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MILITARY CAPITAL LITIGATION: MEETING THE HEIGHTENED STANDARDS OF *UNITED STATES V. CURTIS*

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I. Introduction

> *The problem with the death sentence in this case . . . is the lack of an adequate, full, and complete sentencing case . . . . I am convinced that this representation is unacceptable, substandard, inadequate, and ineffective in a military capital murder case. The result is a sentence that is not reliable.*[2]

In the summer of 1989, a general court-martial at Camp Lejeune, North Carolina, found Marine Lance Corporal (LCpl) Ronnie A. Curtis guilty of the premeditated stabbing murders of his lieutenant and the lieutenant's wife and sentenced him to death. The Navy-Marine Corps Court of Military Review (NMCMR) affirmed Curtis's death sentence in June 1989,[3] but the Court of Appeals for the Armed Forces (CAAF) ultimately reversed in 1997.[4] The renamed Navy-Marine Court of Criminal Appeals

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2. United States v. Curtis, 48 M.J. 331, 333 (1997) (Cox, C.J., concurring) (citations omitted).

3. 28 M.J. 1074 (N.M.C.M.R. 1989).

4. 46 M.J. 129 (1997).

(NMCCA)[5] affirmed a life sentence in 1998,[6] and in September 1999, the CAAF affirmed,[7] granting Ronnie Curtis his life.

United States v. Curtis[8] spent ten years in appellate review, during which the service court for the Navy and Marine Corps reviewed the case three times and the CAAF considered it four times.[9] Issues raised during the course of appeal included ineffective assistance of counsel, defense counsel qualifications, military panel size, the service-connection requirement in military capital cases, jury instructions, voting procedures, panel selection, the President's authority to impose capital punishment,[10] and the constitutionality of Rule for Courts-Martial (RCM) 1004.[11] Ultimately reversed on the grounds of ineffective assistance of counsel,[12] *Curtis* left unresolved many other issues that arguably relate to the reliability of an adjudged death sentence.

United States v. Curtis[13] was the first capital case to reach the CAAF after the promulgation of RCM 1004 and its creation of aggravating factors

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5. In 1994, pursuant to the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 924, 108 Stat. 2831 (1994), the NMCMR was renamed the NMCCA, the Army Court of Military Review (ACMR) was renamed the Army Court of Criminal Appeals (ACCA), and the Court of Military Appeals (COMA) was renamed as the CAAF. *Id.* When discussing cases, this article refers to courts by their names when they issued their decisions.

6. United States v. Curtis, 1998 CCA LEXIS 493 (N-M. Ct. Crim. App. Nov. 30, 1998) (unpublished).

7. United States v. Curtis, 52 M.J. 166 (1999).

8. 28 M.J. 1074 (N.M.C.M.R. 1989), *aff'd in part*, 32 M.J. 252 (C.M.A. 1991) (upholding the constitutionality of Rule for Courts-Martial 1004), *remanded*, 33 M.J. 101 (C.M.A. 1991) (remanded for findings concerning sentencing instructions, computation of aggravating factors, proportionality review, and effectiveness of trial and appellate defense counsel), *cert. denied*, 502 U.S. 952 (1991), *cert. denied*, 502 U.S. 1097 (1992), *aff'd on reh'g*, 38 M.J. 530 (N.M.C.M.R. 1993), *aff'd on reh'g*, 44 M.J. 106 (1996), *rev'd and remanded*, 46 M.J. 129 (1997) (reversed as to sentence), *modified*, 48 M.J. 331 (1997) (denying government petition for reconsideration), 1998 CCA LEXIS 493 (N-M. Ct. Crim. App. Nov. 30, 1998) (unpublished) (affirming sentence of life imprisonment), *aff'd*, 52 M.J. 166 (1999). Lance Corporal Curtis is presently confined at the Federal Penitentiary in Leavenworth, Kansas.

9. *See Curtis*, 52 M.J. at 166-67.

10. Loving v. United States, 517 U.S. 748 (1996).

11. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1004 (2002) [hereinafter MCM] (creating aggravating factors, at least one of which a military panel must find unanimously to consider the death penalty).

12. *Curtis*, 52 M.J. at 169.

13. 46 M.J. 129 (1997).

for capital courts-martial.[14] While certainly illustrating the heightened standard of defense representation in capital cases, the impact of *Curtis* on military capital jurisprudence is comparable to that of *United States v. Matthews*,[15] in which the Court of Military Appeals (COMA) held that the existing military capital sentencing procedures were unconstitutional.[16] Where *Matthews* resulted in the promulgation of aggravating factors and brought the military death penalty in line with the constitutional mandates set forth in *Furman v. Georgia*,[17] *Curtis* created a heightened review of representation in capital cases and placed upon the armed forces an affirmative duty to ensure reliability and fairness in the few cases in which it seeks, obtains, and approves a sentence of death. In many aspects, however, *Curtis* created more issues than it resolved.

This article analyzes *United States v. Curtis* in the context of the reliability of the military death penalty and discusses the impact of the case on military capital jurisprudence. It briefly discusses the background of the military death penalty, followed by an overview of the facts and appellate history of *United States v. Curtis*. The article then examines the impact of *Curtis* in the areas of access to mitigation specialists and ex parte access to the convening authority as they relate to development of a qualified capital trial defense team. Finally, the article recommends changes to the Rules for Courts-Martial and suggests modifications in judge advocate career management which recognize and address the need for a heightened standard of defense in capital cases.

II. Capital Punishment Under the Uniform Code of Military Justice (UCMJ)

This section discusses the development of the jurisdiction of courts-martial to try capital cases in peacetime, beginning with the Articles of War and culminating in the landmark decisions of *United States v. Matthews*[18] and *United States v. Curtis*.[19] Then, to establish a context for the remainder of the article, it examines the procedural differences between capital and non-capital courts-martial.

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14. *See* MCM, *supra* note 11, R.C.M. 1004.

15. 16 M.J. 354 (C.M.A. 1983).

16. *Id.* at 379-80.

17. 408 U.S. 238 (1972); *see* MCM, *supra* note 11, R.C.M. 1004 analysis, app. 21, at A21-72.

18. 16 M.J. 354 (C.M.A. 1983).

19. 46 M.J. 129 (1997).

A. Brief Background

> *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.*[20]

The American Articles of War, promulgated in 1775 and enacted in 1789,[21] prescribed our nation's first military justice system. They were based largely on the British Articles of War and authorized the death penalty for fourteen offenses, but they required the military commander to allow civil authorities to prosecute offenders of capital crimes that were punishable under civil law.[22]

Not until 1863, concerned with the ability of civil courts to convene effectively amidst hostilities, did Congress empower general courts-martial with the authority to impose the death penalty in wartime for "civilian" offenses committed by soldiers.[23] Even in 1916, when Congress granted courts-martial jurisdiction over felonies committed by service members, that jurisdiction did not extend to murder and rape committed in the United States during peacetime.[24] It was not until the enactment of the UCMJ in 1950 that Congress authorized courts-martial to impose the death penalty for peacetime offenses.[25]

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20. Loving v. United States, 517 U.S. 748, 754 (1996).

21. Congress first enacted the American Articles of War in 1789, adopting Articles that had been promulgated by the Continental Congress in 1775, and revised in 1776. *See* Act of Sept. 29, 1789, ch. 25, § 4, 1 Stat. 96.

22. American Articles of War of 1776, *reprinted in* W. WINTHROP, MILITARY LAW AND PRECEDENTS 964 (2d ed. 1920).

23. Act of Mar. 3, 1863, § 30, 12 Stat. 736, Rev. Stat. § 1342, art. 58 (1875), *construed in Loving*, 517 U.S. at 753.

24. Articles of War of 1916, ch. 418, § 3, arts. 92-93, 39 Stat. 664, *construed in Loving*, 517 U.S. at 753.

25. *Loving*, 517 U.S. at 753.

Article 118 of the 1950 Code set forth four types of murder and authorized death in cases involving premeditated and felony murder.[26] In 1983, the COMA overturned the death sentence in *United States v. Matthews*[27] because "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."[28] This fell short of the Supreme Court's 1972 decision in *Furman v. Georgia*,[29] in which the Court held that the discretionary capital sentencing statutes in Texas and Georgia violated the Eighth Amendment's prohibition against cruel and unusual punishment and were therefore unconstitutional.[30]

To remedy the defect identified in *Matthews*, President Reagan promulgated RCM 1004,[31] which requires that before a service member may be sentenced to death, the court-martial members must unanimously find that the service member is guilty of a capital offense, that at least one aggravating factor exists, and that any extenuation and mitigation evidence is substantially outweighed by the evidence of the aggravating factor(s) and circumstances.[32] In *Loving v. United States*,[33] the first military capital case reviewed by the Supreme Court since the enactment of the UCMJ, the Court considered the constitutionality of RCM 1004. The Court affirmed the lower court's holding that the promulgation of RCM 1004 was within

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26. UCMJ art. 118 (1950).

> Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he—
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> (1) has a premeditated design to kill;
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> (2) intends to kill or inflict great bodily harm;
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> (3) is engaged in an act which is inherently dangerous to others 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.

Id.

27. 16 M.J. 354 (C.M.A. 1983).
28. *Id.* at 379.
29. 408 U.S. 238 (1972).

the President's authority and that the capital sentencing scheme provided by the Rule is constitutional.[34]

There are presently six service members awaiting execution,[35] an additional four having been removed from death row in the past five years.[36] The first and perhaps most far-reaching reversal of a death sentence since *Matthews* occurred in 1997, when the CAAF reversed the service court's decision in *United States v. Curtis* based solely on ineffective

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30. *See id* at 238; *see also* United States v. Gay, 16 M.J. 586 (A.F.C.M.R. 1983) (holding that the military death penalty procedures in place at that time (1981) were unconstitutional in light of *Furman*). Decided after the ACMR decided *Matthews*, the Air Force Court of Military Review held that "[m]easured by *Furman* and its progeny, Article 118(1) fails." *Gay*, 16 M.J. at 596. In support of this holding, it found that the military death penalty procedures

> permit the jury unlimited and undirected discretion, lacking either a narrow range of specific capital offenses (Texas) or specific aggravating factors (Florida and Georgia) for imposition of capital punishment. Under the military system there are no mandatory factors to be found; no required weighing for aggravating versus mitigating factors; no insistence that the members make specific findings or answer specific questions. In sum, no specific consideration needs be given the death penalty as a unique sentence, over and above the usual, so as to avoid arbitrariness. Instead, the absolute discretion is permitted the sentencing authority, unchecked by articulated standards.

Id.

31. *See* United States v. Loving, 517 U.S. 748, 754 (1996).

32. *See* MCM, *supra* note 11, R.C.M. 1004. In addition to evidence surrounding the aggravating factors, the panel may also consider general aggravation evidence admissible under RCM 1001(b)(4). *See id*. R.C.M. 1001(b)(4).

33. 517 U.S. at 748.

34. *Id*. at 773.

35. Three Army soldiers (Loving, Gray, and Kreutzer) and three Marines (Parker, Walker, and Quintanilla) are presently on death row. Death Penalty Information Center, *The U.S. Military Death Penalty* (July 1, 2002), *at* http://www.deathpenaltyinfo.org/military.html. The Supreme Court affirmed the CAAF's decision in *Loving* in 1996, 517 U.S. at 748, and the CAAF affirmed the ACMR's decision in *United States v. Gray* in 1999, 51 M.J. 1 (1999). At the time this article was submitted for publication, *Kreutzer* was pending review at the ACCA.

36. The death sentences of Simoy, Thomas, and Curtis were overturned. United States v. Simoy, 50 M.J 1 (1998); United States v. Thomas, 46 M.J. 311 (1997); United States v. Curtis, 46 M.J. 129 (1997). That portion of Sergeant Murphy's sentence extending to death was set aside in 1998. In 1998, the CAAF remanded *United States v. Murphy* to the ACCA for additional fact-finding concerning extenuation and mitigation evidence obtained post-trial, 50 M.J. 4 (1998). In 2001, the ACCA returned the case to the convening authority for a *DuBay* hearing, 56 M.J. 642 (Army Ct. Crim. App. 2001).

assistance of counsel at the sentencing phase of trial.[37] One year later, the CAAF set aside the death sentence[38] in *United States v. Murphy*[39] and remanded it to the Army Court of Criminal Appeals (ACCA) for remedial action, based in part on its finding of ineffective assistance of counsel.[40] In 2001, the ACCA returned *Murphy* to the convening authority for a *DuBay*[41] hearing to determine whether extenuation and mitigation evidence obtained post-trial might have impacted the sentence of death.[42]

B. Capital Sentencing: A Different Approach for Defense Counsel

Under the RCM, an accused in a non-capital case may be tried on the merits either by military judge alone or a panel consisting of at least five officer members.[43] If the accused is enlisted, he may elect to have his panel include at least one-third enlisted soldiers senior in rank to him.[44] During the trial on the merits, at least two-thirds of the members must find the accused guilty of a specification to find him guilty of the charged offense.[45] If the accused is found guilty of an offense, the sentencing phase of the court-martial follows—usually immediately after the court

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37. *See Curtis*, 46 M.J. at 130.

38. The decision does not set aside the entire death sentence. The CAAF set aside the service court's decision and returned the record of trial to The Judge Advocate General of the Army for remand to the service court for further review. United States v. Murphy, 50 M.J. 4, 38-39 (1998). Implicit in the decretal paragraph of the CAAF's decision is that the CAAF set aside that part of the sentence extending to death. This is evident when considering that one of the options the CAAF gave to the ACCA was to affirm a sentence of life imprisonment, with accessory penalties. That at least some of the adjudged sentence remains is evident when considering that another of the options the CAAF provided the ACCA was to authorize a rehearing as to the death sentence. *See id*. The actual meaning of the decretal paragraph was challenged in *United States v. Curtis*, 52 M.J. 166 (1999), wherein the CAAF clarified identical decretal language, holding that "we did not set aside the sentence of the court-martial. We set aside the portion of the Court of Criminal Appeals' decision that affirmed the death penalty, which left that court with the option of affirming the remaining portion of the sentence—confinement for life, or authorizing a capital rehearing." *Id.* at 168.

39. 50 M.J. at 4.

40. *Id.* at 38-39.

41. United States v. DuBay, 37 C.M.R. 411 (C.M.A. 1967). A *DuBay* hearing is a limited evidentiary hearing that is ordered by a service Court of Criminal Appeals to elicit facts sufficient to determine whether there was error at trial. *See* FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 24-76.00 (1991).

42. United States v. Murphy, 56 M.J. 642, 648 (Army Ct. Crim. App. 2001).

43. MCM, *supra* note 11, R.C.M. 903(b).

44. *Id.* R.C.M. 503(a)(2).

45. *Id.* R.C.M. 921(c)(2)(B).

announces its findings. The forum the accused selected for trial on the merits will also be his forum for sentencing.[46] The sentence announced by the members, so long as it is lawful, is the sentence adjudged by the court.[47]

To adjudge a sentence, two-thirds of the panel members must agree on the sentence after voting on all proposed sentences.[48] If the proposed period of confinement exceeds ten years, then three-fourths of the panel must agree on that sentence.[49] "If the required number of members [cannot] agree on a sentence after a reasonable effort to do so, a mistrial may be declared as to the sentence."[50]

A capital case follows a similar procedure, but with several noteworthy distinctions. The accused may not plead guilty to a capital offense[51] and is not entitled to trial by military judge alone;[52] he must elect between an officer or a one-third enlisted panel. To adjudge a sentence that includes death, the panel must unanimously agree, beyond a reasonable doubt, that the accused is guilty of the capital offense[53] and that at least one aggravating factor exists.[54] To vote on a sentence that includes death, the panel

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46. A judge alone determines the providence of pleas of guilty the accused might enter. *Id.* R.C.M. 910. If the accused pleads guilty to all charged offenses, he will not actually select forum until sentencing, at which point he may choose either military judge alone, or a panel. Legislation is presently before Congress to amend the Rules to permit an accused tried by a panel to be sentenced by military judge alone. The provision was included in a House amendment to the National Defense Authorization Act for Fiscal Year 2002, H. R. 333, S. 434, 107th Cong. (1st Sess. 2001), but was not included in the Act passed on 2 October 2001. As of the date this article was submitted for publication, the provision was before the Joint Service Committee on Military Justice for review.

47. *See* MCM, *supra* note 11, R.C.M. 1106(e). The convening authority ultimately approves or disapproves the findings and the sentence. *Id.* R.C.M. 1107. Unlike many civilian jurisdictions, the military judge may not alter the sentence announced by the panel; it is the adjudged sentence, rather than merely a recommendation to the military judge. *See id*. R.C.M. 1106(e) (providing for the judge to ensure only that the sentence is in proper form). Therefore, if a panel announces a sentence of death, then the sentence of the court is death.

48. MCM, *supra* note 11, R.C.M. 1006(d)(4)(C).

49. *Id*. R.C.M. 1006(d)(4)(B).

50. *Id*. R.C.M. 1006(d)(6). Were this to occur, the case would "be returned to the convening authority, who may order a rehearing on sentence only or order that a sentence of no punishment be imposed." *Id*.

51. UCMJ art. 45(b) (2000); MCM, *supra* note 11, R.C.M. 910(A)(1).

52. UCMJ art. 18; MCM, *supra* note 11, R.C.M. 201(f)(1)(C).

53. MCM, *supra* note 11, R.C.M. 1004(a)(2).

54. *Id*. R.C.M. 1004(a)(4)(A).

must also unanimously agree that any evidence in extenuation and mitigation is substantially outweighed by the evidence in aggravation.[55]

That the members make the required findings to consider the death penalty does not require them to actually vote on a death sentence.[56] As the CAAF held in *United States v. Loving*,[57] "the military death penalty procedures give the court-martial the absolute discretion to decline to impose the death penalty even if all the gates toward death-penalty eligibility are passed."[58] Further, only if the members agree unanimously on a sentence that includes death may they sentence the accused to death.[59]

In both capital and non-capital sentencing, the members must "vote on each proposed sentence in its entirety beginning with the least severe and continuing, as necessary, with the next least severe, until [the required concurrence is reached]."[60] Accordingly, in a non-capital case, the defense counsel's focus will be on presenting a sentencing case that achieves a sentence agreed upon by at least two-thirds (or three-fourths) of the members.

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

56. *See id*. R.C.M. 1004(b). The panel is not required to enter a separate finding that the matters in extenuation and mitigation are substantially outweighed by the matters in aggravation; RCM 1004(b)(4)(C) simply requires that "all members concur" on this point, *id*. R.C.M. 1004(b)(4)(C), and the CAAF has interpreted this Rule to not require a separate finding. *See* United States v. Curtis, 32 M.J. 252, 269 (C.M.A. 1991) ("We are convinced, however, that the weighing of aggravating against mitigating factors can be adequately handled by instructions to the members that they must all concur as to this imbalance and does not require a separate finding.").

57. 41 M.J. 213 (1994).

58. *Id.* at 277. Whether the members must be instructed that they retain the discretion to decline to impose the death penalty, even after passing the first three gates, was initially raised by the COMA in that court's first review of *Curtis*. There, the COMA directed the NMCMR to consider whether an explicit instruction to this effect was required. United States v. Curtis, 33 M.J. 101, 107 n.8 (C.M.A. 1991). The NMCMR did not address this in its subsequent decision, United States v. Curtis, 38 M.J. 530 (N.M.C.M.R. 1993); however, the CAAF held later that this matter "was resolved against appellant in *Loving*, 41 M.J. at 276-77." United States v. Curtis, 44 M.J. 106, 160 (1996). In *Loving*, the members had been given the standard instructions, which informed them that if they made the required unanimous findings, they "*may* then consider, *along with all—with other possible sentences*, a sentence of death." *Loving*, 41 M.J. at 277 (quoting record of trial) (emphasis added by the Supreme Court). The Supreme Court found this language was sufficient to inform the members of their discretion to not impose death, even if all the eligibility requirements were met. *Id*.

59. UCMJ art. 52 (2000); MCM, *supra* note 11, R.C.M. 1006(d)(4)(A).

60. MCM, *supra* note 11, R.C.M. 1006(d)(3)(A).

In a capital case, the defense counsel's focus will be on obtaining a single vote for a life sentence.

The four requirements of a death sentence, as outlined above, are sometimes referred to as "gates."[61] They significantly change the dynamic of the defense because the panel must pass through each gate unanimously to proceed to the next. Should any member not concur at any one of the four gates, that member has effectively precluded the imposition of the death penalty. Put another way, each member must essentially vote against the accused four times to reach a death sentence.[62] This dynamic is especially heightened if the panel reaches the fourth gate because it must vote on the sentences from the least severe to most severe. If the panel reaches a three-fourths concurrence on a life sentence, they never vote on any proposed sentence that includes death.[63]

The practical effect of these differences is that in a capital sentencing case, the defense team has little incentive to hold anything back. Whereas a trial defense team in a non-capital case may be concerned with preserving its credibility by not revisiting a theory in sentencing that failed on the merits—because only a two-thirds or three-fourths concurrence is required for a non-capital sentence—a capital trial defense team need only persuade one member that the accused does not deserve to die to avoid the death penalty, even if the theory that achieves the one vote for life failed on the issue of guilt. This reverse dynamic is likely what led Chief Judge Cox to change his vote in *Curtis*: while in a non-capital case it would be understandable to not pursue voluntary intoxication during sentencing after that theory failed on the merits, there was little reason to not present it in sentencing when only one vote was required at any of the three remaining gates to save LCpl Curtis from death.

III. *United States v. Curtis*: The Turning of the Tide

> *I am now convinced that in order to ensure that those few military members sentenced to death have received a fair and*

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61. *See, e.g.*, *Loving*, 41 M.J. at 277; Mary T. Hall, *Death Penalty 101*, *in* DEFENSE CAPITAL LITIGATION 2000 (Naval Justice School 2000). Commander Hall is a retired Navy judge advocate who, while on active duty and after retirement, served as LCpl Curtis's appellate counsel and was his counsel at the time his death sentence was reversed.

62. *See* MCM, *supra* note 11, R.C.M. 1004(a)-(b).

63. *See id.* R.C.M. 1006(d)(3)(A); *see also* U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 8-3-40 (1 Apr. 2001).

> *impartial trial within the context of the death-penalty doctrine of the Supreme Court, we should expect that: 1. Each military service member has available a skilled, trained, and experienced attorney; 2. All the procedural safeguards prescribed by law and the* Manual for Courts-Martial *have been followed; and 3. Each military member gets full and fair consideration of all pertinent evidence, not only as to findings but also as to sentence.*[64]

The facts surrounding the murders were largely undisputed at trial. Lance Corporal Ronnie A. Curtis, an African-American Marine, was unhappy with his officer-in-charge, Lieutenant James Lotz, in part because LCpl Curtis felt that Lieutenant Lotz was racially biased against minorities. On the evening of 14 April 1987, after consuming a large quantity of alcohol, LCpl Curtis rode a bicycle to the lieutenant's quarters, knocked on the door, and made up a story as to why he needed to use the telephone. After Lieutenant Lotz allowed LCpl Curtis to enter his quarters, LCpl Curtis twice stabbed Lieutenant Lotz with a knife he had stolen that night; the second stab proved fatal. When Lieutenant Lotz's wife, Joan, appeared on the scene, LCpl Curtis stabbed her eight times and fondled her genitalia while she lay dying.[65]

At trial, the defense team attempted to present LCpl Curtis as "a young man adopted at age two and one-half and raised in a good Christian home whose dignity and self-worth had been systematically destroyed by LT Lotz's racial treatment of him."[66] Lance Corporal Curtis was convicted of both premeditated murders. During sentencing, the defense focused on his upbringing and reputation in his home community, avoiding what Judge Sullivan dubbed the "alcohol abuse-excuse,"[67] attempting instead to present LCpl Curtis "as a good, law-abiding person who was not violent rather than depicting him as maladjusted due to child abuse and alcoholism."[68] Although the defense possessed substantial evidence of LCpl Curtis's level of intoxication both before and after the murders, it did not introduce evidence regarding intoxication during the sentencing case, request an instruction that intoxication was a relevant factor for the mem-

64. United States v. Curtis, 48 M.J. 331, 332 (1997) (Cox, C.J., concurring).
65. United States v. Curtis, 44 M.J. 106, 117 (1996).
66. *Id.* at 120.
67. *Id.* at 171 (Sullivan, J., concurring).
68. *Id.* at 121.

bers to consider in their sentencing deliberations, or mention intoxication in its sentencing argument.[69]

The appellate history of *Curtis*, described by Judge Crawford[70] as "unfortunately long and tortured,"[71] raised numerous issues surrounding the reliability of the death sentence, many of which the CAAF addressed in its four reviews of the case, and two of which the Supreme Court resolved in *Loving v. United States*.[72] In its first review of *Curtis*,[73] the COMA considered whether the President's promulgation of the military capital punishment procedures was a permissible extension of presidential power and whether RCM 1004 was constitutional. The court answered both questions in the affirmative,[74] and the Supreme Court affirmed both holdings in *Loving*.[75] In a bifurcated review, the COMA also remanded several issues to the service court, including matters concerning sentencing instructions, computation of aggravating factors,[76] proportionality review, and effectiveness of the trial and appellate defense counsel.[77]

In its second review, the CAAF affirmed the service court's holdings after considering the issues of ineffective assistance of counsel and qualification of defense counsel.[78] In a split decision,[79] the CAAF considered

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69. *Id.* at 171 (Gierke, J., dissenting); *Curtis*, 48 M.J. at 333 (Cox, C.J., concurring).

70. Susan J. Crawford is presently the Chief Judge of the CAAF. U.S. Court of Appeals for the Armed Forces, *History of the Bench* (Oct. 17, 2002), *at* http://www.armfor.uscourts.gov/Judgehis.htm. At the time *Curtis* was finally decided, Walter T. Cox III was the Chief Judge. *See id.* This article identifies judges in the capacity in which they were serving at the time of the relevant decision.

71. United States v. Curtis, 52 M.J. 166, 169 (1999) (Crawford, J., concurring in part and dissenting in part).

72. 517 U.S. 748 (1996).

73. 32 M.J. 252 (C.M.A. 1991).

74. *Id.* at 252.

75. *Loving*, 517 U.S. at 773-74.

76. Also referred to as "double counting;" *see, e.g.*, United States v. Curtis, 38 M.J. 530, 533 (N.M.C.M.R. 1989) (concluding that "there was a double counting of aggravating factors in this double homicide case where each murder was considered to aggravate the other"); United States v. Curtis, 33 M.J. 101, 108 (C.M.A. 1991) ("we doubt that the President intended for commission of a double murder to constitute two 'aggravating factors,' rather than only one"); United States v. Curtis, 44 M.J. 106, 161 (1996); *Curtis*, 32 M.J. at 269.

77. *See Curtis*, 33 M.J. at 107-10.

78. *Curtis*, 44 M.J. at 167.

79. Judge Crawford wrote the majority opinion with Chief Judge Cox concurring, Judge Sullivan concurred separately, Judge Gierke concurred in part and dissented in part, and Judge Wiss attended oral argument but died before the CAAF issued its opinion. *See* 43 M.J. at CLXIII (1996) (*In Memoriam*, Judge Wiss).

a myriad of matters concerning the performance of the trial defense team that ultimately resulted in reversal of the death sentence two years later. Included among these issues were the defense team's failure to employ a "mitigation expert to explain [Lance Corporal Curtis's] troubled family background,"[80] the defense team's failure to present evidence of intoxication as a mitigating factor,[81] and the inexperience of the trial defense counsel.[82] The CAAF also addressed whether LCpl Curtis was entitled to appointment of defense counsel qualified under the American Bar Association Guidelines for death penalty representation,[83] an issue discussed later in this article.[84]

Both Judges Crawford and Sullivan found the defense team's decision to not exploit the intoxication defense reasonable.[85] Chief Judge Cox concurred with Judge Crawford.[86]

Judge Gierke strongly disagreed, pointing out that the case "was not a dispute about 'Did he do it?' Quite the contrary, the focus of the case was 'Why did he do it?' The defense team's job was to provide an explanation sufficient to win one vote for life."[87] Highlighting the absence of any explanation by the defense team for its failure to not pursue the intoxication evidence, especially in light of a sanity board finding that "it is doubtful that the event would have happened without the use of alcohol,"[88] Judge Gierke found that "this record cries out for explanation" and creates a "serious question whether LCpl Curtis would have been sentenced to death if counsel had used the intoxication evidence to convince at least one member to vote for life."[89] While intoxication may have failed on the merits, the defense team failed to explain its decision to not present it during sentencing, even though such evidence included testimony from another Marine, who was drinking with LCpl Curtis that night, that LCpl Curtis

80. *Curtis*, 44 M.J. at 120.
81. *Id.* at 122-23.
82. *Id.* at 124.
83. *Id.* at 126-27.
84. *See infra* notes 97 - 122 and accompanying text.
85. *Curtis*, 44 M.J. at 122 (Crawford, J.), 170 (Sullivan, J., concurring).
86. *Id.* at 167.
87. *Id.* at 171 (Gierke, J., concurring in part and dissenting in part).
88. *Id.* at 172 (quoting sanity board report).
89. *Id.* at 171-72.

was "heavily drunk" before leaving for the lieutenant's quarters and a North Carolina State Trooper's rating of LCpl Curtis as "unfit" to drive.[90]

Six months after deciding *Curtis*, the CAAF granted a motion for reconsideration, and in June 1997, set aside the death penalty in the case.[91] Chief Judge Cox proved to cast the deciding vote in overturning LCpl Curtis's death sentence, writing that "time has marched on since my vote in 1991" and that

> [u]pon further review of this case, I have concluded that LCpl Curtis did not receive a full and fair sentencing hearing and that, therefore, the sentence to death is wholly unreliable . . . there is just too much information which should have been presented to the court-martial members, the convening authority, and the United States Navy-Marine Corps Court of Military Review.[92]

In 1998, the NMCCA reassessed the sentence and, without explanation, affirmed a sentence of life imprisonment.[93] In 1999, the CAAF affirmed.[94]

IV. Trial Defense Counsel Qualifications: Does *Curtis* Raise the Bar?

> *In my judgment, [LCpl Curtis's] sentencing case was not fully developed because trial defense counsel lacked the necessary training and skills to know how to defend a death-penalty case or where to look for the type of mitigation evidence that would convince at least one court member that [LCpl Curtis] should not be executed.*[95]

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90. *Id.* at 172.

91. 46 M.J. 129 (1997). The CAAF actually reversed the decision of the lower court as to sentence, and returned the record of trial to The Judge Advocate General of the Navy for remand to the NMCCA. The CAAF instructed the lower court that it could affirm a sentence of life imprisonment and accessory penalties or order a rehearing on sentencing. *Id.* at 130. Implicit in this language is that the CAAF set aside that portion of the sentence extending to death, leaving in place the remaining elements of the sentence and accessory penalties. *See supra* note 38.

92. United States v. Curtis, 48 M.J. 331, 332-33 (1997) (Cox, C.J., concurring).

93. United States v. Curtis, 1998 CCA LEXIS 493 (N-M. Ct. Crim. App. Nov. 30, 1998) (unpublished).

94. United States v. Curtis, 52 M.J. 166 (1999).

95. *Curtis*, 48 M.J. at 333 (Cox, C.J., concurring).

This section addresses the American Bar Association's Guidelines for capital representation, the CAAF's reaction to those guidelines, the application of *Strickland v. Washington*[96] in the ultimate decision in *Curtis*, and the practical impact of *Curtis* on the standards of capital defense representation in courts-martial.

A. American Bar Association Guidelines

In 1989, the American Bar Association (ABA) published its *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*[97] and urged all jurisdictions that authorize the death penalty to adopt them.[98] These guidelines require two "qualified" attorneys at each stage of a capital case.[99] Qualification requires at least five years of criminal defense experience, including training and experience in "the specialized nature of practice involved in capital cases."[100] They specifically provide, however, "for such exceptions to the Guidelines as may be appropriate in the military."[101]

According to the ABA, "[n]o state has fully embraced the system . . . . To the contrary, grossly unqualified and under compensated lawyers who have nothing like the support necessary to mount an adequate defense are often appointed to represent capital clients."[102] In response to these concerns, legislation is pending concerning enforcement of the Guidelines. In February 1997, the ABA called upon all jurisdictions that authorize the death penalty to halt executions until the jurisdiction implements policies and procedures that are consistent with ABA policies.[103] In March 2001, Representative Jesse L. Jackson, Jr., introduced the National Death Penalty Moratorium Act of 2001,[104] which would prohibit the federal government

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96. 466 U.S. 668 (1984).

97. AMERICAN BAR ASSOCIATION, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (Feb. 1989) [hereinafter ABA GUIDELINES].

98. AMERICAN BAR ASSOCIATION, DEATH PENALTY REPORT (Feb. 7, 1997), *available at* http://www.uncp.edu/home/vanderhoof/dp-news/aba-rept.htm [hereinafter ABA DEATH PENALTY REPORT]. The American Bar Association "calls upon each jurisdiction that imposes capital punishment not to carry out the death penalty until the jurisdiction implements policies and procedures that are consistent with . . . [the] ABA 'Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.'" *Id.*

99. ABA GUIDELINES, *supra* note 97, guideline 2.1.

100. *Id*. guideline 3.1.

101. *Id*. at iii.

102. ABA DEATH PENALTY REPORT, *supra* note 98.

103. *Id*.

from executing death sentences while the National Commission on the Death Penalty reviews the fairness and the imposition of the death penalty.[105] The bill is pending before the House Committee on the Judiciary's Subcommittee on Crime.[106] An identical bill[107] is pending in the Senate.[108]

To date, the armed forces have declined to mandate adherence to the ABA Guidelines for defense counsel in capital courts-martial. The CAAF has considered this issue on three occasions, first in *United States v. Loving*,[109] again in its second review of *United States v. Curtis*,[110] and finally in *United States v. Murphy*,[111] each time declining to adopt such guidelines.[112]

Writing for the CAAF in its review of *Loving*, Judge Gierke noted that "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."[113] Citing the Supreme Court decision in *United States v. Cronic*[114] for the proposition that "limited experience does not raise a presumption of ineffectiveness" and finding that "the quality of representation compelled by the Constitution is determined by reference to *Strickland v. Washington*,"[115] the CAAF held in *Lov-*

104. H.R. 1038, 107th Cong. (2001).

105. *Id.* at 1.

106. Library of Congress, Thomas: Legislative Information on the Internet, *Bill Summary & Status for the 107th Congress*, *at* http://thomas.loc.gov (last visited Oct. 30, 2002).

107. S. 233, 107th Cong. (2001).

108. Library of Congress, Thomas: Legislative Information on the Internet, *Bill Summary & Status for the 107th Congress*, *at* http://thomas.loc.gov (last visited Oct. 30, 2002).

109. 41 M.J. 213 (1994).

110. 44 M.J. 106 (1996).

111. 50 M.J. 4 (1998).

112. *Loving*, 41 M.J. at 300; *Curtis*, 44 M.J. at 126-27; *Murphy*, 50 M.J. at 9-10; *see also* Curtis v. Stumbaugh, 31 M.J. 397 (C.M.A. 1990) (order denying writ of mandamus for "death qualified" counsel on appeal); Murphy v. The Judge Advocate General of the Army, 32 M.J. 312 (C.M.A. 1991) (order denying writ of mandamus for "death qualified" counsel on appeal).

113. *Loving*, 41 M.J. at 300.

114. 466 U.S. 648, 665 (1984).

115. *Loving*, 41 M.J. at 300 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

ing that "the constitutional standard was met at the trial level in this case,"[116] notwithstanding the defense counsel's lack of ABA qualification.

When raised again in *Curtis*, Judge Crawford wrote that "it is not error that [LCpl Curtis] was not represented by counsel qualified under the ABA Guidelines," citing Judge Gierke's decision in *Loving*.[117] Judge Crawford noted that "[t]he few states that have rules on the matter have not adopted [the ABA Guidelines] in total" and emphasized that the ABA Guidelines themselves provide for "exceptions as may be appropriate in the military," quoting *United States v. Gray*.[118] In *Gray*, the ACMR found that "the ABA Guidelines do not apply specifically to the military," but nonetheless found that the defense counsel met the ABA Guidelines under the Alternative Procedures.[119] The ACMR qualified this finding by noting that "[e]ven if the ABA Guidelines apply, the appellant's counsel satisfies those standards."[120] Most recently in *Murphy*,[121] the court described the ABA Guidelines as "instructive," but as in *Loving*, again relied on *United States v. Cronic*, which "compels [the court] to look to the adequacy of counsels' performance, rather than viewing the limited experience of counsel as an inherent deficiency."[122]

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116. *Id*.

117. United States v. Curtis, 44 M.J. 106, 127 (1996) (citing *Loving*, 41 M.J. at 300).

118. *Curtis*, 44 M.J. at 126 (quoting United States v. Gray, 32 M.J. 730, 734 (A.C.M.R. 1991)).

119. *Gray*, 32 M.J. at 734. *See generally* ABA GUIDELINES, *supra* note 97, guideline 5.1(C). The Alternate Procedures provide for detailing of counsel

> with extensive criminal trial experience or extensive civil litigation experience, if it is clearly demonstrated to the appointing authority that competent representation will be provided to the capitally charged indigent defendant. Lawyers appointed under this paragraph shall meet one or more of the following qualifications: i. Experience in the trial of death penalty cases which does not meet the levels detailed in [Guideline 5.1, Attorney Eligibility]; ii. Specialized post-graduate training in the defense of persons accused of capital crimes; iii. The availability of ongoing consultation support from experienced death penalty counsel.

Id.

120. *Gray*, 32 M.J. at 734.

121. 50 M.J. 4 (1998).

122. *Murphy*, 50 M.J. at 9-10 (construing United States v. Chronic, 466 U.S. 648 (1984)). As discussed later in this article, the CAAF remanded *Murphy* to the service court based on its finding of ineffective counsel for reasons unrelated to the ABA Guidelines. *Id.* at 16. *Murphy* has since been returned to the convening authority for a *DuBay* hearing concerning the impact of extenuation and mitigation evidence obtained post-trial. United States v. Murphy, 56 M.J. 642 (2001).

B. *Curtis*'s Application of *Strickland v. Washington*

> *A standard of effective assistance that satisfies the Constitution must hold counsel for capital defendants to the performance of "a reasonably competent attorney" who is experienced in death penalty defense.*[123]

Strickland v. Washington[124] is a capital case that created the present two-prong test for analyzing claims of ineffectiveness of counsel.[125] An appellant alleging ineffective assistance of counsel must first demonstrate that his counsel's performance was so "deficient" that "counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment," and then "that the deficient performance prejudiced the defense."[126] The second prong "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[127]

In evaluating the trial attorney's performance, the reviewing court must consider "whether counsel's assistance was reasonable considering all the circumstances."[128] Recognizing that a "Monday morning quarterback" approach might adversely affect "counsel's performance and even willingness to serve,"[129] the Supreme Court held in *Strickland* that "[j]udicial scrutiny of counsel's performance must be highly deferential" and "requires that every effort be made to eliminate the distorting effects of hindsight . . . and to evaluate the conduct from counsel's perspective at the time."[130] The second prong of the *Strickland* analysis requires that "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution."[131] To satisfy this prong, the appellant must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of

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123. Note, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 HARV. L. REV. 1923, 1935 (June 1994) [hereinafter *Eighth Amendment and Ineffective Assistance*] (quoting Strickland v. Washington, 466 U.S. 668, 687 (1984); citing Ivan K. Fong, *Ineffective Assistance of Counsel at Capital Sentencing*, 39 STAN. L. REV. 461, 490-91 (1987)).

124. 466 U.S. 668 (1984).

125. For a thorough analysis of *Strickland* and the Supreme Court cases that interpret the right to effective representation of counsel, see Fong, *supra* note 123, at 467-85.

126. *Strickland*, 466 U.S. at 687.

127. *Id*.

128. *Id*. at 688.

129. *Id*. at 690.

130. *Id*. at 689.

131. *Id*. at 692.

the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[132]

While the CAAF has repeatedly cited *Strickland* as the measure of trial defense counsel competence in capital courts-martial, some scholars argue that the *Strickland* analysis is insufficient in capital cases.[133] Their criticism centers primarily on the requirement that the appellant demonstrate prejudice

> because the decision to impose death or to grant mercy is inherently subjective, [and] to prove a "reasonable probability" that "the result of the proceeding would have been different" is daunting indeed. Faced with a horrific crime and overwhelming evidence of guilt, reviewing courts are often unable to imagine that a jury would have imposed any sentence but death.[134]

Indeed, during the CAAF's second review of *Curtis* in 1996, Judge Crawford concluded for the majority that "[u]nder the circumstances of this case, it is difficult to imagine a jury that would not have imposed a penalty of death."[135]

Many who believe that capital cases require a higher standard of review for effectiveness point to the Supreme Court's recognition that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed."[136] Some critics deem *Strickland* "a failed solution"[137] and "ill-suited to the sentencing portion of a capital trial."[138] They express concern that defense counsel may hide their ineptitude by labeling poor decisions as "tactical" or "strategic," thereby allowing an appellate court "to ignore gross incompetence if a mistake can somehow be labeled a choice"[139] and argue that such application

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132. *Id*. at 694.

133. *See, e.g*., Louis D. Billonis & Richard A. Rosen, *Lawyers, Arbitrariness, and the Eighth Amendment*, 75 TEX. L. REV. 1301 (May 1997); Jeffrey Levinson, *Don't Let Sleeping Lawyers Lie: Raising the Standard of Effective Assistance of Counsel*, 38 AM. CRIM. L. REV. 147 (Winter 2001); *Eighth Amendment and Ineffective Assistance*, *supra* note 123; Fong, *supra* note 123.

134. *Eighth Amendment and Ineffective Assistance*, *supra* note 123, at 1935 (quoting *Strickland*, 466 U.S. at 694).

135. 44 M.J. 106, 167 (1996).

136. Lockett v. Ohio, 438 U.S. 586, 604 (1978).

137. *Eighth Amendment and Ineffective Assistance*, *supra* note 123, at 1930.

138. Levinson, *supra* note 133, at 158.

139. *Id*. at 165.

of *Strickland* in a capital case fails to recognize the important differences between non-capital and capital sentencing. While defenders of *Strickland* are quick to point out that *Strickland* itself is a capital case, it is important to recall that the defendant in that case pled guilty to three capital offenses and was sentenced to death by a judge sitting alone as the sentencing authority.[140] The strength in the argument for a higher standard lies largely in recognition that in a capital sentencing trial with court members, "the attorney's role is not so much to litigate facts as to direct a morality play,"[141] and that only one vote for life is required to spare the accused from death.

Chief Judge Cox's ultimate decision regarding the reliability of the death sentence in *Curtis* resolves some of the issues raised in these attacks on *Strickland* by assessing counsel's performance in the context of the defense of a capital case. While his language mirrors that used by the Supreme Court in *Strickland*, in effect he applied a much more narrow analysis of the performance prong, arguably in recognition that "it only takes one court member's vote in either the findings or sentencing phase of a court-martial to defeat a death sentence."[142] Chief Judge Cox's conclusion that LCpl Curtis's death sentence was "wholly unreliable" derived from his finding that "there is just too much information which should have been presented to the court-martial members, the convening authority, and the [reviewing court]."[143] This much seems in keeping with the minimum standards of performance required by *Strickland*; however, Chief Judge Cox went on to find that the "sentencing case was not fully developed because trial defense counsel lacked the necessary training and skills to know how to defend a *death-penalty* case."[144] While not overtly articulating a different standard, Chief Judge Cox essentially applied the *Strickland* standard of "reasonably effective assistance,"[145] not within the

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140. David Leroy Washington waived his right to a jury trial and pled guilty to all charges, including three capital murder charges. Against the advice of his counsel, he similarly waived his statutory right to an advisory jury at his capital sentencing hearing. Levinson, *supra* note 133, at 154 (citing United States v. Strickland, 466 U.S. 668, 671 n.109 (1984)). Article 45, UCMJ, prohibits acceptance of a guilty plea to a capital offense. UCMJ art. 45 (2000). Article 18, UCMJ, prohibits trial by judge alone in a capital court-martial. *Id.* art. 18.

141. Levinson, *supra* note 133, at 164 (quoting WELSH S. WHITE, THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT 76 (1991)).

142. *Curtis*, 48 M.J. 331, 332 (1997) (Cox, C.J., concurring).

143. *Id*.

144. *Id*. at 333 (emphasis added).

145. *Strickland*, 466 U.S. at 687.

"wide range of professionally competent assistance"[146] generally required in any defense, but rather within the very narrow range of professionally competent assistance required in a *death penalty* defense.

C. *Curtis*'s Impact on the Standard of Capital Defense Representation

Tried the same year as *Curtis*, *United States v. Murphy*[147] was the next military capital case that the CAAF decided after its final review of *Curtis*.[148] Sergeant Murphy had been convicted of the premeditated murders of his wife, their son, and his stepson and sentenced to death in December 1987. Chief Judge Cox, now writing for the majority, found that Sergeant Murphy "received ineffective assistance of counsel as to his sentencing case"[149] and returned the record to the service court for remedial action.[150]

Murphy followed a similar pattern between the appellate courts as *Curtis*, undergoing its first review by the ACMR in 1990,[151] and a second review in 1993[152] on remand from the COMA[153] for reexamination of the sentence in light of the court's first review of *Curtis*.[154] In 1998, the CAAF

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146. *Id*. at 690.

147. 30 M.J. 1040 (A.C.M.R. 1990) (affirming findings and sentence), *remanded*, 36 M.J. 8 (C.M.A. 1992) (setting aside the sentence and returning to the service court for reexamination of the sentence in light of *United States v. Curtis*, 32 M.J. 252 (C.M.A. 1991) and *United States v. Curtis*, 33 M.J. 101 (C.M.A. 1991)), 34 M.J. 310 (C.M.A. 1992) (amending the prior order remanding the case to the service court), *aff'd on reh'g*, 36 M.J. 1137 (A.C.M.R. 1993) (affirming the sentence of death), *remanded on reh'g*, 50 M.J. 4 (1998) (returning the case to The Judge Advocate General for remand to the ACCA for additional fact-finding concerning evidence obtained post-trial regarding SGT Murphy's mental status), *remanded on reh'g*, 56 M.J. 642 (Army Ct. Crim. App. 2001) (returning the record of trial to the convening authority for *DuBay* hearing).

148. *United States v. Gray*, 51 M.J. 1 (1999), was argued before the CAAF on 7 March 1995, and reargued on 17 December 1996, in light of Justice Stevens's concurring opinion in *United States v. Loving*, 517 U.S. 748, 774 (1996). *Murphy* was argued before the CAAF on 15 May 1997, and decided on 16 December 1998. Thus, while *Gray* appeared first before the CAAF, *Murphy* was decided first.

149. *Murphy*, 50 M.J. at 5.

150. *Id.* at 16.

151. *Murphy*, 30 M.J. at 1040.

152. *Murphy*, 36 M.J. at 1137.

153. *Murphy*, 34 M.J. at 310 (returning the record of trial to The Judge Advocate General for remand to the ACCA); *Murphy*, 36 M.J. at 8 (amending and clarifying remand order).

154. *Murphy*, 34 M.J. at 311. The court conducted a bifurcated review. *See generally* United States v. Curtis, 32 M.J. 252 (C.M.A. 1991); United States v. Curtis, 33 M.J. 101 (C.M.A. 1991).

again reviewed *Murphy* and again remanded it to the ACCA, this time based on mitigation evidence discovered post-trial.[155] Prior to the case reaching the CAAF, the Army had provided funding for a post-trial social history, which included examination by a mitigation specialist, a clinical psychologist, and several psychiatrists, which yielded affidavits that questioned Sergeant Murphy's mental ability to form the specific intent to commit the 1987 murders.[156] Unwilling to speculate as to the potential impact of this evidence, the CAAF remanded the case to the ACCA for remedial action.[157] In November 2001, the ACCA returned the case to the convening authority for a *DuBay* hearing to consider the impact of mental health evidence obtained as part of an extensive psychological examination conducted five years after trial.[158]

In his majority opinion in *Murphy*, Chief Judge Cox applied, as he did in *Curtis*, the *Strickland* performance prong against the standard of performance in the defense of a *capital* case. Noting that "our review of defense counsels' performance in this trial does not reveal anything which suggests that they were less than totally dedicated to the defense of SGT Murphy,"[159] he concluded that "a capital case—or at least this capital case—is not 'ordinary,' and counsels' inexperience in this sort of litigation is a factor that contributes to our ultimate lack of confidence in the reliability of the result: a judgment of death."[160]

Chief Judge Cox found that defense "counsels' lack of training and experience contributed to questionable tactical judgments, leading us to the ultimate conclusion that there are no tactical decisions to second-guess."[161] That "training and experience" refers to training and experience in capital litigation defense is evident earlier in the opinion, when Chief Judge Cox found that "SGT Murphy was defended by two attorneys who were neither educated nor experienced in defending capital cases, and they

155. United States v. Murphy, 50 M.J. 4, 16 (1998).
156. *Id.* at 13-14.
157. *See id*. at 16.
158. United States v. Murphy, 56 M.J. 642, 642 (Army Ct. Crim. App. 2001).
159. *Murphy*, 50 M.J. at 8.
160. *Id*. at 13.
161. *Id*.

either were not provided the resources or expertise to enable them to overcome these deficiencies, or they did not request same."[162]

Judges Sullivan and Crawford, both of whom dissented in the reversal of LCpl Curtis's death sentence, again dissented and sharply criticized Chief Judge Cox's opinion in *Murphy.* Judge Crawford expressed concern that "the majority, without explanation or justification, fails to follow Supreme Court precedent concerning the effective assistance of counsel when the sentence is death,"[163] and noted that "[t]he majority's decision lowers an appellant's burden in ineffective assistance of counsel cases in which the death penalty has been imposed."[164] Judge Sullivan similarly found "no legal basis upon which the majority can reverse this case because the defense attorneys might have been better trained."[165]

A year later, the CAAF affirmed the service court decision upholding the death sentence in the case of *United States v. Gray,*[166] in which the accused was sentenced to death, but was not afforded a mitigation specialist.[167] While *Gray* has been criticized as a backwards step from the heightened effectiveness standard set by *Curtis*,[168] the decisions are distinguishable.

Specialist Gray was convicted in 1988 of multiple specifications of premeditated murder, attempted premeditated murder, rape, forcible sodomy, burglary, and larceny, and was sentenced to death. Among the many appellate issues that he raised, he challenged the effectiveness of his trial defense team in several aspects, including the competence of the mental health experts who performed his mental health evaluation before trial and

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162. *Id*. at 9.

163. *Id*. at 29 (Crawford, J., dissenting).

164. *Id*. at 35 (Crawford, J., dissenting).

165. *Id*. at 27 (Sullivan, J., dissenting).

166. 51 M.J. 1 (1999).

167. 32 M.J. 730 (A.C.M.R. 1991) (denying motion to provide funding for expert psychiatrist, death penalty-qualified defense counsel, and investigator), *aff'd on reh'g*, 37 M.J. 730 (A.C.M.R. 1992) (denying petition for new trial based on "newly discovered evidence of lack of mental responsibility"), *aff'd on reh'g*, 37 M.J. 751 (A.C.M.R. 1993), *aff'd*, 51 M.J. 1 (1999).

168. *See* Major David D. Velloney, *Balancing the Scales of Justice: Expanding Mitigation Specialists in Military Death Penalty Cases*, 170 MIL. L. REV. 1 (2001).

his defense counsels' failure to adequately investigate "the mitigating circumstances of [his] traumatic family background."[169]

The crux of Specialists Gray's complaint with his defense team appears to lie in what he described as "new evidence" of organic brain damage discovered after trial.[170] The ACMR disagreed with his characterization of this evidence, pointing out that "according to appellant's own brief there were 'clear indicators of appellant's organic brain damage . . . present at the time of trial.'"[171] Two forensic psychiatrists and a psychologist had examined Specialist Gray before trial and noted "symptoms associated with organic involvement."[172]

After his trial, Specialist Gray underwent two additional sanity boards and additional neurological testing. While the most recent sanity board found "undifferentiated brain damage," it concluded, as did the pre-trial sanity board, that "it does not appear of sufficient magnitude to negate criminal responsibility."[173] The "new evidence" consisted largely of an affidavit from a physician specializing in neurology who, after reviewing the results of the tests and evaluations, concluded that Specialist Gray "suffers from organic brain defects that probably impaired his capacity to distinguish right from wrong and conform his conduct to the law."[174] Noting that the physician "did not personally examine the appellant, nor did he review the testimony of the experts,"[175] the ACMR found that while "it is true that the appellant now possesses information that was not presented at trial . . . the information presented has not been proved correct."[176]

Specialist Gray's claim of ineffective assistance of counsel was based largely on his counsel's failure to challenge the professional competence of the mental health experts who examined him during trial and to investigate his social and personal background adequately. Although Gray's request for an independent investigator was denied, the defense team was granted the assistance of a CID agent, and presented testimony from family members at trial concerning Specialist Gray's abusive childhood and "generally about the conditions under which he grew up."[177] The defense also

169. *Gray*, 37 M.J. at 745.
170. *See id*. at 742.
171. *Id*.
172. *Id*. at 742.
173. *Id*. at 743.
174. *Id*. at 742.
175. *Id*.
176. *Id*. at 743.

presented the forensic psychiatrist who conducted the sanity board, who testified "about [Gray's] social background of growing up in the projects, his alcohol dependence, and his abusive stepfather."[178]

Specialist Gray's claim of ineffectiveness was, in effect, an attempt to impeach the mental health evidence presented at his trial. While he challenged the adequacy of his defense team's investigation, he did not identify to the court any mitigating evidence (other than the "new" mental health findings) that his trial defense team did not present at trial. This is distinguishable from both *Curtis* and *Murphy.* In *Curtis*, the trial defense team was unable to provide an explanation for not presenting evidence of intoxication during sentencing, noteworthy in light of the pre-trial sanity board's finding that "it is doubtful that the event would have happened without the use of alcohol."[179] In *Murphy,* substantial new mental health evidence was discovered post-trial which the CAAF determined warranted additional fact-finding.[180]

Rather than viewing *Gray* as a backstep from *Curtis*, it seems more an affirmation of the CAAF's position that it will view defense counsel qualifications independent of the ABA standards, and that it will not reject a death sentence simply because the accused did not have the benefit of a mitigation specialist. While *Curtis* and *Murphy* demonstrate a decision to hold defense counsel to a higher standard in capital cases, *Gray* demonstrates the limits of that standard and the CAAF's resolve to apply a process rather than a result-oriented analysis in its review of counsel's effectiveness. Its review of defense counsel performance in capital cases, however, will measure counsel's performance not merely in the context of general competence, but in the context of acceptable performance in a *capital* court-martial, where the focus from the outset is avoiding a death sentence, and where only one vote is necessary to secure that victory.

IV. Defense Resources: How Wide Does *Curtis* Open the Door?

> *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 circum-*

177. *Id*. at 746.
178. *Id*.
179. United States v. Curtis, 48 M.J. 331, 333 (1997) (Cox, C.J., concurring).
180. United States v. Murphy, 50 M.J. 4, 16 (1998).

> *stances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.*[181]

In setting aside the death sentences[182] in *Curtis* and *Murphy*, the CAAF, while expressly refusing to mandate qualification standards for capital trial defense teams, made clear its concern with the quality of representation in capital cases. Having already expressed its frustration with the inability of the *Curtis* trial defense team to explain its rationale in not presenting crucial evidence in sentencing, the court put its collective foot down in *Murphy* and refused to speculate on the impact of the mitigation evidence undiscovered at trial. Clear from a reading of these cases together is that the defense of military capital cases demands a much greater dedication of resources than convening authorities might have previously considered necessary, and a greater level of expertise than the military trial defense services have been accustomed to providing. As Chief Judge Cox observed in *Curtis*, "[t]he sentencing hearing may have been adequate for an absence-without-leave case . . . it was woefully lacking and totally unacceptable in a capital murder case."[183]

The procedural differences between a capital and non-capital trial are something that defense counsel can appreciate after attending capital litigation training, and the defense team's appreciation of these differences is a step in the right direction toward meeting the heightened standard of representation that *Curtis* and *Murphy* require. Practitioners who are seasoned trial advocates, but new to military capital litigation, might ask why capital litigation training is not sufficient, by itself, to meet Judge Cox's call for reform. Understanding how a capital trial differs from a non-capital trial, however, only scratches the surface. Only with expert resources will a defense team discover potentially mitigating evidence in an accused's background that neither the accused nor his family members might provide, and only with experience, training, and exposure to experts with capital trial experience will the defense team be able to fully analyze

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181. Woodson v. North Carolina, 42 U.S. 280, 304 (1976).

182. In *Curtis*, the CAAF reversed the service court's decision as to sentence. United States v. Curtis, 46 M.J. 129, 130 (1997). In *Murphy*, the CAAF set aside the service court's decision. *Murphy*, 50 M.J. at 5. In both cases, the CAAF set aside that portion of the sentence extending to death, leaving in place the remaining elements of the affirmed sentence, and accessory penalties. *See supra* notes 38, 91.

183. *Curtis*, 48 M.J. at 332 (Cox, C.J., concurring).

and assess sometimes complicated social background evidence in a case in which the focus from the start may be not on guilt, but on mitigation.

This section discusses the lessons of *Curtis* as they relate to defense team resources. It addresses the role and the importance of mitigation specialists in capital courts-martial, as well as the need for ex parte access to the convening authority in obtaining both mental health and mitigation experts. Finally, it recommends changes to the Rules for Courts-Martial that recognize the importance of providing these resources to the capital trial defense team.

A. Employment of Mitigation Specialists

In setting aside the death penalty in *Murphy*,[184] the CAAF strongly indicated its unwillingness to second-guess the impact of the mitigation evidence withheld from the members at trial, either through lack of discovery, or an unexplained failure to present it. Even in light of the CAAF's later decision in *Gray*, *Curtis* and *Murphy*, when read together, are a strong signal to convening authorities that defense counsel in capital cases must be provided the resources and funding required to investigate a capital accused's social history thoroughly and expertly before trial.

In its review of *United States v. Thomas*,[185] the NMCMR, in considering Sergeant Thomas's argument that he did not receive an adequate defense without a thorough psycho-social background investigation, noted that "a psychosocial investigation is not within the ken of a competent attorney."[186] Similarly, the NMCMR noted in its second review of *Curtis* that "[i]t is not particularly surprising that a family would not initially reveal any form of dysfunction within the family, even when their child faced serious charges. This information could be perceived as embarrassing, humiliating, or insignificant."[187]

The field of mitigation specialists developed following *Furman v. Georgia*,[188] in which the Supreme Court distinguished between the "eligi-

184. *Murphy*, 50 M.J. at 5.

185. 33 M.J. 644 (N.M.C.M.R. 1991).

186. *Id*. at 647. The court also noted, however, that "the appellant is required to establish clearly the materiality and necessity" of such expert assistance, which Sergeant Thomas failed to do. *Id*.

187. United States v. Curtis, 38 M.J. 530, 539 n.10 (N.M.C.M.R. 1993).

188. 408 U.S. 238 (1972).

bility phase of capital cases," where the jury must determine whether the defendant's actions warrant eligibility for the death penalty, and the "selection phase," in which the Court "has recently reaffirmed the need for 'a broad inquiry into all relevant mitigating evidence to allow an individualized determination.'"[189] Mitigation specialists serve to fill the "significant blind spot [that] existed between the roles played by the private investigator and the psychiatrist, the two standard information-getters in the trial process."[190] Their job is to discover and communicate "the complex human reality of the defendant's personality in a sympathetic way" by conducting an investigation into the life history of an accused and sometimes testifying at trial.[191]

The Committee of Defender Services, Subcommittee on Federal Death Penalty Cases, described this evolving expert assistance as follows in the May 1998 Judicial Conference of the United States:

> Mitigation specialists typically have graduate degrees, such as a Ph.D. or masters degree in social work, have extensive training and experience in the defense of capital cases, and are generally hired to coordinate a comprehensive biopsychosocial 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 materials for them to review.[192]

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189. Russell Stetler, *Why Capital Cases Require Mitigation Specialists*, INDIGENT DEFENSE, July/Aug. 1999, at 1 (quoting Buchanan v. Angelone, 522 U.S. 269, 275 (1998)).

190. *Id*. (quoting Lacey Fosburgh, *The Nelson Case: A Model for a New Approach to Capital Trials*, CALIFORNIA DEATH PENALTY MANUAL N6-N10, at N7 (July 1982)).

191. *Id*.

192. *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation*, Subcommittee on Federal Death Penalty Cases, Committee on Defender Services, Judicial Conference of the United States (May 1998), adopted Sept. 15, 1998, *available at* http://www.uscourts.gov/dpenalty/4REPORT.htm.

While employment of a mitigation specialist is not legally required in a capital court-martial,[193] it is a sound means of adding capital experience to an otherwise inexperienced trial defense team.[194] Rule for Courts-Martial 1004 determines whether an accused is eligible for a death sentence, and grants a capital accused broad latitude in presenting evidence in extenuation and mitigation during pre-sentencing; however, it does not indicate what factors in extenuation and mitigation the sentencing authority should consider in determining whether to actually adjudge death.[195] As Judge Gierke emphasized in his dissenting opinion in the CAAF's first review of *Curtis*, the defense team must be able to explain to the members *why* the accused did what he did.[196]

Curtis was the first case in which a mitigation specialist was funded post-trial. Similar funding requests were granted in *United States v. Murphy*[197] and *United States v. Kreutzer.*[198] As discussed earlier, *Murphy* was recently returned to the convening authority to determine whether the mitigation evidence discovered after trial, had it been available to the sentencing authority, might have changed the outcome.[199] At least one scholar has predicted that *Kreutzer* will follow suit.[200]

None of the service courts or the CAAF has mandated employment of a mitigation specialist in a capital court-martial. In fact, the CAAF held in *United States v. Loving*[201] that such employment was not necessarily a requirement. In both *Loving* and *Gray,*[202] soldiers were sentenced to death but were not provided mitigation specialists.[203] In both cases, the ACMR

193. In both *Loving*, 41 M.J. 213 (1994), and *Gray*, 51 M.J. 1 (1999), the CAAF affirmed death sentences in cases in which the accused was not afforded a mitigation specailist. The Supreme Court affirmed *Loving* in 517 U.S. 748 (1996).

194. *See* Velloney, *supra* note 168, at 31-33.

195. *See* MCM, *supra* note 11, R.C.M. 1004.

196. United States v. Curtis, 44 M.J. 106, 171 (1996) (Gierke, J., dissenting).

197. 36 M.J. 1137, 1153 (A.C.M.R. 1993) (appellant's submissions to the ACMR indicating that the Office of The Judge Advocate General allocated $15,000 in funding for a mitigation expert in 1992).

198. United States v. Kreutzer, No. 9601044 (Army Ct. Crim. App. Dec. 15, 2000) (unpublished). Sergeant Kreutzer was sentenced to death in 1996 after he was convicted of murdering members of the 82d Airborne Division at Fort Bragg, North Carolina, when he opened fire on them during a morning physical training session at Fort Bragg's Towle Stadium on 27 October 1995. United States v. Kreutzer, No. 9601044 (Headquarters, 82d Airborne Division June 12, 1996).

199. United States v. Murphy, 50 M.J. 4, 16 (1998).

200. *See* Velloney, *supra* note 168.

201. 41 M.J. 213 (1994).

202. 51 M.J. 1 (1999).

affirmed the death sentence,[204] and the CAAF affirmed the ACMR.[205] In both cases, however, the appellants were unable to establish what evidence a mitigation specialist might have uncovered, and how that evidence might have impacted their death sentences.

While neither *Curtis* nor *Murphy* requires defense counsel to use a mitigation specialist or to use the information obtained during such an investigation, they strongly suggest that defense counsel must at least have access to all information available before making an informed, tactical decision as to how or whether to use it. It is certainly subject to debate whether the death sentence in *Curtis* would have survived had the defense team been able to explain adequately their decision to not present evidence of voluntary intoxication in pre-sentencing.

It is clear, however, from the court's action in *Murphy*, that a defense team's failure or inability to investigate a capital accused's social and psychological history thoroughly before a death sentence is almost a guarantee for sentence reversal on appeal. Had Private Loving and Specialist Gray been able to point to specific mitigation evidence that was missed at trial, the CAAF might have viewed their cases differently. A trial defense team treads on thin ice when it presents a capital defense without the benefit of a mitigation expert's investigation, and in Sergeant Murphy's case, the ice broke. Employing a mitigation expert does not guarantee that a death sentence will be reliable, but it ensures that the accused will have the benefit of a fully informed trial defense team, and that no stone in his psychosocial background will remain unturned.

The field of mitigation specialists has grown substantially in recent years,[206] and the value of mitigation specialists in ensuring the reliability of a death sentence is a source of debate in both the military and civilian capital litigation fields.[207] Many scholars argue that mitigation specialists' unique investigative skills make them indispensable members of a capital trial defense team,[208] and that a mitigation case that fails to employ

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203. *See supra* notes 167, 194 and accompanying text.

204. United States v. Loving, 34 M.J. 956, *on recon*., 34 M.J. 1065 (A.C.M.R. 1992); United States v. Gray, 32 M.J. 730 (A.C.M.R. 1991).

205. *Loving*, 41 M.J. at 213; *Gray*, 51 M.J. at 1. The Supreme Court did not consider this issue in its review of *Loving v. United States*, 517 U.S. 748 (1996).

206. *See, e.g*., NLADA MITIGATION DIRECTORY 2000, A NATIONAL COMPILATION OF DEATH PENALTY MITIGATION SPECIALISTS (2000).

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

a mitigation specialist will likely run afoul of the Eighth and Fourteenth Amendments.[209] "Where potentially beneficial mitigating evidence exists and counsel has not presented it, counsel has precluded the sentencer from considering mitigating factors. Through failure to discover or present evidence, counsel has 'create[d] the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'"[210]

Notwithstanding the recognized need for mitigation specialists in capital trials, there remains an "undue reluctance [on the part] of convening authorities and military judges to fund mitigation specialists to supplement capital defense teams."[211] In light of *Curtis* and *Murphy*'s affirmation that trial defense teams must possess all available relevant mitigation evidence *at trial*, convening authorities should strongly consider funding mitigation specialists as a means of adding capital experience to an otherwise under-qualified defense team. In light of the recent return of *Murphy* to a *DuBay* hearing,[212] and amidst speculation that *Kreutzer* faces the same future,[213] prudent convening authorities will recognize the heightened standard *Curtis* has established for capital representation. Convening authorities should understand that depriving a capital accused of the right to present all available mitigating evidence to the convening authority violates the law set forth by the Supreme Court. Accordingly, convening authorities should consider granting a defense request for a mitigation specialist as soon as they determine that a capital referral might be appropriate.

B. Access to the Convening Authority

Meeting the heightened standard of representation in capital courts-martial requires access to the convening authority. To obtain government employment of expert assistance—including the assistance of a mitigation specialist—the defense team must convince the convening authority that such assistance is necessary.[214] Such showing generally requires that defense counsel reveal information about the accused supporting the need

208. *See generally* Velloney, *supra* note 168; Stetler, *supra* note 189.

209. CONST. amends. VIII, XIV.

210. Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 319 (May 1983) (citing Lockett v. Ohio, 438 U.S. 586, 605 (1978)).

211. Velloney, *supra* note 168, at 5.

212. United States v. Murphy, 56 M.J. 642, 648 (Army Ct. Crim. App. 2001).

213. Velloney, *supra* note 168.

for expert assistance. An accused might not wish to share potentially incriminating information with the convening authority before trial, or in some cases, before referral, but risks going to trial with inadequate defense resources if he does not. Similarly, defense counsel who desire a sanity board for their client must make a similar showing of necessity to the convening authority.[215] The request is almost always reviewed by government counsel, even though it may contain information damaging to the accused.

In *Ake v. Oklahoma*,[216] the Supreme Court recognized the need for psychiatric assistance in certain cases, noting that "a defense may be devastated by the absence of a psychiatric examination and testimony," but also contemplating "an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense."[217] The present Rules for Courts-Martial make no provision for ex parte requests for assistance to the convening authority or to the military judge, even in capital cases. As a result, to meet the burden of demonstrating necessity, defense counsel are often faced with the dilemma of revealing sensitive information in the text of the request or not submitting the request at all. As seen recently in *Murphy*, the failure to investigate such matters thoroughly before trial is now a matter of great concern to the courts.

1. Curtis *Heightens the Need for Ex Parte Access*

In his analysis of the CAAF's decision in *Gray*,[218] one scholar points out that while counsel in *Gray* never specifically requested a mitigation specialist, "the tenor of the opinion regarding investigators and psychiatrists indicates a reluctance to provide any assistance to defense counsel absent an extensive showing of necessity on the record."[219] This observation highlights the shortcomings inherent in a system that denies a capital accused ex parte access to the convening authority. One might imagine a

214. United States v. Gonzalez, 39 M.J. 459, 461 (C.M.A. 1994) (applying the three-part test set forth by the ACMR which requires that the accused demonstrate first, why the expert assistance is needed; second, what expert assistance would accomplish for the accused; and third, why the defense counsel is unable to gather and present the evidence that the expert assistant would be able to develop); *see also* MCM, *supra* note 11, R.C.M. 703(d).

215. *See* MCM, *supra* note 11, R.C.M. 706.

216. 470 U.S. 68 (1985).

217. *Id.* at 82-83.

218. 51 M.J. 1 (1999).

219. Velloney, *supra* note 168, at 22.

scenario in which a trial defense team discovers evidence about the accused that might be characterized as "double-edged sword" evidence[220]—evidence that while providing mitigation, might also demonstrate an accused's future dangerousness or lead to additional harmful discoveries about the accused's past. Aside from the decision whether to present such evidence at trial,[221] a defense team encounters a formidable quandary when faced with the choice of disclosing the evidence to the trial counsel as part of a showing of necessity for expert assistance, or not meeting the necessity burden by omitting the information from the request, or not submitting the request at all to avoid disclosure of confidential information.

Ex parte access to the military judge is insufficient to remedy this dilemma because a competent trial defense team must have the assistance immediately to prepare a defense, or in some cases, to avoid a capital referral altogether. Once a case is referred as capital, half the battle is already lost; indeed, a trial defense counsel's greatest (and perhaps only) victory in a potential capital case may be to obtain a non-capital referral. To afford the convening authority with enough information about the accused to make a truly informed decision on whether to refer a case as capital, the trial defense team may require substantial information concerning the accused's social history before the referral decision. Even in cases in which the convening authority has already expressed his intent to refer a case as capital, the trial defense team must begin preparing the mitigation case immediately, in part due to the difficulty in discovering, locating, and contacting the many potential sources of information regarding the accused's social history.[222] This process must begin well before referral to ensure the accused has the opportunity to present all mitigating factors to a panel, the convening authority, or both—whether presented in defense of a non-capital referral, or as part of a sentencing case for life.

Federal practice recognizes the value of affording a defendant ex parte access to funding for investigative, expert, or "other services neces-

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220. Both Judge Sullivan in *Gray* and Judge Crawford in *Curtis* used this term to characterize mitigation evidence that can cut either for or against the accused. *Gray*, 51 M.J. at 41; United States v. Curtis, 44 M.J. 106, 120 (1996).

221. For a discussion of the "double-edge sword" approach to analyzing claims of ineffective assistance of counsel, see John H. Blume & Sheri Lynn Johnson, *Symposium Gideon—A Generation Later: The Fourth Circuit's 'Double-Edged Sword': Eviscerating the Right to Present Mitigating Evidence and Beheading the Right to Assistance of Counsel*, 58 MD. L. REV. 1480 (1999).

222. *See* Goodpaster, *supra* note 210, at 323-25.

sary for adequate representation,"[223] and provides for ex parte review of such requests by a court or magistrate when a defendant is financially unable to obtain those services himself. As noted earlier, *Ake v. Oklahoma*[224] contemplates a similar process,[225] but in *United States v. Garries*,[226] the COMA held that the federal right to request assistance ex parte does not apply to the military. In *United States v. Kaspers*,[227] the CAAF affirmed that "an *ex parte* hearing will only be used if the circumstances are 'unusual.'"[228] As both *Garries* and *Kaspers* were capital cases, these decisions imply that a capital referral does not by itself constitute an "unusual" circumstance; however, in neither case did the request for assistance involve a mitigation specialist or a mental health expert.[229]

The CAAF recognized in *Kaspers* that "our rule may burden the defense to make a choice between justifying necessary expert assistance and disclosing valuable trial strategy," but noted that "the defense is not without a remedy. The military judge has broad discretion to protect the rights of the military accused" and may permit an ex parte request for funding if the defense can demonstrate "unusual circumstances." [230] This rationale fails to recognize the need for expert assistance, such as a mitigation specialist or a forensic psychiatrist independent of the sanity board, before referral—assistance which in some cases may provide the accused's only hope in obtaining a non-capital referral, and in others may provide the basis for a defense. While in some instances a military judge may be able to preclude disclosure of confidential information in a capital cases by finding unusual circumstances, a defense counsel is likely to be able to establish that his circumstances are unusual only through disclosure of the very information he seeks to protect. *Kaspers*'s circuitous reasoning is simply unacceptable in cases in which an accused is facing death.

As discussed earlier, the United States Code provides a means by which an indigent defendant in federal court may request expert services

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223. 18 U.S.C. § 3006A(e)(1) (2000).

224. 470 U.S. 68 (1985).

225. For a discussion of whether ex parte proceedings are constitutionally required under *Ake v. Oklahoma*, see Donna H. Lee, Note, *In the Wake of* Ake v. Oklahoma*: An Indigent Criminal Defendant's Lack of Ex Parte Access to Expert Services*, 67 N.Y.U. L. REV. 154 (1992).

226. 22 M.J. 288, 291 (C.M.A. 1986), *cert. denied*, 479 U.S. 985 (1986).

227. 47 M.J. 176 (1997).

228. *Id*. at 180.

229. *See generally* Velloney, *supra* note 168, at 42-48 (thoroughly discussing the need for ex parte access to the military judge).

230. *Kaspers*, 47 M.J. at 180.

ex parte.[231] This provision was part of the Criminal Justice Act of 1964, a response to the growing issue of providing equal justice to indigent defendants. Enacted twenty years before the Supreme Court's decision in *Ake v. Oklahoma*, its legislative history provides meaningful insight into the rationale supporting the rule. As noted by Senator Hruska, acting Chair of the Senate Judiciary Committee on the Criminal Justice Act of 1964, without an ex parte procedure, "the penalty for asking for funds and services may be the disclosure, prematurely, and ill-advisedly, of a defense."[232]

Affording a capital accused the right to ex parte access to the convening authority for such funding would add little to the government's burden in prosecuting a capital case and would eliminate the Hobson's choice created when a capital accused needs investigative funding before trial, but cannot afford to disclose potentially damaging information about himself to obtain it. As discussed above, the recent remand of *United States v. Murphy*[233] illustrates that post-trial funding of such crucial resources is too late.

2. Changes to the Rules for Courts-Martial

In recognition of the heightened need for reliability in capital courts-martial, RCM 706[234] and RCM 703[235] should be amended to permit ex parte access to the convening authority for purposes of showing necessity in capital cases. In these proposed amendments, capital courts-martial should be defined to include cases in which charges have been preferred and under the circumstances are likely to be referred as capital.[236] This change would both bring military practice more in line with federal capital procedures[237] and provide the accused a real opportunity to present miti-

231. *See* 18 U.S.C. § 3006(A) (2000).

232. *Criminal Justice Act of 1963: Hearings on S. 63 and H. 1057 Before the Senate Comm. on the Judiciary*, 88th Cong. 173 (1963).

233. 50 M.J. 4 (1998) (returning the case to The Judge Advocate General for remand to the ACCA); 56 M.J. 642 (Army Ct. Crim. App. 2001) (returning the record to the convening authority for a *DuBay* hearing).

234. MCM, *supra* note 11, R.C.M. 706, Inquiry into the mental capacity or mental responsibility of the accused.

235. *Id.* R.C.M. 703, Production of witnesses and evidence.

236. Whether to leave this language vague or to provide a more specific definition would be a matter for consideration by the Joint Services Committee. In addition to this change, RCM 1004(b)(1) should be amended to require the government to provide notice of its intent to refer the case as capital, as well as the aggravating factors upon which it relies, before referral.

gation evidence to the convening authority before his decision to refer the case as capital.[238]

A government mental health evaluation is often the defense counsel's first view into the mind of the accused. The detailed results and conclusions of the evaluation are invaluable in determining what kind of mental health and/or mitigation expertise the defense of the service member facing a death sentence will require. While the need to establish a basis for requesting government services is understandable in the context of limited government resources, the routing of the request through the prosecution team is not.

Governed by RCM 706, an accused may receive a government health evaluation, commonly known as a "sanity board," by submitting a formal written request to the convening authority (or to the military judge, if the charges are referred to trial). The Rule requires that the request establish a basis upon which the evaluation is required.[239] That an accused has committed a capital offense is not in itself an adequate basis under the present RCM 706.[240] As discussed above, RCM 706 may place the defense counsel in an awkward position by requiring him to disclose confidential information to obtain a government mental health evaluation.

Rule for Courts-Martial 706 provides for disclosure of the board's detailed conclusions, often referred to as the "long form," only to the defense counsel (and if after referral, to the military judge)[241] because of

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237. U.S. ATTORNEY'S MANUAL para. 9-10.050 (June 2001) (providing that once a case has been submitted to the Assistant Attorney General in support of a request for authorization to seek the death penalty, the materials shall be reviewed by a committee appointed by the Attorney General, and "counsel for the defendant shall be provided an opportunity to present the Committee the reasons why the death penalty should not be sought").

238. While some may argue that the Article 32 process affords soldiers the right to present evidence in support of a non-capital referral to the convening authority before referral, in reality the defense team most likely has not yet received funding for expert assistance by the time the Article 32 is appointed and has developed very little of the case in mitigation. Forensic reports are most likely still pending, and the government may or may not yet have disclosed which aggravating factors it intends to pursue, as this disclosure is not required until sometime "before arraignment." MCM, *supra* note 11, R.C.M. 1004(b)(1). While federal death penalty procedures permit an oral presentation in support of a non-capital indictment to a Committee appointed by the Assistant Attorney General, *see supra* note 237, the Rules for Courts-Martial afford the accused no such right to present matters in person to the convening authority at any time, before or after referral.

239. MCM, *supra* note 11, R.C.M. 706.

240. *See id*.

the privileged nature of this information. The rule should be modified to make the request for the evaluation in capital cases ex parte as well, in recognition of the greater role that mental health issues typically play in a capital case,[242] and to encourage defense counsel to obtain such an evaluation early in the process. In the alternative, RCM 706 should be amended to delete the provisions requiring the statement of a factual basis for the request in capital cases. By removing this requirement and thereby the need to disclose privileged information, defense counsel in capital cases could obtain the evaluation with minimal risk to the accused.[243]

Similarly, RCM 703 should be amended to make requests for funding of defense experts in capital cases ex parte, a provision already included in federal criminal practice.[244] Rule for Courts-Martial 703 provides the mechanism for an accused to request employment of expert services,[245] and like an RCM 706 request, RCM 703 requests are routinely processed through the prosecution team to the convening authority. This again places the defense counsel in the very awkward position of having to disclose a potential defense (or very aggravating information) early in the case to obtain crucial assistance to the defense team.

While the contents of RCM 703 and RCM 706 requests are not admissible at trial,[246] requiring counsel in capital cases to disclose privileged information to the prosecution in the course of obtaining resources before trial, when the purpose of those resources is to ensure an adequate defense of the accused, is counterintuitive. Considering *Curtis*'s heightened standdard of representation, a standard mandated by the fact that a service-

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241. *Id.* R.C.M. 706(c)(3).

242. In a non-capital case, mental health issues are often resolved through a sanity board, and they may or may not be presented in mitigation. In a capital case, an accused's mental health, while not constituting a defense or rendering him incompetent, may be his only hope against execution. The potentially greater impact of mental health evidence in a capital trial, given that the accused is on trial for his life, mandates special rules for ex parte consideration.

243. While RCM 706 protects statements made by the accused to mental health professionals during the course of an RCM 706 evaluation, *see* MCM, *supra* note 11, R.C.M. 706(c)(5), those statements become discoverable if the accused raises mental responsibility as a defense at trial, *see id.* MIL. R. EVID. 302.

244. *See* 18 U.S.C. § 3006(A) (2000).

245. *See* MCM, *supra* note 11, R.C.M. 703.

246. In addition to Military Rule of Evidence (MRE) 802's exclusion of hearsay, MRE 302 protects statements made by a service member to his attorney for the purpose of facilitating the rendition of legal services to the client, and MRE 302 protects statements (or evidence derived therefrom) made by the accused during the course of a sanity board. MCM, *supra* note 11, MIL. R. EVID. 802, 302.

man's life is at stake, rules that tie defense counsels' hands unnecessarily should be amended to permit aggressive and immediate access to expert resources as soon as the defense can articulate a viable need. Removing the prosecution team from the process would allow the defense to ask for what it needs, while leaving the discretion to grant or deny the funding with the convening authority or the military judge.

V. Adequate Representation of Counsel: Are the Services Up to the Challenge?

> *The current system of providing and funding defense counsel shortchanges accused servicemembers who face the ultimate penalty. It has been long recognized by every U.S. jurisdiction with a death penalty that only qualified attorneys may conduct death penalty cases. The paucity of military death penalty referrals, combined with the diversity of experience that is required of a successful military attorney, leaves the military's legal corps unable to develop the skills and experience necessary to represent both sides properly.*[247]

In May 2001, fifty years after the enactment of the UCMJ, the National Institute of Military Justice sponsored a study of the military justice system. In its report, the Commission on the 50th Anniversary of the UCMJ (commonly referred to as the "Cox Commission" after its chairman, Judge Walter T. Cox, III), made several recommendations, including implementing additional protections in death penalty cases—specifically, addressing the issue of inadequate counsel and requiring a court-martial panel of twelve members.[248]

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247. REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE 10, 11 (May 2001) [hereinafter COX COMMISSION REPORT].

248. *Id.* It was Chief Judge Cox changing his vote in 1997 that ultimately spared LCpl Curtis from the death penalty due to his trial defense team's ineffectiveness during the pre-sentencing phase of his court-martial. *See* United States v. Curtis, 48 M.J. 331 (1997) (Cox, C.J., concurring). Chief Judge Cox also wrote the majority opinion in *United States v. Murphy*, 50 M.J. 4 (1998), a military death penalty case remanded based on claims of ineffective assistance of counsel. Article 16(1)(A) was recently amended to require that a panel in a capital court-martial consist of at least twelve members. National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 582, 155 Stat. 1012, 1124-25 (2001).

As discussed throughout this article, Chief Judge Cox's ultimate decision in *United States v. Curtis*[249] effectively raised the standard of representation in capital trial defense. Similarly, the Cox Commission challenged the armed services to recognize their duty to ensure adequate defense in capital cases and to find ways to carry out this duty.[250] While the services are presently considering alternatives to the present system of detailing counsel to capital cases, such as contracting with civilian law firms to try our capital cases,[251] the solution lies within the services.

Chief Judge Cox's decisions in both *Curtis* and *Murphy*[252] highlight the need for an experienced capital defense team. Although the CAAF has on several occasions expressly declined to mandate standards of counsel competence in capital cases apart from that set by the Supreme Court in *Strickland v. Washington*,[253] the Cox Commission has suggested that the services re-evaluate how they detail defense counsel to capital cases.[254] Indeed, most of the focus in capital litigation since *Curtis* has been on the lack of capital experience among military defense counsel.

The key to answering the call of *Curtis* is finding within the armed services a means to both breed capital experience within the ranks of the military defense bar and to capture the experience that already exists. The first step in such a process is recognizing the unique skills required in capital defense and identifying judge advocates possessing those skills with a skill identifier. Equally important, once experienced judge advocates are identified, is the creation of an organization that pools the experience within all of the services, establishes a network of experts both within and outside the military, and is available to military defense counsel detailed to capital courts-martial around the world.

A. Creation of a Capital Litigation Skill Identifier

Most of the branches of the Army comprise the Army Competitive Category (ACC), which forms the group within which officers compete for

249. 46 M.J. 129 (1997).

250. COX COMMISSION REPORT, *supra* note 247, at 9-11.

251. Telephone Interview with Lieutenant Tri Nahn, U.S. Navy, Office of the Judge Advocate General (Jan. 25, 2002); E-mails from Lieutenant Nhan to Mary T. Hall and to author (Jan. 23-25, 2002) (on file with author).

252. 50 M.J. at 4.

253. 466 U.S. 668 (1984).

254. COX COMMISSION REPORT, *supra* note 247, at 10-11.

promotion and for selection to attend civil and military professional schooling.[255] The Judge Advocate General's Corps (JAGC) is a special branch of the Army that is separate from the ACC. Accordingly, JAGC officers compete only among themselves for promotion and selection for civil and senior service schooling and are not required to become "branch qualified," as ACC officers must between their eighth and twelfth years of service.[256] In practice, this allows judge advocates an equal place on the playing field while recognizing their distinct skills and different career advancement objectives.

Officers of the ACC receive a branch or functional area within a career field immediately following their promotion to major.[257] A functional area is a grouping of officers by technical specialty or skills, most of which require significant education, training, and experience.[258] Each functional area falls under one of the four career fields.[259] Most company grade officers will not serve in functional area jobs until after branch qualification, ensuring that each officer obtains the basic skills, experience, and general knowledge of the branch before moving to a more specialized area of expertise.[260] The goal behind these groupings is to "build an officer corps that is both skilled in combined arms operations in the joint and multinational environment and fully experienced in the technical applications that support the Army's larger systemic needs."[261]

The JAGC does not assign functional areas or career fields, but has recognized two areas of concentration and four skill identifiers.[262] Separate classification of judge advocates specializing in these areas recognizes

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255. U.S. DEP'T OF ARMY, PAM. 600-3, COMMISSIONED OFFICER DEVELOPMENT AND CAREER MANAGEMENT para. 5-9 (1 Oct. 1998).

256. *Id*. para. 3-7a(5). For example, for an armor captain to be branch qualified, he must have completed an advanced course (usually the Armor Officer Advanced Course), successfully completed command of a company or troop for eighteen months, obtained a baccalaureate degree from an accredited college or university before attending the advanced course, and completed the staff process training phase of the Combined Arms and Services Staff School (CAS3). *Id*. para. 11-3(a)(2)(f).

257. *Id*. para. 8-1b.

258. *Id*. para. 8-3a.

259. *Id*. para. 8-3c.

260. *Id*. para. 8-2b.

261. *Id*. para. 8-1a.

262. *Id*. para. 48-1c(5). The areas of concentration are judge advocate (55A) and military judge (55B). The skill identifiers are 3D (government contract law specialist), 3F (patent law specialist), 3G (claims/litigation specialist), and 3N (international law specialist).

the unique education and experience required by positions within the areas of law they represent. Similarly, only officers assigned to the U.S. Army Trial Defense Service (USATDS), or those made available as individual military counsel (IMC), may be detailed to represent soldiers facing adverse military administrative or criminal action.[263] The USATDS is a relatively new organization that recognizes the unique training required in defending courts-martial and the need to separate defense counsel from the command structure.[264]

Before *United States v. Curtis*,[265] qualification and certification by the service Judge Advocate General under Article 27b, UCMJ,[266] were sufficient to defend a military death penalty case.[267] Because the CAAF has declined to mandate any additional qualifications, the services must determine how best to ensure adequate representation of capital accused in courts-martial given the inexperience of many military defense counsel, and the limited time their careers will allow them to remain in trial work. Service-wide recognition of capital litigation as a skill identifier would accomplish that purpose.

The JAGC has recognized the importance of having officers who specialize in contracting, patent law, claims and litigation, and international law by awarding skill identifiers for these areas of expertise.[268] Just as the Army needs experts in these areas to further modern-day missions and to protect the Army from civil lawsuits and criminal liability, *Curtis* clearly demonstrates that the Army also needs experts in defending capital courts-martial.

Obtaining a capital litigation skill identifier would require education and training similar to that required for the other four identifiers. As with the military judge area of concentration, it would also require criminal law experience in trial prosecution and defense. Like military judges, judge

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263. *Id*. para. 48-1c(3)(b).

264. For a history of the development of USATDS, see Lieutenant Colonel John R. Howell, *TDS: The Establishment of the U.S. Army Trial Defense Service*, 100 MIL. L. REV. 4 (1983). For a discussion of the purpose and mission of the USATDS, see Lieutenant Colonel R. Peter Masterton, *The Defense Function: The Role of the U.S. Army Trial Defense Service*, ARMY LAW., Mar. 2001, at 1. *See also* U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE ch. 6 (6 Sept. 2002).

265. 46 M.J. 129 (1997).

266. UCMJ art. 27b (2000).

267. *See also* U.S. DEP'T OF ARMY, REG. 27-1, LEGAL SERVICES: JUDGE ADVOCATE LEGAL SERVICES para.13-2h (30 Sept. 1996).

268. *See supra* note 262.

advocates with a capital litigation skill identifier would be assigned to positions requiring their expertise and stabilized for a term of years to ensure the maximum benefit of their specialty. Similar to judge advocates with other skill identifiers, these judge advocates might temporarily leave the specialty to serve in general JAGC assignments, but would eventually resume service in the capital litigation specialty. Even while serving in assignments outside of capital litigation, they would remain identifiable as capital litigation resources.

B. Joint Services Capital Litigation Resource Center

In addition to creating a skill identifier, the services need a joint capital litigation resource center committed to obtaining, consolidating, and nurturing capital experience.[269] Such an organization would fall within the Department of Defense under one of the service appellate defense divisions or one of the service JAG schools, and would include judge advocates with the capital litigation skill identifier and those with substantial non-capital defense experience.

Employment of a full-time civilian attorney with capital litigation experience as a senior member of the center would provide continuity, promote long-term cooperation among the services in capital appellate defense, and would be the first step in closing the "ungoverned revolving door of [appellate] defense counsel" that Judge Wiss wrote of in *Loving v. United States*.[270] That attorney, while most likely unable to represent a capital accused throughout his appeal given his involvement in trial-level issues, would ensure that change of counsel during an appellant's appeal would not rise to the level that Judge Wiss so vehemently criticized in *Loving*.[271] While the nature of military service may never permit the revolving

269. From 1997 to 2000, a judge advocate captain in the U.S. Navy Reserve was assigned to the Navy-Marine Corps Appellate Defense Division as a joint services resource for capital litigation. That position is presently unfunded; however, the Navy is considering means by which capital litigation resources may be made more accessible to judge advocates detailed to capital cases. Telephone Interview with Lieutenant Tri H. Nahn, U.S. Navy, Office of the Judge Advocate General (Jan. 25, 2002); E-mails from Lieutenant Nahn to Mary T. Hall and to author (Jan. 23-25, 2002) (on file with author). An alternative to a joint organization would be to assign one of the service appellate divisions as the lead in providing capital defense resources to trial defense counsel.

door to close completely, a measure of continuity in the capital resource center would be a firm step in remedying its "ungoverned" nature.

The center's activities would include writing scholarly articles concerning capital litigation; assisting trial defense counsel in obtaining funding to attend capital litigation courses when detailed to a capital case;[272] and providing a network of civilian, retired, and reserve attorneys with capital experience willing to assist military counsel in the defense of capital cases. Whether to assign capital litigation center counsel to capital appellate cases would be a matter between the center and the appellant's service appellate division. The center would also assist trial defense counsel defending capital cases and, if necessary, provide judge advocates for detailing to capital cases in the field. With one phone call, a trial defense counsel detailed to a capital case could tap into the wealth of knowledge

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270. 41 M.J. 213, 327 (1994) (Wiss, J., dissenting). While the representation issues in *Curtis* and later in *Loving* focused primarily on the trial defense counsel, Judge Wiss in his dissent in *Loving* expressed great concern regarding the appellate defense counsel, writing that "[he was] not alone in expressing frustration of this Court at the delays and inefficiencies in capital litigation that are the direct result of lack of continuity of appellate counsel," and that "[i]t is time to fix what is broken." *Id*. at 329. He noted that "[s]even appellate counsel represented [Sergeant Murphy] in the Court of Military Review; five others represented him in this Court," and that "[n]o expression of concern appears anywhere for even informing the client of an impending change in representation, much less seeking the client's views." *Id*. at 327. Appended to his dissent was a congressional letter to the Secretary of Defense, in which the Chairman of the Subcommittee of Civil and Constitutional Rights expressed concern that "no procedures are in place . . . to provide continuity of representation" in military capital litigation, *id*. at 335, and urging the Secretary to take steps to "ensure that in proceedings where life itself is at stake, no American serviceman or servicewoman is denied the essential tools of an adequate defense." *Id*. at 336.

271. *Id*. Judge Wiss noted, for example, that "[i]t was unclear at times who was the lead counsel,"and that "[t]he confusion is so pervasive that even opposing counsel demonstrated confoundment." *Id*. at 327. He concluded that "it is clear from various pleadings in this case that lack of continuity and accountability of counsel directly caused substantial inefficiencies at both appellate levels." *Id*.

272. Capital litigation training courses are offered throughout the United States several times each year. For example, the Naval Justice School offers a Defense Capital Litigation Course each July, and the National Legal Aid and Defender Association sponsors a "Life in the Balance" capital litigation course each March. *See* U.S. DEP'T OF NAVY, COMMANDER, NAVY LEGAL SERVICES COMMAND, INSTR. 5450.3A, MISSION AND FUNCTIONS OF NAVAL JUSTICE SCHOOL, NEWPORT, RHODE ISLAND encl. 1, para. 3k (25 Nov. 1998); National League Aid & Defender Association, *Training & Conferences*, at http://www.nlada.org/Training/Train_Defender/Train_Defender_Balance (last visited Dec. 5, 2002).

and experience that presently exists, but that is unknown to the majority of military counsel in the field.

Because the combined services produce so few capital courts-martial, only through consolidation of experience and resources can the services grow their own qualified capital defense teams. Similarly, only through a joint point of contact for defense counsel in the field can inexperienced counsel engage the wealth of capital resources available to them. Identification, consolidation, and joint cooperation of counsel with capital experience are the first steps in answering Chief Judge Cox's call to arms.

VI. Conclusion

Chief Judge Cox's changing of his vote in 1997 both saved LCpl Ronnie Curtis from the "executioner's needle"[273] and set military capital jurisprudence on a path whose future is uncertain. Although *Strickland v. Washington* remains the standard of reviewing defense counsel's performance at trial, *Curtis* and *Murphy* effectively modified *Strickland* by measuring defense counsel performance in the context of capital defense representation standards. While the CAAF has on numerous occasions expressed its clear intent to avoid mandating capital defense standards, the message of *Curtis* is clear: defense counsel in capital cases must be capable of putting together a competent *capital* trial defense team. In a system where only one vote will derail the death sentence, every decision the team makes at trial carries the potential weight of life or death.

Curtis squarely places the duty to ensure adequate defense of capital cases on the armed forces, and its impact is felt today as the services struggle to find ways to ensure competent representation of capital cases at the trial and appellate levels amidst the competing demands of military service. Building a competent, qualified capital trial defense team requires training, experience, and access to resources. In many cases, convening authorities may not recognize the need for such funding, especially as operational budgets shrink.

The constitutionality of the military death penalty is a settled matter;[274] however, *Curtis* demonstrates that the system alone cannot ensure

273. United States v. Curtis, 48 M.J. 331, 331 n.1 (1997) (Cox, C.J., concurring).

the reliability of a death sentence. The services need not look past their own joint boundaries to find substantial talent, education, and experience in capital litigation. Until the services acknowledge this need and pool their wealth of information, however, they will struggle with the monumental task of finding counsel competent to defend capital courts-martial.

Awarding a skill identifier would permit judge advocates with capital litigation training and experience to remain in positions using that specialized knowledge and to be available should a need for their experience arise. It would recognize that just as being a military judge requires certain skills and experience, so too does defending a capital case. Classifying judge advocates as capital litigation specialists, however, is only one step in the process. Capital cases arise from installations throughout the world, and only when all defense counsel can tap into one centralized resource

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274. *See* Loving v. United States, 517 U.S. 748 (1996) (affirming the constitutionality of RCM 1004). The military death penalty remains subject to constitutional challenges on at least two grounds that were raised during *Curtis*'s appellate history. One issue involves the constitutionality of a variable size panel. *See, e.g.*, Dwight H. Sullivan, *Playing the Numbers: Court-Martial Panel Size and the Military Death Penalty*, 158 MIL. L. REV. 1, 24 (1998). While Article 16(1)(A) was recently amended to require that a panel in a capital court-martial consist of at least twelve members, National Defense Authorization Act for Fiscal Year 2002, Pub. L. 107-107, § 582, 115 Stat. 1012, 1124-25, the variable nature of "no [fewer] than" twelve members, *id.*, leaves the present military death penalty open to attack. The underlying premise of this argument is that because under the present Rules for Courts-Martial a challenged member is not replaced if a quorum remains, MCM, *supra* note 11, R.C.M. 505(c)(2)(B), an accused is penalized in a capital case when he conducts effective voir dire because with each member he successfully challenges and removes from the panel, he reduces his statistical probability of receiving one vote for life. As one judge on the Air Force Court of Criminal Appeals noted,

> Little mathematical sophistication is required to appreciate the profound impact . . . of reducing the court-martial panel size. To use a simple metaphor—if appellant's only chance to escape the death penalty comes from his being dealt the ace of hearts from a deck of fifty-two playing cards, would he prefer to be dealt thirteen cards, or only eight?

United States v. Simoy, 46 M.J. 592 (A.F. Ct. Crim. App. 1006), *rev'd*, 50 M.J. 1 (1998). A second ground for challenge to the constitutionality of the military death penalty, which Justice Stevens discussed in his concurring opinion in *Loving*, is whether service-connection should be a requirement for capital courts-martial jurisdiction. *Loving*, 517 U.S. at 774 (Stevens, J., concurring). While not directly addressing the issue of service-connection, the CAAF expressly found service-connection in both *Curtis*, 44 M.J. 106, 118 (1996), and *Gray*, 51 M.J. 1, 11 (1999).

center will the JAGC maximize the capital defense experience shared by so few of its members.

While one can only speculate as to what really led Chief Judge Cox to change his vote in 1997 and spare Ronnie Curtis his life, the impact of that decision will continue to haunt the services until we recognize that the challenge of ensuring qualified defense of capital courts-martial is formidable, but not impossible, and that the solution lies not in looking outside the services, but looking within.