remains simply reasonableness under prevailing professional norms,'" n146 and that Wiggins's counsel did not meet this standard. n147 The Court "emphasize[d] [*23] 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." n148 The conduct must be reasonable under "'[p]revailing norms of practice as reflected in American Bar Association standards and the like'" n149 that can be used to determine reasonableness. Wiggins's defense counsel's conduct fell short of these "well-defined norms." n150

C. American Bar Association Guidelines

> An attorney representing the accused in a death penalty case must fully investigate the relevant facts. Because counsel faces what are effectively two different trials - one regarding whether the defendant is guilty of a capital crime, and the other concerning whether the defendant should be sentenced to death - providing quality representation in capital cases requires counsel to undertake correspondingly broad investigation and preparation. Investigation and planning for both phases must begin immediately upon counsel's entry into the case, even before the prosecution has affirmatively indicated that it will seek the death penalty. n151

The *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (ABA Guidelines*) state that the defense team should contain an investigator and a mitigation specialist. n152 Moreover, the *ABA Guidelines* note that a mitigation specialist is "an indispensable member of the defense team throughout all capital proceedings," n153 and that "[m]itigation specialists possess clinical and information-gathering skills and training that most lawyers simply do not have." n154 "Perhaps most critically, having a qualified mitigation specialist assigned to every capital case as an integral part of the defense team insures that the presentation to be made at the penalty phase is integrated into the overall preparation of the case . . . ." n155 The *ABA Guidelines* also note the importance the mitigation specialist plays "in maintaining close contact with the client and his family while the case is pending," n156 and how that rapport "can be the key to persuading a client to accept a plea to a sentence less than death." n157

The CAAF has repeatedly refused to require military defense counsel in capital cases to meet the minimum requirements of the *ABA Guidelines.* n158 In *Loving*, Judge H.F. "Sparky" Gierke noted: "Appellate defense counsel have repeatedly invited this Court to involve itself in the internal personnel management of the military services, and we have repeatedly declined the invitation." n159 The quality of representation, Judge Gierke held, "is determined by reference to *Strickland v. Washington.*" n160 He also pointed out that the *ABA Guidelines* expressly provided "for such exceptions . . . as may be appropriate in the military." n161 This "military exception" was removed from the most recent edition of the *ABA Guidelines.* n162

[*24] V. *United States v. Kreutzer*

A. Background

William Kreutzer, Jr. grew up fascinated with military history. n163 His dream of being a Soldier n164 came true when he enlisted in the Army in February, 1992. n165 In March of 1993 he joined the 325th Airborne Infantry Regiment of the 82d Airborne Division in Fort Bragg, North Carolina. n166 Some of his superiors described him as a good Soldier. n167 Throughout his career, however, Kreutzer's fellow Soldiers made fun of "his intelligence, his quiet demeanor and his thick glasses," n168 and he had trouble fitting in with his peers. n169 Military records show that "from nearly the beginning of his service . . . Kreutzer spoke persistently about killing." n170 One superior noted that he "seemed to be fixated on death." n171

Over time, Kreutzer lost the ability to deal with the derogatory remarks and practical jokes. He began responding with tears and anger, and told a friend "that he was losing control, that he was on the verge of killing himself or members of his squad." n172 Later, while standing guard duty, Kreutzer threatened to kill members of his unit, as he cried in frustration. n173 After that incident, he was brought to see Dr. (Captain) Darren Fong, his division's mental health officer. n174 Dr. Fong's report concluded that Kreutzer "has inappropriate coping mechanisms in dealing with his anger. This morning, [Kreutzer] said he wanted to kill his squad and he had plans using weapons and ammunition." n175 Kreutzer also told Dr. Fong that he had considered suicide on several occasions, and had gotten as far as holding a gun to his head. n176 Following that meeting, Dr. Fong approached Kreutzer's leadership who then confiscated Kreutzer's weapons and removed him to a camp containing noncombat personnel. n177 Despite his other remarks, Dr. Fong concluded that Kreutzer was not a danger to himself or others, n178 and chose not to refer Kreutzer's case to a psychiatrist or psychologist. n179 "'That may have been the biggest single mistake involving Kreutzer.'" n180

Although he continued to have serious problems interacting with other Soldiers, Kreutzer was promoted to SGT in March 1995 and assigned as a weapons squad leader. n181 Later that year, he began to fall apart. Fellow Soldiers continued to chide him and call him names such as "Wild Bill" n182 and "Crazy Kreutzer." n183 In early October, Kreutzer was disciplined for [*25] losing the barrel to an M-60 machine gun and "took it hard, again crying to other soldiers." n184 Soon after, he failed an inspection. n185 Kreutzer "felt increasingly depressed, suicidal, and angry." n186 Remembering that he had told Dr. Fong he would seek help if he felt he was going to lose control, Kreutzer did so on 21 October 2005. n187 He received no response to his request for help. n188 Kreutzer called a friend, Specialist (SPC) Mays, and told him he was "going to shoot the run the following day." n189

Kreutzer spent the night of 26 October 1995 in a motel room, loading magazines in preparation for his attack. n190 He later described that he felt like he was operating on "automatic pilot" that night and that he "had two goals: (1) to send a message to the Army that the upper ranks did not care about the lower ranks and that he was an NCO willing to kill and die for his men, and (2) to be killed." n191 The next morning, SPC Mays brought the threats to the attention of his superiors. n192 As they dismissed his threats, Kreutzer prepared to kill. Earlier that morning, Kreutzer parked his car, left a suicide note, n193 and found a hiding place. "At 0631, [Kreutzer] methodically opened fire on his fellow soldiers. He wounded eighteen soldiers and killed one." n194

Kreutzer admitted that he was the shooter and said he was attempting to send a message that his unit did not care about its men. n195 On 26 January 1996, charges against Kreutzer were referred to a capital general court-martial. n196 Shortly thereafter, Kreutzer's detailed defense counsel filed a request to the convening authority for the assistance of a mitigation specialist. n197 The convening authority denied that request. n198 Defense counsel renewed their request before the military judge.

> Defense counsel provided a copy of the request they had made to the convening authority in which they asserted that they lacked "the experience and scientific expertise to uncover all potentially mitigating events or factors in SGT Kreutzer's case." They also provided an extensive affidavit from a "mitigation specialist" that explained the necessity of a mitigation investigation in capital cases, the scope of that investigation, and the role of a mitigation specialist. n199

[*26] Despite defense counsel's lack of training and claim that they could not conduct an appropriate mitigation investigation, the military judge denied the request. n200

Kreutzer refused to accept a plea agreement that included life imprisonment with the possibility of parole. n201 His counsel, without the assistance of a mitigation specialist, had regular meetings with him, attempting to convince him to accept the plea. n202 Counsel later noted, "Our failure to get SGT Kreutzer to make a timely decision and accept the plea was of tragic proportions." n203

The members took two hours to return a finding of guilty as charged. n204 They returned a sentence in less than four hours: "The court martial, all of the members concurring, sentences you to be reduced to the grade of E-1, to total

forfeiture of all pay and allowances, to be dishonorably discharged from the service, and to be put to death." n205

B. The Court of Appeals for the Armed Forces' Decision

The Army Judge Advocate General asked the CAAF to "determine whether the Court of Criminal Appeals erred in finding that the Government did not meet its burden of demonstrating that the erroneous denial of a mitigation specialist was harmless beyond a reasonable doubt." n206 Therefore, the court did not directly address the lower court's ruling "that the military judge erred in denying Kreutzer's request for a mitigation specialist." n207 The court began its discussion by noting the possible sources of the right Kreutzer was denied:

> The right to the expert assistance of a mitigation specialist in a capital case is determined on a case-by-case basis. Where such a request is erroneously denied, that ruling implicates the right to present a defense, compulsory process, and due process conferred by the Constitution, the right to obtain witnesses and evidence conferred by Article 46, UCMJ, and the right to the assistance of necessary experts conferred by R.C.M. 703(d). n208

With no further discussion, the CAAF relied on solely due process grounds and held the denial of the expert an "error of constitutional magnitude." n209 Judge Susan J. Crawford, in dissent, found the majority's decision "unfortunately consistent with this Court's recent overreliance on due process, often without articulation of the source for that reliance." n210 The rest of the majority decision focused on the test for prejudice of the constitutional violation. The court noted that the ACCA used the proper standard--harmlessness beyond a reasonable doubt--yet "went on to misstate the nature of the inquiry." n211

[*27] The CAAF then conducted a de novo review of the denial of Kreutzer's request for a mitigation specialist. n212 Specifically, the court reviewed the general role of a mitigation specialist and how one could have been used in Kreutzer's case. The court noted "it is likely that a mitigation specialist may be the most experienced member of the defense team in capital litigation." n213 The court found Kreutzer's case "replete with evidence or information indicating that Kreutzer's mental health was dubious." n214 "[T]he presentation of the defense case-in-chief[, however,] include[d] testimony from only three individuals about Kreutzer's performance, behavior and reputation, and expert testimony from a single mental health professional." n215 The entire trial took approximately nineteen hours; the defense's entire case--two hours and forty-seven minutes. n216

The CAAF could have achieved the same result on non-constitutional grounds. "The rights given to service members in the pretrial, trial, and post-trial stages are often more protective than the rights given citizens in both the federal and state courts." n217 Thus, the court could have found the right to a mitigation specialist in a capital case rooted in Article 46 of the UCMJ. n218 While specifically noting the denial of a request for a mitigation specialist implicated Article 46, the court analyzed the denial on due process grounds.

Less than two months after deciding *Kreutzer*, the court chose to base its related holding in *United States v. Warner* n219 on a statutory interpretation of Article 46, rather than due process grounds. n220 In *Warner*, the court held that Article 46 entitles defense counsel to an expert reasonably comparable to the government expert. Rejecting Judge Crawford's reliance on the Sixth Amendment in dissent, the court said "Congress was free to, and did, adopt a more protective statutory system for military accused than the Constitution provides for civilians in a criminal trial." n221 The court could have used the same logic in *Kreutzer* by expanding its interpretation of Article 46, but chose instead to find the denial of a mitigation specialist "error of constitutional magnitude." n222

VI. After *Kreutzer*--Questions Unanswered

A. What Showing Is Now Required?

Before the *Kreutzer* decision, the three-part analysis laid out by the NMCMR in *Allen* provided the framework for defense counsel's request for expert assistance. n223 The CAAF did not discuss the required showing in *Kreutzer*. It

did say, however, that "when a defendant subject to the death sentence requests a mitigation specialist, trial courts should give such requests careful consideration in view of relevant capital litigation precedent and any denial of such a request should be [*28] supported with written findings of fact and conclusions of law." n224 In light of the constitutional right found by the CAAF in *Kreutzer*, has the burden on defense counsel lessened?

Judge Crawford, in dissent, claimed the majority expanded the Supreme Court's holding in *Ake* "by finding in the U.S. Constitution a right of an accused to a death penalty mitigation specialist on the defense team without the accused first demonstrating the need for such an expert." n225 The majority said only that an accused is entitled to mitigation specialists "where their services would be necessary to the defense team." n226 The ACCA held that the defense team had made the appropriate showing under the *Gonzalez* three-pronged test and found the military judge's legal conclusion unsupported by the facts. n227 Judge Crawford disagreed, finding that Kreutzer's defense team failed to meet the *Gonzalez* test despite the evidence relied on by both the lower court and the CAAF's majority. n228 Ignoring counsel's lack of experience or training in capital cases, and in spite of tremendous support to the conclusion that capital cases differ profoundly from non-capital cases, Judge Crawford concluded "defense counsel are expected to educate themselves to obtain competence in defending an issue presented in a particular case." n229

Is Judge Crawford right to assume the *Gonzalez* test is no longer required following *Kreutzer?* Had the Judge Advocate General of the Army certified the question whether the military judge erred in denying Kreutzer's request for expert assistance, the court likely would have answered that question. One can certainly predict that military trial judges will be more lenient in granting defense requests for mitigation specialists in capital cases following *Kreutzer*. What showing is required, however, is yet to be seen.

B. *Ex Parte* Access

> Is it unfair to require the defense to disclose its trial strategy to the government to seek litigation support funds, while the trial counsel bears no similar requirement to reveal his or her trial strategy to the defense? Should the military justice system instead follow the federal model--as it does in so many other areas--by permitting the defense to appear before the judge in an ex parte hearing to try to establish the necessity of funding for an expert witness or other litigation support? n230

In *Ake*, the Supreme Court held that "[w]hen the defendant is able to make an ex parte threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent." n231 Likewise, *18 U.S.C. § 3006*(e) provides an ex parte hearing for a person financially unable to obtain expert and other services. Legislative history of *18 U.S.C. § 3006A*(e) n232 details concern that without ex parte access, defense counsel may be forced to disclose their strategy prematurely. n233 In contrast, the military justice system requires defense counsel to make the showing of necessity for the expert assistance to the convening authority. If the convening authority denies the assistance, then defense counsel may renew the request before the military judge. In both instances, however, the defense risks providing the prosecution valuable information about its case and strategy.

To prevent this disclosure and harm to the defense's case, counsel may request an ex parte hearing. Accused in the military justice system, however, are not guaranteed an ex parte hearing, and such a hearing "will only be used if the [*29] circumstances are 'unusual.'" n234 Nor does *18 U.S.C. § 3006*(e) apply to the military. n235 In *Kaspers*, the CAAF realized this rule forces defense counsel to "make a choice between justifying necessary expert assistance and disclosing valuable trial strategy," n236 yet held the military judge's discretion to allow an ex parte hearing on the issue a sufficient remedy. n237

If defense counsel requesting expert assistance must still satisfy the three-part *Gonzalez* test in order to show necessity, the lack of a right to an ex parte hearing will continue to be a significant issue. Despite the importance of obtaining a mitigation specialist, counsel may determine that the disclosure required to meet the *Gonzalez* test outweighs the benefit of expert assistance. Regardless of counsel's choice, the defense's case will suffer.

VII. Conclusion

> *[O]ne of the most frequent grounds for setting aside state death penalty verdicts is counsel's failure to investigate and present available mitigating information.* n238

The role of a mitigation specialist in capital cases is paramount in preventing the death sentence because defense attorneys do not have the knowledge, experience, or capability to handle that aspect of the case.

The CAAF has held that the law does not require the appointment of a mitigation specialist in every capital case. n239 As noted above, however, the Supreme Court will look to "'[p]revailing norms of practice as reflected in American Bar Association standards'" n240 in determining the reasonableness of counsel's performance under the *Strickland* standard for ineffectiveness of counsel. The *ABA Guidelines* note that "the use of mitigation specialists has become 'part of the existing standard of care' in capital cases, ensuring 'high quality investigation and preparation of the penalty phase.'" n241 Additionally, the Judicial Conference of the United States found that a mitigation specialist's "work is part of the existing 'standard of care' in a federal death penalty case." n242 Most recently, the CAAF held that erroneous denial of a request for a mitigation specialist "was error of constitutional magnitude." n243

In light of the *Kreutzer* decision, prudent military defense counsel in capital cases should request the services of a mitigation specialist and convening authorities should provide funds for the expert assistance absent rare circumstances.

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity. n244

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureSentencingCapital PunishmentGeneral OverviewCriminal Law & ProcedureSentencingDeparturesCriminal Law & ProcedureSentencingImpositionEvidence

FOOTNOTES:

n1 *Spaziano v. Florida, 468 U.S. 447, 468 (1984)* (Stevens, J., concurring in part and dissenting in part).

n2 Todd Richissin, *Nobody Listened When a Soldier Warned of His Violent Intentions,* NEWS & OBSERVER (Raleigh, N.C.), Mar. 9, 1997, at A1.

n3 *Id.*

n4 *Id.*

n5 *See* UCMJ art 118 (2005); *United States v. Kreutzer, 61 M.J. 293 (2005).*

n6 *Id.*

n7 *United States v. Kreutzer, 59 M.J. 773 (Army Ct. Crim. App. 2004).*

n8 *Kreutzer, 61 M.J. at 294.*

n9 *Id. at 305.*

n10 *Loving v. United States, 517 U.S. 748, 752 (1996).*

n11 *Id.*

n12 *Id.*

n13 UCMJ art. 118 (2005).

n14 *408 U.S. 238 (1972).*

n15 *16 M.J. 354 (C.M.A. 1983).*

n16 *Id. at 368.*

n17 The Court of Military Appeals was renamed the Court of Appeals for the Armed Forces in 1994. *See* National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994).

n18 *Matthews, 16 M.J. at 368.*

n19 *10 U.S.C.S. § 855* (LEXIS 2007).

n20 *Matthews, 16 M.J. at 368* (citing *United States v. Wappler, 9 C.M.R. 23, 26 (C.M.A. 1953)).*

n21 *Id.* at 368.

n22 *Id.* at 377.

> From the procedures approved by the Supreme Court, the following features appear:
> 1. A Bifurcated Sentencing Procedure Must Follow the Finding Of Guilt Of a Potential Capital Offense.
> 2. Specific Aggravating Circumstances Must Be Identified To the Sentencing Authority.
> 3. The Sentencing Authority Must Select and Make Findings On the Particular Aggravating Circumstances Used As a Basis For Imposing the Death Sentence.
> 4. The Defendant Must Have Unrestricted Opportunity To Present Mitigating and Extenuating Evidence.
> 5. Mandatory Appellate Review Must Be Required To Consider the Propriety Of the Sentence As To the Individual Offense and Individual Defendant and To Compare the Sentence To Similar Cases Statewide.
> In sum, the sentence must be individualized as to the defendant, and the sentencing authority must detail specific factors that support the imposition of the death penalty in the particular case.

Id.

n23 *Id.*

n24 *Id.* at 382.

n25 *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES R.C.M. 1004 (2005) [hereinafter MCM] (providing the current version of Rule 1004).

n26 *517 U.S. 748 (1996).*

n27 UCMJ art. 18 (2005).

n28 *Id.* art. 45(b).

n29 *Id.* art. 25a (applying to offenses committed after 31 December 2002).

n30 *United States v. Loving, 41 M.J. 213, 277 (1994).*

n31 MCM, *supra* note 25, R.C.M. 1004(a).

n32 *Id.* R.C.M. 1004(b)(4)(A).

n33 *Id.* R.C.M. 1004(b)(4)(C).

n34 *United States v. Simoy, 50 M.J. 1, 2 (1998).*

n35 MCM, *supra* note 25, R.C.M. 1006(d)(3)(A).

n36 UCMJ art. 60 (2005).

n37 *Id.* art. 66(b)(1).

n38 *Id.* art. 67(a)(1).

n39 *Id.* art. 67a.

> Only those court-martial cases considered by the Court of Appeals for the Armed Forces fall within the Supreme Court's certiorari jurisdiction. Because all cases in which a Court of Criminal Appeals affirms a death sentence fall within the Court of Appeals for the Armed Forces' mandatory jurisdiction, they also fall within the Supreme Court's certiorari jurisdiction. Congress provided the Supreme Court with certiorari jurisdiction over cases reviewed by the Court of Military Appeals in 1983.

Dwight H. Sullivan et al., *Raising the Bar: Mitigation Specialists in Military Capital Litigation, 12 GEO. MASON U. CIV. RTS. L.J. 199 n.24 (2002)* (citations omitted).

n40 UCMJ art. 71(a).

n41 Death Penalty Information Center, The U.S. Military Death Penalty, http://www.deathpenaltyinfo.org/article.php?did=180&scid=32 (last visited Mar. 27, 2007).

n42 U.S. Army Combined Arms Center, U.S. Disciplinary Barracks, http://usacac.leavenworth.army.mil/CAC/usdb.asp (last visited Mar. 27, 2007).

n43 MCM, *supra* note 25, R.C.M. 1004(b)(3).

n44 Jonathan P. Tomes, *Damned If You Do, Damned If You Don't: The Use of Mitigation Experts in Death Penalty Litigation, 24 AM. J. CRIM. L. 359, 366 (1997).*

n45 *Id. at 368.*

n46 *State v. Langley, 839 P.2d 692 (Or. 1992).*

n47 Tomes, *supra* note 44, at 367 (citing *Boyd v. North Carolina, 319 S.E.2d 189 (N.C. 1984), cert. denied, 471 U.S. 1030 (1985)).*

n48 *Id.* (citing *Ohio v. Slagle, No. 55759, 1990 Ohio App. LEXIS 2426* (Ohio Ct. App. June 14, 1990), *cert. denied, 510 U.S. 833 (1993)).*

n49 *Id.* (citing *Ohio v. Carter, No. C-920604, 1993 Ohio App. LEXIS 5233* (Ohio Ct. App. Nov. 3, 1993), *cert. denied, 133 L. Ed. 2d 498 (1995)).*

n50 *Id.* at 365.

n51 *33 M.J. 644, 647 (N.M.C.M.R. 1991).*

n52 *United States v. Kreutzer, 61 M.J. 293, 302 (2005)* (citing Subcommittee on Federal Death Penalty Cases, Committee on Defender Services, Judicial Conference of the United States, Federal Death Penalty Cases: *Recommendations Concerning the Cost and Quality of Defense Representation,* at Pt. I, § B.7 (May 1998), *available at* http://www.uscourts.gov/dpenalty/4report.htm) [hereinafter Judicial Conference Report]. The Judicial Conference of the United States adopted the subcommittee's recommendations on 15 September 1998. Judicial Conference Report, *supra,* at cover.

n53 Sullivan et al., *supra* note 39 (quoting Russell Stetler et al., *Mitigation Introduction: Mitigation Evidence Twenty Years After Lockett,* in CAL. DEATH PENALTY DEF. MANUAL 3 (1998)).

n54 Tomes, *supra* note 44, at 365.

n55 *Id.* at 368 (noting that "[a] problem pregnancy, involving, for example, prolonged pre-term labor, can result in bleeding in the germinal matrix of the fetus's brain that can cause adverse effects running from mild developmental delay to profound mental retardation.").

n56 *Id.* at 368-69.

n57 *Id.* at 370.

n58 *Id.* at 369-70.

n59 Elizabeth Beck et al., *Seeking Sanctuary: Interviews with Family Members of Capital Defendants, 88 CORNELL L. REV. 382, 413 (2003)* (noting that "[l]ike co-victims, offenders' family members experience depression, cognitive changes, chronic grief, and symptoms consistent with [Post Traumatic Stress Syndrome]").

n60 *Id.* (noting "[t]heir shame is often intensified by the nature of mitigation which, though essential to the defense, may be interpreted as suggesting the defendant's family is culpable.").

n61 Tomes, *supra* note 44, at 370 (noting the need to conduct interviews "beyond close family members" and the possibility that "[t]he defendant or his family may distrust the attorney").

n62 *Id.* at 364.

n63 David D. Velloney, *Balancing the Scales of Justice: Expanding Access to Mitigation Specialists in Military Death Penalty Cases, 170 MIL. L. REV. 1 (2001)* (citing Stetler et al., *supra* note 53).

n64 Tomes, *supra* note 44, at 364.

n65 *Woodson v. North Carolina, 428 U.S. 280, 304 (1976).*

n66 *Id. at 305.* The North Carolina statute read, in pertinent part,

> A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death.

Id. at 286.

n67 *Lockett v. Ohio, 438 U.S. 586, 603 (1978).*

n68 *Id. at 604.*

n69 *Tenard v. Dretke, 542 U.S. 274, 285 (2004)* (citing *Payne v. Tennessee, 501 U.S. 808 (1991)).*

n70 *Id.* at 284 (holding the standard to be "any tendancy to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence").

n71 Tomes, *supra* note 44, at 363.

n72 *Buchanan v. Angelone, 522 U.S. 269 (1998).*

n73 MCM, *supra* note 25, R.C.M. 1004(a)(3).

n74 *Id.* R.C.M. 1004(a)(6).

n75 *United States v. Murphy, 50 M.J. 4, 8 (1998)* (citing *United States v. Scott, 24 M.J. 186 (C.M.A. 1987)).*

n76 *470 U.S. 68, 76 (1985).*

n77 *Id. at 83.*

n78 *Id. at 83-84.*

n79 *Id. at 83.*

n80 *Id. at 84.*

n81 *Id.*

n82 *22 M.J. 288, 290 (1986)* (citations omitted).

n83 *Id. at 291* (citing *Ake v. Oklahoma, 470 U.S. 68 (1985)).*

n84 *Ake, 470 U.S. at 82-83* (holding "[w]hen the defendant is able to make an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent.").

n85 *Garries, 22 M.J. at 290.*

n86 MCM, *supra* note 25, R.C.M. 703(d).

n87 Will A. Gunn, *Supplementing the Defense Team: A Primer on Requesting and Obtaining Expert Assistance,*

39 A.F. L. REV. 143, 146 (1996).

n88 *Id.*

n89 MCM, *supra* note 25, R.C.M. 703(d).

n90 *Id.*

n91 *Id.*

n92 UCMJ art. 46 (2005).

n93 *United States v. Warner, 62 M.J. 114, 118 (2005)* ("While the defense request in this case was for an expert consultant rather than an expert witness, Article 46 is still applicable.").

n94 *31 M.J. 572 (N.M.C.M.R. 1990).*

n95 *Id. at 623* (citing *United States v. Garries, 22 M.J. 288, 288 (1986)).*

n96 *Id.*

n97 *Id.*

n98 *39 M.J. 459 (C.M.A. 1994).*

n99 *Id. at 461.*

n100 *Id.*

n101 *41 M.J. 213 (1994).*

n102 *Id. at 229-30.*

n103 *Id. at 230.*

n104 *Id. at 231-32.*

n105 *Id. at 249.*

n106 *Id. at 250.*

n107 *Id.*

n108 *Id.*

n109 *United States v. Murphy, 50 M.J. 4 (1998).*

n110 *Id. at 5-6.*

n111 *Id. at 7.*

n112 *Id. at 12.*

n113 *Id. at 9.*

n114 *Id.*

n115 *Id. at 12.*

n116 *Id. at 13.*

n117 *Id.*

n118 *Id.*

n119 *Id.*

n120 *Id. at 14.*

n121 *Id. at 15.*

n122 *Id.*

n123 *Id.*

n124 *Id.*

n125 *Id. at 16.*

n126 *466 U.S. 668, 687 (1984).*

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id.

n127 *Williams v. Taylor, 529 U.S. 362, 390 (2000).*

n128 *Id.*

n129 *Id. at 370.*

n130 *Id. at 369* (citing app. 4-5) ("One of the neighbors had not been previously interviewed by defense counsel, but was noticed by counsel in the audience during the proceedings and asked to testify on the spot." Additionally, "[t]he weight of defense counsel's closing, however was devoted to explaining that it was difficult to find a reason why the jury should spare Williams' life.").

n131 *Id. at 395.*

n132 *Id. at 369* (citing app. 4-5).

n133 *Id. at 370.*

n134 *Id. at 395* (citing app. 528-529).

> The home was a complete wreck . . . . There were several places on the floor where someone had had a bowel movement. Urine was standing in several places in the bedrooms. There were dirty dishes scattered over the kitchen, and it was impossible to step any place on the kitchen floor where there was no trash . . . . The children were all dirty and none of them had on under-pants. Noah and Lula were so intoxicated, they could not find any clothes for the children, nor were they able to put the clothes on them . . . . The children had to be put in Winslow Hospital, as four of them, by that time, were definitely under the influence of whiskey.

Id.

n135 *Id. at 370.*

n136 *Id. at 397.*

n137 *539 U.S. 510 (2003).*

n138 *Id. at 515.*

n139 *Id. at 534.*

n140 *Id. at 516-17.*

n141 *Id. at 517.*

n142 *Id.*

n143 *Id. at 535* (citing *Penry v. Lynaugh, 492 U.S. 302, 319 (1989)* ("'[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse[.]'")) (quoting *California v. Brown, 49 U.S. 538, 545 (1987)* (O'Connor, C.J., concurring)).

n144 *Id.* at 517.

n145 *Id.* at 517-18.

n146 *Id.* at 521 (citing *Strickland v. Washington, 466 U.S. 668, 680 (1984)).*

n147 *Id.* at 534.

n148 *Id.* at 533.

n149 *Id.* at 522 (citing *Strickland, 466 U.S. at 688-89).*

n150 *Id.* at 524.

n151 American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 HOFSTRA L. REV. 913, 925-26 (2003)* [hereinafter *ABA Guidelines*].

n152 *Id. at 952.*

n153 *Id. at 959.*

n154 *Id.*

n155 *Id.*

n156 *Id. at 960.*

n157 *Id.*

n158 *United States v. Loving, 41 M.J. 213, 300 (1994); United States v. Curtis, 44 MJ 106, 126-27 (1996); United States v. Murphy, 50 M.J. 4, 9-10 (1998).*

n159 *Loving, 41 M.J. at 300* (citations omitted).

n160 *Id.*

n161 *Id.* (citation omitted) (referencing the 1989 version of the *ABA Guidelines*).

n162 *See ABA Guidelines, supra* note 151, at 921 (noting that "[t]he use of the term 'jurisdiction' as now defined has the effect of broadening the range of proceedings covered. In accordance with current ABA policy, the Guidelines now apply to military proceedings, whether by way of a court martial, military commission or tribunal, or otherwise.").

n163 Richissin, *supra* note 2.

n164 *Id.*

n165 *United States v. Kreutzer, 61 M.J. 293, 296 (2005).*

n166 *Id.*

n167 *Id.*

n168 Richissin, *supra* note 2.

n169 *Kreutzer, 61 M.J. at 296.*

n170 Richissin, *supra* note 2.

> In looking at Kreutzer's case, The News & Observer reviewed internal Army psychiatric evaluations that detail [Kreutzer's] mental history, Army reports obtained through the Freedom of Information Act and more than 1,800 pages of investigative and court records. In addition, the N&O conducted extensive interviews inside and outside the military, including 12 hours of telephone interviews with Kreutzer himself.

Id.

n171 *Id.*

n172 *Id.*

n173 *Kreutzer, 61 M.J. at 296.*

n174 *Id.*

n175 *United States v. Kreutzer, 59 M.J. 773, 787 (Army Ct. Crim. App. 2004)* (Currie, J., concurring).

n176 Richissin, *supra* note 2.

n177 *Id.*

n178 *Kreutzer, 61 M.J. at 296.*

n179 Richissin, *supra* note 2.

n180 *Id.* (quoting Tony Martin, one of Kreutzer's defense counsel).

n181 *United States v. Kreutzer, 59 M.J. 773, 787 (Army Ct. Crim. App. 2004)* (Currie, J., concurring).

n182 *Id.*

n183 Todd Richissin, *Shooting Victims Testify in Bragg Trial*, NEWS & OBSERVER (Raleigh, N.C.), June 11, 1996, at A3.

n184 Richissin, *supra* note 2.

n185 *Id.*

n186 *Kreutzer, 59 M.J. at 788* (Currie, J., concurring).

n187 Richissin, *supra* note 2.

n188 *Kreutzer, 59 M.J. at 789* (Currie, J., concurring) ("[Kreutzer] stated that he attempted to get mental health phone support . . . but no one answered the phone.").

n189 *United States v. Kreutzer, 61 M.J. 293, 296 (2005).*

n190 *Kreutzer, 59 M.J. at 788* (Currie, J., concurring).

n191 *Id.*

n192 *Kreutzer, 61 M.J. at 296.*

n193 *Kreutzer, 59 M.J. at 789* (Currie, J., concurring).

> In [the car] was a suicide note dated 21 October: The bad dreams just won't end. I don't care where I go as long as its [sic] away from here. I'm a loser who just keeps on losing. I have nothing to look forward to. Fuck the world! Suicide is the ultimate test of faith. It shows one is ready to risk all to see if his God will accept him. I love my parents, my sisters, my brother, and my closest friends, but I must leave them. I don't want to hurt them, but there is no other way. AA Self-Storage--sell the contents of unit A-130 to pay for the funeral--sell my car too.

Id.

n194 *Id. at 788.*

n195 *Kreutzer, 61 M.J. at 296.*

n196 *Id. at 297.*

n197 *Id.*

n198 *Id.*

n199 *Id.*

n200 *Id.* ("The military judge denied the motion without entering any findings of fact by simply stating: 'I find the law here at *United States v. Loving 41 M.J. 213, 250.* I don't find the showing requiring me to order one.'").

n201 *Affidavit of James Anthony Martin, United States v. Kreutzer, 59 M.J. 773, 811 (Army Ct. Crim. App. 2004)* (James A. Martin served as one of Kreutzer's defense counsel).

n202 *Id.*

n203 *Id.*

n204 Richissin, *supra* note 2.

n205 *Id.*

n206 *United States v. Kreutzer, 61 M.J. 293, 295 (2005).*

n207 *Id.*

> The Judge Advocate General of the Army made a decision to certify a precise issue relating to the lower court's finding of prejudice. Despite the opportunity to bring the lower court's ruling before this court . . ., TJAG chose not to do so. Under these circumstances, we conclude that the lower court's ruling that the military judge erred in denying Appellee's request for expert assistance is the law of the case.

Id. (citation omitted).

n208 *Id. at 298* (citation omitted).

n209 *Id.*

n210 *Id. at 310* (Crawford, J., dissenting) (citations omitted).

n211 *Id. at 299.*

n212 The court stated the burden on the government:

> The Government must demonstrate there is no reasonable possibility that the absence of a mitigation specialist contributed to the contested findings of guilty, or, in this case, that not even a single member would have harbored a reasonable doubt after considering the mental health evidence that the mitigation specialist could have gathered, analyzed, and assisted the defense in presenting.

Id. at 302.

n213 *Id. at 299.*

n214 *Id. at 303.*

n215 *Id.* "The only mental health professional called by the defense on the merits was Doctor (Major) Carroll J. Diebold, the Chief of the Department of Psychiatry and Neurology at Womack Army Medical Center, Fort Bragg, North Carolina." *Id.* "Doctor Diebold was called as a defense witness despite his recommendation to defense counsel 'that they should reconsider calling me to testify' and he specifically indicated that his 'testimony might not be helpful in front of the panel.'" *Id. at 303 n.13.*

n216 Richissin, *supra* note 2.

n217 Francis A. Gilligan, *The Bill of Rights and Service Members,* ARMY LAW., Dec. 1987, at 3.

n218 UCMJ art. 46 (2005).

n219 *62 M.J. 114 (2005).*

n220 *Id. at 119* ("Providing the defense with a "competent" expert satisfies the Government's due process obligations, but may nevertheless be insufficient to satisfy Article 46 if the Government's expert concerning the same subject matter area has vastly superior qualifications.").

n221 *Id. at 121* (citation omitted).

n222 *United States v. Kreutzer, 61 M.J. 293, 298 (2005).*

n223 *See United States v. Gonzalez, 39 M.J. 459, 461 (C.M.A. 1994); United States v. Allen, 31 M.J. 572, 623 (1990).*

n224 *Kreutzer, 61 M.J. at 298.* The military judge in Kreutzer's trial "denied the motion without entering any finds of fact. . . ." *Id. at 297.*

n225 *Id. at 306* (Crawford, J., dissenting).

n226 *Id. at 305.*

n227 *See United States v. Kreutzer, 59 M.J. 773, 778-79 (Army Ct. Crim App. 2004).*

n228 *Kreutzer, 61 M.J. at 311* (Crawford, J., dissenting).

n229 *Id.* "Judge Crawford has at times signaled her intent to drive a wedge between the American servicemember and his Constitutional rights." *United States v. Taylor, 41 M.J. 168, 174 (C.M.A. 1994)* (Sullivan, J., dissenting).

n230 H.F. "Sparky" Gierke, *Five Questions About the Military Justice System, 56 A.F. L. REV. 249, 256 (2005)* (as part of the overall question: "[S]hould the structure of the military trial judiciary be changed?").

n231 *Ake v. Oklahoma, 470 U.S. 68, 82-3 (1985).*

n232 *18 U.S.C. § 3006A*(e) (LEXIS 2007).

n233 Mary M. Foreman, *Military Capital Litigation Meeting the Heightened Standards of* United States v. Curtis, *174 MIL. L. REV. 1, 35 (2002)* (citing *Criminal Justice Act of 1963: Hearings on S. 63 and H. 1057*

Before the Senate Comm. on the Judiciary, 88th Cong. 173 (1963) ("the penalty for asking for funds and services may be the disclosure, prematurely, and ill-advisedly, of a defense")).

n234 *United States v. Kaspers, 47 M.J. 176, 180 (1997); see also* 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 14-63.20 (2d ed. 1999).

n235 *United States v. Garries, 22 M.J. 288, 290 (1986)* ("The provisions of *18 U.S.C. § 3006A* concern representation of indigent defendants in federal district courts and are inapplicable to the military.").

n236 *Kaspers, 47 M.J. at 180.* In *Garries*, the "defense refused to make a showing of necessity on the record." *Garries, 22 M.J. at 291.* Likewise, defense counsel in *Kaspers* initially asked for an ex parte hearing, but "opted to reveal strategic information necessary to obtain an expert," after the military judge refused such hearing. *Kaspers, 47 M.J. at 179.* The court found persuasive Kaspers argument that "defense counsel often treads lightly with the famous Sword of Damocles hanging over them when attempting to justify expert requests to the military judge." *Id. at 180.*

n237 *See Kaspers, 47 M.J. at 180.*

n238 Judicial Conference Report, *supra* note 52, at pt. I, § B.3.4

n239 *United States v. Kreutzer, 61 M.J. 293, 305 (2005).*

n240 *Wiggins v. Smith, 539 U.S. 510, 522 (2003)* (quoting *Strickland v. Washington, 466 U.S. 668, 688 (1984)).*

n241 *ABA Guidelines, supra* note 151, at 960 (citations omitted).

n242 Judicial Conference Report, *supra* note 52, at recommendation 7 cmt.

n243 *Kreutzer, 61 M.J. at 305.*

n244 *Furman v. Georgia, 408 U.S. 238, 306 (1972)* (Stewart, J., concurring).