REQUEST FOR COMMUTATION OF DEATH SENTENCE

In the Matter of:

PRIVATE DWIGHT J. LOVING

Addressed to:

Secretary of the Army
and the
President of the United States

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Table of Contents

Private Dwight J. Loving, United States Army, is a death-sentenced inmate before you, pursuant to Uniform Code of Military Justice Article 71(a), for consideration of whether his death sentence should be approved. Loving is the first military death-sentenced inmate to have his case reviewed by the President since February 1962 when President Kennedy commuted a death sentence to a life sentence.[1] No military service member has been executed since Army Private First Class John A. Bennett was hanged at the United States Disciplinary Barracks, Fort Leavenworth, Kansas on April 13, 1961.[2]

Loving requests that his death sentence be commuted to life for numerous reasons including, but not limited, to the following:

- the significant racial disparities in the military's application of the death penalty
- the use of an eight-member panel in Loving's court-martial, when recent legislation requires a minimum of twelve members
- the convening authority[3] exercised his powers to select Loving's court-martial members in a fashion clearly exhibiting racial and gender bias
- the members of Loving's court-martial used illegal voting procedures, influenced by command influence, in sentencing

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[1]Dwight Sullivan, *A Matter of Life and Death: Examining the Military Death Penalty's Fairness*, 45-Jun Fed. Law. 38, 39 (1998).

[2]Dwight H. Sullivan, Jerry L. Britain, Michael N. Knowlan, and Cheryl Pettry, *Raising the Bar: Mitigation Specialists in Military Capital Litigation*, 12 Geo. Mason U. Civ. Rts. L.J. 199, 204-05 (2002).

[3]"Convening authority" is a term of art but is typically the commanding general who determines that charges should be brought and then convenes the court-martial.

- recent Supreme Court Rulings reveal that the current military death penalty scheme is unconstitutional.

Numerous other unresolved legal questions and legitimate criticisms of the military justice system warrant clemency.

Statements of Facts and History of this Case.

The government's evidence at trial focused on a four-day period in December 1988. On December 11, 1988, Dwight Loving, driven in a car by his girlfriend, Nadia Pessina, robbed two 7-Eleven stores in Killeen, Texas. The following day, Loving robbed and killed two taxicab drivers (Christopher Fay and Bobby Sharbino) in separate incidents at Fort Hood and Killeen. In the early morning hours of December 13, 1988, Loving robbed and attempted to kill a third cab driver, Howard Harrison, in Killeen.

After rejecting Loving's offer to plead guilty in exchange for a sentence of life imprisonment, the convening authority referred Loving's charges to a general court-martial. On March 27, 1989, following voir dire, a court-martial panel composed of eight male officer members (seven white and one black) was selected. On March 28-31, 1989, Loving was tried and convicted of attempted murder, premeditated murder, felony murder, and four specifications of robbery, in violation of U.C.M.J. articles 80, 118, and 122, 10 U.S.C. §§ 880, 918, and 922 (1982), respectively.

Following the presentation of evidence in sentencing on March 31, April 1, and April 3, 1989, the panel members announced that three aggravating factors were proven beyond a reasonable doubt: (1) the premeditated murder of Bobby Gene Sharbino was committed during the commission of a robbery; (2) the accused was the "actual perpetrator" of the felony murder of Christopher Fay;

and (3) the accused was found guilty of premeditated murder and a second murder in the same case.[4] Loving was then sentenced to death, a dishonorable discharge, and forfeiture of all pay and allowances. The convening authority approved the sentence as adjudged.

The Army Court of Criminal Appeals affirmed the findings and sentence on mandatory review.[5] The Court of Appeals for the Armed Forces (CAAF) affirmed the Army Court's resolution of the case.[6] Judge Wiss dissented, however, based on

> two areas that relate to the bedrock for ensuring the fairness of a trial like this – a trial that ultimately may serve as the basis for executing this appellant: selection of and deliberations by court members. The first . . . raises the cancerous possibility that command influence inside the members' deliberation room during their consideration of a sentence so skewed the legally required voting procedures that it undermined the fundamental fairness of those proceedings; two other issues raise the specter of the insidious possibility of racial . . . and gender . . . discrimination infecting the convening authority's selection of the court-members who ultimately tried appellant. . . . As to each of these issues, therefore, I am compelled to dissent from the majority opinion.[7]

The United States Supreme Court granted certiorari and, on June 3, 1996, affirmed.[8] Four members of the Court, however, noted that "when the punishment may be death, there are particular reasons to ensure that the men and women of the Armed Forces do not by reason of serving their country receive less protection than the Constitution provides for civilians" and noted that the question of

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[4]*Loving v. Hart*, 47 M.J. 438, 440 (1998).

[5]*United States v. Loving*, 34 M.J. 956, *recon. denied*, 34 M.J. 1065 (A.C.M.R. 1992).

[6]*United States v. Loving*, 41 M.J. 213 (1994), *modified on reconsideration*, 42 M.J. 109 (1995).

[7]*Id.* at 310 (Wiss, J., dissenting).

[8]*Loving v. United States*, 517 U.S. 748 (1996).

whether a "service connection" must be found in order for the military to try capital cases was still an open question.[9]

On August 23, 1996, Loving filed a Petition for Extraordinary Relief in the Army Court of Criminal Appeals arguing that because he was convicted of felony murder pursuant to U.C.M.J. Article 118(4), and because the aggravating circumstance was that he was the "actual perpetrator" in that felony murder (R.C.M. 1004(c)(8)), neither of which includes any element of an intent to kill, his sentence of death is incompatible with the Eighth Amendment. The Army Court denied relief on September 9, 1996. CAAF granted review and affirmed on February 26, 1998.[10]

On August 11, 1997, while the writ appeal was pending before CAAF, Loving also filed a Petition for Reconsideration out of time based on the court's decision in *United States v. Thomas*.[11] This petition was denied on February 26, 1998, with Judge Effron dissenting "[i]n view of the unresolved questions regarding unlawful command influence during the sentencing proceeding."[12]

Following notice that The Judge Advocate General intended to initiate this Article 71 review process, on September 8, 1998, Loving's counsel wrote to the Secretary of Defense asking that a process actually be established before the process began. On September 10, 1998, Loving submitted a Request for Abeyance or Recommendation of Commutation of Death Sentence Under U.C.M.J. Article 71 to The Judge Advocate General and again asked that a process be established before beginning the process. The request for a process was reiterated to The Judge Advocate General's

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[9] *Id.* at 774 (Stevens, J., with whom Souter, J., Ginsburg, J., and Breyer, J., joined, concurring).

[10] *Loving v. Hart*, 47 M.J. 438, *cert. denied*, 525 U.S. 1040 (1998).

[11] 46 M.J. 311 (1997).

[12] *Loving v. Hart*, 47 M.J. at 459-60 (Effron, J., concurring in part and dissenting in part).

advisers in the Criminal Law Division in a letter submitted by Loving's counsel on February 23, 1999.

On January 2, 2001, Loving filed a Motion for Leave to File a Petition for Reconsideration Out of Time and Petition for Reconsideration in CAAF based on the intervening decision of the United States Supreme Court in *Williams v. Taylor*.[13] On March 30, 2001, the court granted leave to file out of time but denied reconsideration.[14]

On March 24, 2003, more than four years after Loving requested notice of the process for the Article 71(a) proceedings and an opportunity to respond and participate at each level, Loving's counsel received a letter from The Judge Advocate General's adviser that Loving would not be notified of, or allowed to participate in, the process to be used. Counsel was also notified that the case would be forwarded to the Secretary of the Army after April 14, 2003.[15]

On April 15, 2003, Loving petitioned CAAF for a writ of error coram nobis. In this petition, Loving asserts that the United States Supreme Court's decisions in *Ring v. Arizona*[16] and *Apprendi v. New Jersey*[17] reveal that Loving's death sentence is invalid. CAAF ordered the government to

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[13]529 U.S. 362 (2000).

[14]*Loving v. United States*, 54 M.J. 459 (2001), *cert. denied*, 534 U.S. 949 (2001).

[15]This notice by The Judge Advocate General noticeably coincided with the allegations against Sergeant Hasan K. Akbar. Akbar is accused of premeditated murder, 17 specifications of attempted murder, and misbehavior as a sentinel for his alleged actions in attacking officers' tents during Operation Iraqi Freedom on March 23, 2003.

[16]122 S. Ct. 2428, 2443 (2002).

[17]530 U.S. 466 (2000).

respond to Loving's assertions by May 15, 2003. The government requested and was granted an extension until June 16, 2003. This action is still pending.

Reasons for Commutation

I. The Military Death Penalty for Peacetime Non-Military Offenses Does Not Promote Justice and Is Unnecessary to Promote Good Order and Discipline in the Military Establishment.

The National Institute of Military Justice, a private nonprofit organization dedicated to the fair administration of military justice, formed a Commission to review the adequacy of the Uniform Code of Military Justice during the commemoration of the U.C.M.J.'s 50th anniversary. The Commission was chaired by The Honorable Walter T. Cox, III.[18] The Commission recommended further study of "whether the modern military needs a death penalty, particularly during peacetime."[19] We submit that the modern military does not need a death penalty for nonmilitary, peacetime offenses and that the system is better served without it.

"The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[20] The use of capital punishment for nonmilitary, peacetime offenses does not accomplish these purposes anymore so than life sentences.

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[18]Judge Cox was formerly the Chief Judge of the United States Court of Appeals for the Armed Forces. He participated in the appellate review of a number of military death penalty cases, including Loving's. He now serves as a Senior Judge.

[19]Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice, May 2001 ("Cox Commission Report") at sec. III.C. A copy of the report, available from http://www.nimj.com, is provided at Attachment 1.

[20]*Preamble to Manual for Courts-Martial*, at para. 3.

Moreover, the use of capital punishment for nonmilitary, peacetime offenses is not in keeping with the purpose of military justice and the traditions of military justice in this country.

From the beginning of this nation, nonmilitary capital offenses were withheld from military jurisdiction. In the American Articles of War of 1775, military jurisdiction was strictly limited to military offenses or offenses which were prejudicial "to good order and discipline." Desertion in combat and betraying the password to the enemy were the only capital offenses.[21] Military justice was designed to enforce discipline as needed, but was restricted in a way to "reflect the plain purpose to confine the scope of courts-martial jurisdiction to the trial and punishment of military offenses."[22] In 1776, the Articles were revised "with a single end in view, military discipline,"[23] and the number of purely military capital offenses was increased to fourteen.[24]

The first time that Congress expanded military jurisdiction and allowed the military to try service members for civilian offenses regardless of whether they were capital or noncapital and regardless of prejudice to good order and discipline was in 1863. Because of the disruption caused by the Civil War many civil courts in the South were closed, so Congress, on March 3, 1863, authorized

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[21]Grant W. Nelson & James E. Westbrook, *Court-Martial Jurisdiction Over Servicemen for "Civilian" Offenses: An Analysis of O'Callahan v. Parker*, 54 Minn. L. Rev. 1, 13 n.7 (1969).

[22]Robert D. Duke & Howard S. Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 Vand. L. Rev. 435, 445 (1960)

[23]Lieutenant Keith J. Allred, Comment, *Rocks and Shoals in a Sea of Otherwise Deep Commitment: General Court-Martial Size and Voting Requirements*, 35 Nav. L. Rev. 153, 157 (1986).

[24]The capital offenses were: mutiny, failure to suppress a mutiny, desertion, false alarms, violence to traders, cowardice, misbehavior before the enemy, casting away arms, imparting the watchword to persons not entitled to receive it, forcing a safeguard, relieving the enemy, holding correspondence with the enemy, leaving one's post or the colors in search of plunder, and forcing surrender. Allred at 158 n.40.

the military to try soldiers for purely civil offenses, including the capital offenses of murder and rape, "in time of war, insurrection, or rebellion."[25] The Supreme Court interpreted this provision to mean that the military had jurisdiction to try these purely civil offenses only when, "as a result of the existence of martial law or military operations, the courts of the state were not open, and military power was therefore needed to enforce the state law."[26] The Court held, therefore, that the statute had no application when "the civil courts were open and in the undisturbed exercise of its jurisdiction."[27]

In 1916, Congress provided that murder and rape were punishable by death in a court-martial, but provided that "no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace."[28] In 1950, in the Uniform Code of Military Justice, Congress finally extended the military's jurisdiction to try service members for murder and rape within the geographical limits of the United States during peacetime.[29]

While the courts-martial process was originally designed to enforce discipline and ensure military readiness, capital punishment has not been used in modern times for military offenses. The United States military executed 160 service members from 1930 to 1961. Of these executions, 53 were for rape without murder, 106 were for murder (21 of which also involved rape), and only one

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[25]*Lee v. Madigan*, 358 U.S. 228, 233 (1959); *Coleman v. Tennessee*, 97 U.S. 509, 513 (1878) (quoting 12 Stat. 736).

[26]*Caldwell v. Parker*, 252 U.S. 376, 386 (1920).

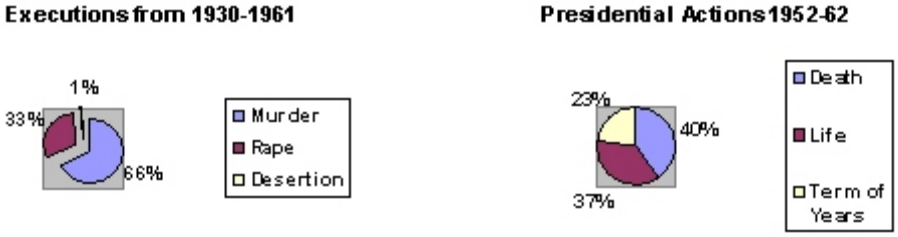
[27]*Id.* (*quoting Coleman*, 97 U.S. at 515).

[28]Articles of War, 1916, art. 92; *see also Kahn v. Anderson*, 255 U.S. 1, 9-10 (1921).

[29]U.C.M.J. arts. 118 & 120(a).

was for desertion.[30] Indeed, Private Eddie Slovik, who was executed for desertion during World War II, is the only person executed for a uniquely military capital offense since the Civil War.[31]

Moreover, in the last decade of actual military executions (1951-1961), the President frequently commuted death sentences to resolve lingering doubts about the appropriateness of the sentence. Specifically, between 1951 and 1961, the President commuted at least 18 death sentences (60%), while approving only 12 (40%).[32] In the cases where the death sentence was commuted, the President commuted the sentence to a term of years on at least seven occasions (four times to 25 years and three times to 55 years) rather than commuting the sentence to the harsher sentence of life imprisonment. In some cases, however, the President commuted the sentence to life imprisonment without possibility of parole.[33]



Since President Reagan instituted the current capital case procedures on August 1, 1984, there have been probably hundreds of death eligible cases. Counsel have been able to document at least 61

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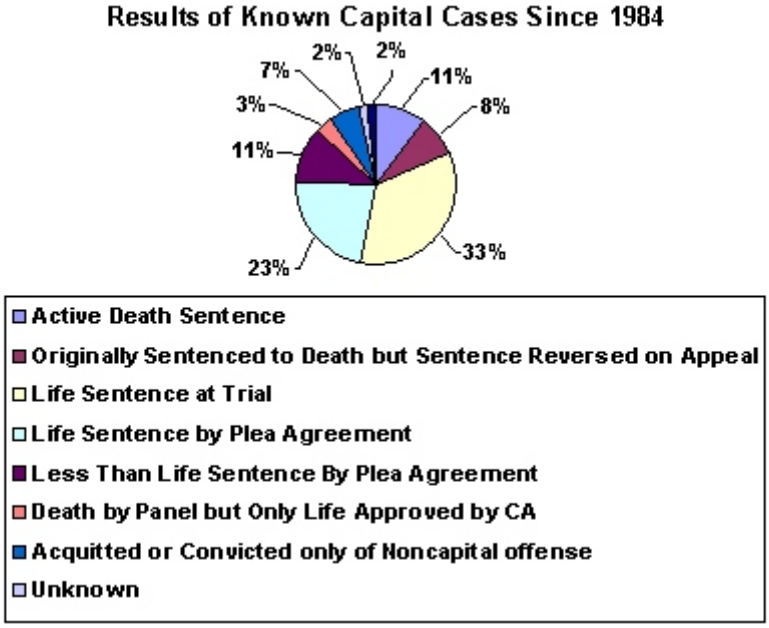
[30]Dwight H. Sullivan, *The Last Line of Defense: Federal Habeas Review of Military Death Penalty Cases*, 144 Mil. L. Rev. 1, 3, n.8 (1994) (citing National Criminal Justice Information and Statistics Service, United States Department of Justice, *Capital Punishment 1977* at 8 (1978)).

[31]William Bradford Huie, *The Execution of Private Slovik*, 12 (1954).

[32]*See* Attachment 2.

[33]*See Schick v. Reed*, 419 U.S. 256 (1974).

cases referred as capital or not referred as capital because of plea agreements or the insistence of a foreign country that the case be tried as noncapital. Nonetheless, only eleven death sentences have been imposed by courts-martial and approved by the convening authority. There are currently six inmates with active death sentences.[34] No service member has been sentenced to death since 1996 when life without parole became a sentencing option.[35]



Given these numbers, clearly capital punishment is not necessary to promote justice, good order and discipline in the armed forces, or efficiency and effectiveness in the military establishment.

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[34]Counsel have been able to document at least 61 capital cases through information contained in published opinions in the Military Justice Reporter and Westlaw and from information provided by appellate defense counsel in the various services. This information is undoubtedly woefully incomplete, but was the best information available to counsel on May 18, 2003. *See* Attachment 3.

[35]Dwight H. Sullivan, Jerry L. Britain, Michael N. Knowlan, and Cheryl Pettry, *Raising the Bar: Mitigation Specialists in Military Capital Litigation*, 12 Geo. Mason U. Civ. Rts. L.J. 199, 204-05 (2002).

Loving has been on death row for fourteen years.[36] His case is nowhere near conclusion because even if his death sentence is approved, he can still seek a writ of habeas corpus in the United States District Court in Kansas. In the event relief is denied in the District Court, Loving would have the option of appealing to the United States Court of Appeals, and again petitioning the United States Supreme Court for review. Approving his death sentence now and possibly executing him years from now after all of these additional proceedings will do nothing to promote military justice. We urge you to commute his sentence to life and to end these proceedings.

II. The Administration of the Death Penalty in the Military Shows Racial Inequities in its Application.

In addition to using capital punishment for nonmilitary offenses, the actual application of capital punishment in the military has also been marred by racial discrimination. Specifically, the military has executed more minorities in the 20th century than it has whites, despite the fact that the vast majority of service members are white.

During World War I, "between April 1917 and June 1919 a total of 35 soldiers, all black, were executed,"[37] despite the fact that blacks composed less than 10% of the population in the United States, and only 13% of military draftees.[38] During World War II, 55 of 70 service members executed in Europe were black. "Nearly 80% of the U.S. Soldiers executed during ETO [European Theater Operations] were African American, although they comprised no more than 10% of the

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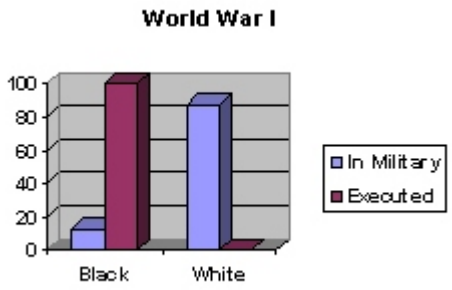
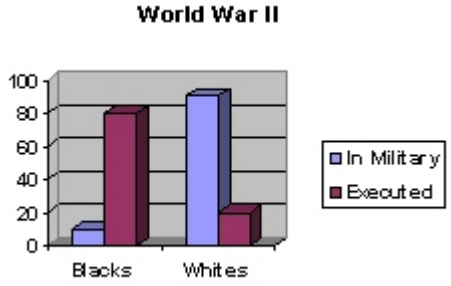
[36]Ronald Gray, whose case is also pending your review, has been on death row even longer.

[37]J. Robert Lilly and J. Michael Thomson, *Executing US Soldiers in England, World War II*, 37 Brit. J. Criminol. 262, 277 (Spring 1997)

[38]Gail Buckley, *American Patriots*, at 165 (2001).

troops."[39] This was during the same time period that, "[i]n some Army camps, black soldiers were forced to sit behind German or Italian POWs for all entertainment, including United Service Organization (USO) shows."[40]





Following World War II, although President Truman ordered integration of the military in 1948, the Army establishment resisted. Integration did not begin in earnest until 1951, in the midst of the Korean Conflict, and was not accomplished until 1953.[41] Although Presidential order and war finally forced integration of the fighting forces, the use of capital punishment continued to be alarmingly discriminatory. Eleven (92%) of the twelve service members executed from 1954 to 1961 were African-Americans,[42] while the percentage of blacks in

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[39]Robert Lilly, *Dirty Details: Executing U.S. Soldiers During World War II*, 42 Crime & Delinquency 491, 493-94 (1996); *see also* Francis X. Clines, *When Black Soldiers Were Hanged: A War's Footnote*, N.Y. Times, Feb. 7, 1993, at 20.

[40]Buckley at 261.

[41]*Id.* at 363.

[42]Robert W. Burns and Herman P. Dennis, Jr., who were hanged on January 28, 1954, were both African-American. *Reporter Tells How Men Died*, Pitt. Courier, Feb. 6, 1954, at 1. Chastine Beverly, Louis M. Suttles, and James L. Riggins were hanged on March 1, 1955. *Soldiers to Death on Gallows*, Leavenworth Times, Mar. 1, 1955, at 1. The Court of Military Appeals noted that all (continued...)

the military during this time frame was approximately 13%.[43] In 1983, before the Court of Appeals for the Armed Forces decided that the military death penalty as applied at that time was unconstitutional,[44] five of the service members on death row were African-American, one was Latino, and only one was white.[45] Since the present military justice system took effect in 1984, eleven capital sentences have been approved by convening

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[42](...continued)
three were African-Americans. *United States v. Riggins*, 2 C.M.A. 451, 456, 9 C.M.R. 81, 86 (C.M.A. 1953). Thomas J. Edwards and Winfred D. Moore were hanged on February 14, 1957; both were African-Americans. *Two Go to Gallows at Military Prison*, Leavenworth Times, Feb. 14, 1957, at 1. Ernest Ransom, executed on April 3, 1957, was African-American. *Hanged for Murder and Rape in Korea*, Leavenworth Times, Apr. 3, 1957, at 1. Abraham Thomas, who was hanged on July 23, 1958, was African-American. *Convicted Soldier is Hanged at Fort*, Leavenworth Times, July 23, 1958, at 1. John E. Day, who was hanged on September 23, 1959, was African-American. *Soldier Dies on Gallows at Army Prison*, Leavenworth Times, Sept. 23, 1959, at 1. John A. Bennett, the last servicemember executed, was also African-American. *Bennett Hanged After Appeal to President is Denied*, Leavenworth Times, Apr. 13, 1961, at 1.

[43]Morris J. MacGregor, Jr., *Integration of the Armed Forces 1940-1965*, Defense Studies Series, Center of Military History, United States Army (1985), available on the internet at http://www.army.mil/cmh-pg/books/integration/IAF-fm.hthm.

[44]*See United States v. Matthews*, 16 M.J. 354 (1983).

[45]NAACP Legal Defense and Educational Fund, *Death Row, U.S.A.*, 598 (Dec. 20, 1983).

authorities and gone on for further review.[46] Five of these service members' death sentences were reversed on appeal; six remain on military death row.[47]

As of January 1, 2003, 45% of death row inmates across the country were white.[48] While this percentage is alarming since whites make up the majority of this country, the military's record is the worst in the country. Specifically, of the eleven individuals sentenced to death since 1984, nine (82%)

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[46]*United States v. Dock*, 26 M.J. 620 (A.C.M.R. 1988), *aff'd*, 28 M.J. 117 (1989) (setting aside death sentence due to impermissible pleas of guilty); *United States v. Loving*, 41 M.J. 213 (1994) (affirming death sentence); *United States v. Thomas*, 46 M.J. 311 (1997) (setting aside death sentence due to instructional error); *United States v. Curtis*, 46 M.J. 331 (1997) (setting aside death sentence due to ineffective assistance of counsel); *United States v. Simoy*, 50 M.J. 1 (1998) (setting aside death sentence due to instructional error); *United States v. Murphy*, 50 M.J. 4 (1998) (setting aside death sentence due to ineffective assistance of counsel); *United States v. Gray*, 51 M.J. 1 (1999) (affirming death sentence); *United States v. Walker*, No. 9501500 (pending before Navy-Marine Court of Criminal Appeals); *United States v. Parker*, No. 9501607 (pending before Navy-Marine Court of Criminal Appeals); *United States v. Kreutzer*, No. 9601044 (pending before Army Court of Criminal Appeals); *United States v. Quintinalla*, No. 9801632 (pending before Navy-Marine Court of Criminal Appeals).

[47]Todd Dock, Joseph Thomas, Ronnie Curtis, and Jose Simoy were sentenced to life in prison after further proceedings. *United States v. Dock*, 40 M.J. 112, 113 n.1 (1994); Wing General Court-Martial Order No. 6-99, Record, *United States v. Thomas* (No. 8901289); *United States v. Curtis*, 1998 CCA Lexis 493 (N-M. Ct. Crim. App. Nov. 30, 1998), *aff'd*, 52 M.J. 166 (1999); *United States v. Simoy*, 2000 WL 1050025 (A.F. Ct. Crim. App. July 7, 2000). James Murphy's case is still pending for either a new trial on sentence or commutation to life imprisonment. *United States v. Murphy*, 56 M.J. 642 (Army Ct. Crim. App. 2001).

[48]NAACP Legal Defense Fund, *Death Row U.S.A.*, at 1,7 (Winter 2002).

were minorities.[49] Of the six that remain on death row, five are minorities, which means that the military death row has the highest percentage of minorities (83%) of any death row in the country,[50] and is almost three times the percentage of minorities in the military.[51] The military death row also reflects a second racial disparity: every servicemember on the military death row was convicted of killing a white person.

Loving's case fits the classic pattern of racial disparity that troubled the Cox Commission.[52] He is black, the two murder victims were white. The attempted murder victim and all of the robbery victims were white. And an important witness, who trial counsel also alleged was Loving's accomplice in these offenses (although she was never charged with any offense), was a married white female with whom he was involved in a sexual affair at the time of his crimes.

As discussed below at pages 21-22, this case is also a shining example of racial and gender disparity in the selection of panel members, which is routine in military capital cases. Loving was sentenced to death by an all-male officer panel with seven white members and only one black member. The other minorities presently on death row have fared no better in achieving a racial and gender cross-section of court-martial members. Only 11% of the panel members have been

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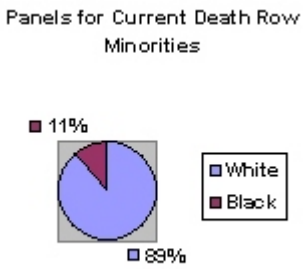
[49]Ronnie Curtis, Ronald Gray, James Murphy, Dwight Loving, Wade Walker, and Kenneth Parker are black. Jose Simoy and Jessie Quintanilla are Pacific Islanders.

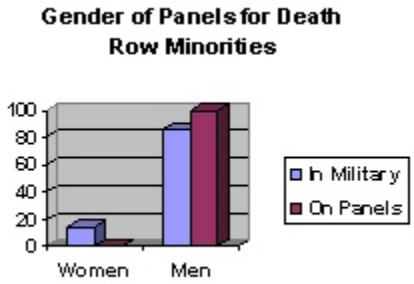
[50]*Death Row, U.S.A.* at 24..

[51]At present, blacks represent 13% of the U.S. population and 20% of all military personnel. Thomas Hargrove, *Study: 20 percent of War Deaths are Black*, The Standard-Times (Apr. 12, 2003). Other minorities make up approximately 14% of military personnel. *See* http://www.defenselink.mil/pubs/almanac/people/minorities.html.

[52]Cox Commission Report sec. III.C.

minorities.[53] Like Loving's panel none of these panels included any female members, despite the fact that women compose approximately 15% of military personnel.[54]





The military has moved away from its racist past in areas outside of capital punishment. As one commentator noted, during Desert Storm, under President George Bush, the all volunteer force was integrated[55] and had blacks in leadership positions from General Colin Powell, chairman of the Joint Chiefs of Staff, on down.[56] "The uniform had no race or gender; green was the great equalizer. . . ."[57] This modern military tradition continued through the 1990's when amends were made for much of the military's racist past, including recognition of wrongful prosecutions of black soldiers, including the Tuskegee Airmen and Henry Flipper, West Point's first black graduate. Black soldiers

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[53]Ronald Gray was tried by a panel composed of five white members and one black member. Kenneth Parker was tried by an all-white panel of eight members. Jessie Quintanilla was tried by a panel composed of ten white members and two black members. Wade Walker was tried by a panel composed of nine white members and one black member.

[54]*See* http://www.womensenews.org/article.cfm?aid=1265.

[55]During Desert Storm, blacks comprised 12 percent of the U.S. population, but 20 percent of the U.S. troops in the Gulf. Buckley at 433.

[56]Buckley at 433.

[57]*Id.* at 434.

that had wrongfully been denied the Medal of Honor during World War I and World War II have now been officially recognized.[58]

The time has now come to eliminate the last racist vestige from the military by eradicating the cloud of racism that overshadows the military's use of the death penalty. Loving's death sentence should be commuted to life.

III. In Light of Recent Legislation, Loving's Death Sentence Cannot Be Approved Without Discriminating Between Him and Those Proceeding to Trial in a Capital Courts-Martial Now.

The Cox Commission Report recommended "immediate action" to address the problem areas of court-martial practice and procedure it identified. At the time of the report in May 2001, the Commission found that the military was the *only* United States jurisdiction that permitted a jury of less than twelve persons to condemn a person to death. The Cox Commission Report called this feature of military law "an anomaly that corrupts the legitimacy of both panel selection and the verdict itself."[59]

Following the Cox Commission Report, Congress passed legislation requiring 12-member panels in military capital trials for offenses committed after December 31, 2002. The President signed that legislation on December 28, 2001.[60] This new law will not, however, apply to Loving, who was tried and sentenced to die by a panel composed of only eight members in April 1989.

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[58] *Id.* at 479-83.

[59] Cox Commission Report at sec. III.C.

[60] *See* National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 582, 115 Stat. 1124-25 (2002).

Executing Loving despite Congress' and the President's action to correct the inherent unfairness of a reduced panel would be a major affront to justice and our nation's commitment to a fair military justice system. Fairness and due process demand more.[61] Equal protection also demands equal treatment for Loving. His death sentence should, therefore, be commuted to life imprisonment.

IV. The Cox Commission Report Reveals Numerous Shortcomings in The Military Justice System That, in the Context of this Capital Case, Amount to Fundamental Unfairness and Require That Loving's Sentence Be Commuted to Life Imprisonment.

"A civilian trial . . . is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice."[62] As one commentator summed it up, the military justice system "was never so much a system of criminal justice as it was a tool of command, which had as its primary function the enforcement of discipline in the armed forces."[63]

Although military justice was dramatically improved in 1950 with the U.C.M.J., which has been amended a number of times, at least one commentator has argued that "the U.S. military justice system . . . no longer meets the standards which today define due process and fundamental fairness."[64] The

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[61]The Supreme Court has long recognized the due process protections afforded by a twelve member jury as opposed to smaller juries. *Ballew v. Georgia*, 435 U.S. 223, 235 (1978).

[62]*O'Callahan v. Parker*, 395 U.S. 258, 266 (1969), *overruled by Solorio v. United States*, 483 U.S. 435 (1987).

[63]Kevin J. Barry, *A Face Lift (And Much More) for an Aging Beauty: The Cox Commission Recommendations to Rejuvenate the Uniform Code of Military Justice*, 2002 L. Rev. Mich. St. U. Det. C.L. 57, 58 (2002).

[64]*Id.* at 60.

criticisms of the Cox Commission confirm this view. The commission found that the military justice system has failed to keep abreast of important developments in the civilian criminal justice system.

In the half century since the promulgation of the U.C.M.J., "military justice in the United States has stagnated, remaining insulated from external review and largely unchanged despite dramatic shifts in armed forces demographics, military missions, and disciplinary strategies." Notably, "the U.C.M.J. has failed to keep pace with the standards of procedural justice adhered to not only in the United States, but in a growing number of countries around the world."[65]

In addition to the concerns about the need for capital punishment in the modern military, racial disparity on death row, and the size of the court-martial panel, the Cox Commission Report highlights the following issues, each of which is a compelling ground for commuting Loving's sentence to life imprisonment:

- "[T]he far-reaching role of commanding officers in the court-martial process remains the greatest barrier to operating a fair system of criminal justice within the armed forces."[66] The actions of the convening authority at several stages of Loving's trial show the problems that so troubled the Cox Commission and cast into serious doubt the fundamental fairness of the proceedings against him.

- "Inadequate [defense] counsel is a serious threat to the fairness and legitimacy of capital courts-martial" and "[t]he current system of providing and funding defense counsel" is inadequate.[67] These concerns are clear in Loving's case.

To execute Loving in the face of the Commission's findings and conclusions would be possible only by ignoring these serious concerns and abandoning any genuine commitment to the idea that the administration of the death penalty in the military must be free from error.

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[65]Cox Commission Report at sec. I.

[66]*Id.* at sec. III.A.

[67]*Id.*

Even in other contexts, such criticisms and concerns might well make compelling grounds for clemency. In a death penalty case, they are a clarion call to stop a potential miscarriage of justice. To proceed with an execution, when the fundamental fairness and justness of the system that handed down the sentence is under pointed and authoritative criticism, would create the appearance, at least, of unseemly haste and would suggest either a prejudgment of the very serious issues that have been raised about this system, or an utter, unjustifiable lack of concern with whether those issues have merit. Loving's execution must not be allowed in the face of a growing consensus that the military capital punishment system, as presently administered, is fundamentally defective and unfair. His death sentence should be commuted to life imprisonment.

A. The Scope of The Convening Authority's Powers Under the U.C.M.J. Is Inconsistent With Due Process, Is an Invitation to Corruption of The System, And Was Apparently Exercised in a Biased Manner in This Case.

Concurring with its many witnesses, the Cox Commission found that "the far-reaching role of commanding officers in the court-martial process remains the greatest barrier to operating a fair system of criminal justice within the armed forces. . . . [C]ommanding officers still loom over courts-martial, able to intervene and affect the outcomes of trials in a variety of ways."[68] The members of Loving's court-martial were, as in all such trials, selected by the convening authority. The Cox Commission Report is unsparing in its condemnation of this practice: "There is no aspect of military criminal procedures that diverges further from civilian practice, or creates a greater impression of improper influence, than the antiquated process of panel selection. The current practice

[68] *Id.*

is an invitation to mischief."[69] The selection of the persons who determined Loving's culpability – and who also sentenced him to death – by the same authority that ordered the investigation and prosecution of Loving was an example of, in the Report's forthright words, "a practice that creates . . . a strong impression of, and opportunity for, corruption of the trial process by commanders and staff judge advocates."[70]

The invitation to abuse of powers raised in the Cox Commission Report is all too apparent in this case both in the initial selection of the panel members and the subsequent conduct of the hand-picked panel members.

1. Racial and Gender Discrimination in the Selection of the Panel.

Loving is black. All of his victims were white. In late December 1988, the Staff Judge Advocate of the 1st Cavalry Division recommended to the Convening Authority that a standing General Court-Martial Panel be selected to sit from January 15 through mid May 1989. The nomination sheets for that panel reflected a cross section of the military community at Fort Hood and contained racial and gender identifiers. The Convening Authority selected a panel that had two African American members, one of whom was the senior member.[71] In early January 1989, the Staff Judge Advocate recommended that this panel be replaced in Loving's case. On February 14, 1989, nomination sheets for the new panel were forwarded to the Convening Authority. The sheets included racial and gender identifiers and reflected a gross underrepresentation of African Americans and females. From these sheets the Convening Authority selected an all-white, all-male officer

[69] *Id.*

[70] *Id.*

[71] CMCO #1.

panel.[72] After the defense objected, without explanation, the Convening Authority replaced one of the white panel members on CMCO #4 with an African American member.[73] Loving was ultimately convicted and sentenced by this officer panel which, after excusals and challenges, included seven white males and one African-American male.

On appeal, the Court of Appeals for the Armed Forces rejected Loving's arguments that these facts fostered questions of racial and gender discrimination in the court-martial selection process and that an evidentiary hearing should be conducted to answer these questions. Judge Wiss dissented, however, based on the "specter of the insidious possibility of racial and gender discrimination infecting the convening authority's selection of the court-members. . . ."[74] He concluded that Loving was entitled to an evidentiary hearing and that "[a]nything short of such action tolerates not only a conviction but likely an execution of a human being under an unresolved cloud of suggested purposeful racial and gender discrimination."[75]

Despite Judge Wiss' observations and the truth of his statements, the "cloud of suggested purposeful racial and gender discrimination" remains unresolved in this case. The facts of Loving's case raise the appearance of impropriety at best and shameful, blatant racial and gender discrimination at worst. Loving's death sentence should be commuted to life imprisonment to remove this "cloud."

2. The Court-Martial Panel's Illegal Voting Procedures.

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[72]CMCO #4.

[73]CMCO #8.

[74]*Loving*, 41 M.J. at 310 (Wiss, J., dissenting).

[75]*Id.* at 325.

In order to adjudge a sentence of death, the members must follow the voting procedures set forth in R.C.M. 1004 and R.C.M. 1006. Under R.C.M. 1004, the members must first vote by secret written ballot on each alleged aggravating factor. "Death may not be adjudged unless all members concur in a finding of the existence of at least one such aggravating factor."[76] If at least one aggravating factor is found, under R.C.M. 1006(c), "[a]ny member may propose a sentence" in writing. The junior member collects the proposed sentences and submits them to the senior member ("the President"). The voting is then conducted by secret written ballot, "beginning with the least severe and continuing, as necessary, with the next least severe, until a sentence is adopted."[77] The junior member collects and counts the votes and the President checks the count and announces the result.[78] A death sentence must be by unanimous vote and a sentence to life imprisonment requires a consensus of three-fourths of the members.[79]

During mandatory review by the Court of Appeals for the Armed Forces, Loving submitted affidavits of three of the eight panel members as proof that the court-martial panel did not follow proper voting procedures in sentencing him to death. The President of the panel and two of the remaining members stated in sworn affidavits that they did not follow the voting procedures required by the Rules for Court-Martial.

Specifically, the panel did not vote at all on the aggravating factors. The members did not propose sentences because the President of the panel understood the military judge's instructions to

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[76]R.C.M. 1004(b)(7).

[77]R.C.M. 1006(d)(3)(A).

[78]R.C.M. 1006(d)(3)(B).

[79]R.C.M. 1006(d)(4)(A) & (B).

mean that it was either life or death and there were no other options. Because there were no proposals, the members did not begin voting with the least severe sentence. Rather, the panel took an either/or vote writing on their secret ballots "life" or "death." Finally, the panel's first vote was seven for death and one for life. Because it was non unanimous, the panel took another vote after more discussion – again voting on life and death at the same time – and reached a unanimous sentence of death.[80] All of these "procedures" violated the instructions the panel was given on how voting was to be conducted.[81]

Despite the evidence before the court, the majority of the Court of Appeals for the Armed Forces declared that "the affidavits are ambiguous at best,"[82] while Judge Wiss in dissent declared that the affidavits were better described as "ambiguous at *least*."[83] Regardless of the question of ambiguity, the court, with Judge Wiss dissenting, concluded that the affidavits were not admissible evidence and would not consider them based on Military Rule of Evidence 606(b).[84]

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[80]*Loving*, 41 M.J. at 331-33 (Appendices) (Affidavits of Colonel Aylor, Captain Williams, and Major Napoli).

[81]R. at 1885.

[82]*Loving*, 41 M.J. at 235.

[83]*Id.* at 313 (Wiss, J., dissenting).

[84]Military Rule of Evidence 606(b) provides, in relevant part:

> Upon an inquiry into the validity of the findings or sentence, a member may not testify as to any matter or statement occurring during the course of the deliberations of the members of the court-martial or, to the effect of anything upon the member's or any other member's mind or emotions as influencing the member to assent to or dissent from the findings or sentence or concerning the member's mental process in connection therewith, except that a member may testify on the question whether extraneous prejudicial information was improperly brought to the attention of the

(continued...)

While the court refused to consider the evidence, the affidavits should be considered by the Secretary of the Army and by the President. The affidavits reveal that the President of the court-martial panel, Colonel Aylor, exercised improper command influence in this case. Indeed, despite having received instructions on the appropriate procedural methods for deliberation, the panel – according to all three affidavits – deviated from the appropriate sentencing procedures no less than six times.[85] The procedural deviations "occurred as a result of the unilateral imposition by the senior-ranking member of the court-martial of a procedure that differed markedly" from the instructions given to the panel.[86] Despite this fact, the court failed to consider these affidavits in light of the procedural aspects of "the military sentencing reality" discussed in its opinion in *Thomas*,[87] which has resulted in an anomalous "legal" result.

In *Thomas*, the military judge improperly instructed the panel members that they were to vote on the option of death first. Despite the lack of evidence before the court on the issue of whether the panel members *actually* followed the instructions and *actually* voted improperly on death first, the court granted relief in *Thomas*. In this case, however, Loving *has proven* in the only way possible – through panel member affidavits – that his sentencing panel did exactly what was only feared in *Thomas*. Yet, Loving was denied relief despite *actual proof*, while Thomas was granted relief only

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[84](...continued)
members of the court-martial, whether any outside influence was improperly brought to bear upon any member, or whether there was unlawful command influence....

[85]*Loving*, 47 M.J. at 458 (Effron, J., dissenting).

[86]*Loving*, 41 M.J. at 314 (Wiss, J., dissenting).

[87]46 M.J. at 314.

because of the fear that the panel had followed improper procedure based on the military judge's instructions.

Following *Thomas*, the court declined further review of this issue in Loving's case. In doing so, as Judge Effron observed in his dissent from the denial of reconsideration, the court ignored its own precedent which requires further review when panel member affidavits simply raise "the potential for command influence."[88]

The courts may or may not ultimately resolve this legal issue in Loving's favor, but his death sentence should certainly be commuted because of the illegality of the proceedings in which he was sentenced to death. While the court system, applying technical legal evidentiary rules, may have avoided the force of the panel member affidavits, the Secretary of the Army and the President of the United States should not do so. Approval of a death sentence returned by a court-martial panel that ignored all the procedural safeguards in the system due to command influence would be a miscarriage of justice and an embarrassment to the military institution. Approval of a death sentence returned by a court-martial panel that ignored all the procedural safeguards in the system due to confusion of the senior ranking member (without the intention to engage in command influence) would be no less a miscarriage of justice and an embarrassment to the military institution.

If the military is to begin executing its own again after 42 years without an execution, it should certainly be done only in a case where the members have followed the prescribed procedure (or at least where the members have not publicly acknowledged their failure to do so). Loving's sentence should be commuted to life.

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[88] *Loving*, 47 M.J. at 458 (Effron, J., dissenting) (citing *United States v. Accordino*, 20 M.J. 102, 105 (1985).

3. *Conclusion.*

If, as the Cox Commission Report states, the convening authority's presently broad powers are fundamentally "unacceptable in a society that deems due process of law to be the bulwark of a fair justice system,"[89] then it must be unacceptable to allow the execution of Loving to proceed when his death sentence was handed down under the same system that the Report has so sharply cast into question. This is especially true when it is apparent that the system, even if just to begin with, failed to protect Loving's constitutional rights and the members ignored the instructions they were given.

B. The System of Appointing Capital Defense Counsel in The Military Is Inadequate.

The American Bar Association (ABA) and the National Legal Aid and Defender Association (NLADA) have established guidelines for the appointment of counsel in capital cases. The NLADA Standards[90] recommend that counsel appointed as lead trial counsel, in addition to other qualifications, have "prior experience as lead counsel or co-counsel in at least one case in which the death penalty was sought," and "a training or educational program" on capital defense within one year prior to appointment. With respect to lead appellate counsel, the NLADA Standards and the ABA Guidelines recommend requirement of at least three years experience in criminal defense, "prior experience . . . as lead counsel or co-counsel" in a capital appeal, and "a training or

[89]Cox Commission Report sec. III.A.

[90]The National Legal Aid and Defender Association, Standards for the Appointment and Performance of Counsel in Death Penalty Cases at Standard 5.1(II) (1988).

educational program" on capital defense prior to appointment.[91] Congress has also established minimum standards for defense attorneys in federal death penalty cases.[92]

Despite Congress' action and the NLADA and ABA guidelines, the military has no established minimum standards for appointment of counsel in capital cases. Qualifications aside, the military system is also inadequate to provide competent counsel because of the "ungoverned revolving door of defense counsel," due to the constant and frequent professional rotations of military officers.[93]

On this issue, the Cox Commission Report was blunt: "The current system of providing and funding defense counsel shortchanges accused servicemembers who face the ultimate penalty."[94] The Report's conclusions recognize that very "few military lawyers have experience in defending capital cases" and, because of the "diversity of experience" and constant rotation of military personnel, military attorneys are "unable to develop the skills and experience necessary" to adequately represent death-sentenced inmates. Dwight Loving's attorneys have been no exception.

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[91]The American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases at Guideline 5.1(II) (1989) was worded identically to the NLADA standards. The ABA Revised Guidelines (February 2003) are now worded in terms of "demonstrated skills" as opposed to years of licensure and numerical trial or appellate experiences, but the requirements are similar and still require a "comprehensive training program" in capital defense prior to appointment.

[92]21 U.S.C. § 848(q)(5)-(7). A number of state courts have also established minimum standards for appointment of qualified defense counsel in capital cases.

[93]*Loving*, 41 M.J. at 327 (Wiss, J., dissenting).

[94]Cox Commission Report sec. III.C.

Loving's trial defense counsel, with less than five months from Loving's arrest to the beginning of his court-martial, had not previously represented a capital defendant and did not have any capital training prior to appointment.

On appeal, as Judge Wiss summarized, there were seven different appellate counsel assigned to represent Loving at various times while this case was pending in the Army court. Captain Ralph Gonzales was initially detailed as lead counsel. By the time the initial brief was filed, Captain Kevin Lovejoy was lead counsel. While the government was preparing their response, Captain Michael Couglin was lead counsel for a period of time. By the time of oral argument, Captain Emmet Wells was lead counsel. As Judge Wiss summarized, when the oral argument was scheduled, Wells had not even read the record of trial.[95] He had not attended capital training, conducted any investigation, or even met with Loving. He ended up even filing an ineffective assistance of counsel claim against himself in the Petition for Reconsideration filed in the Army court on February 24, 1992.

As Judge Wiss noted, the "chaos continued" during Loving's proceedings at CAAF, when a new lead counsel, Captain Teresa Norris (now Loving's civilian counsel),[96] and three other counsel that had not been involved in the proceedings in the Army court, represented Loving. Wells had departed from the Defense Appellate Division suddenly leaving the undersigned with "two large

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[95]*Loving*, 41 M.J. at 327-28 (Wiss, J., dissenting).

[96]The undersigned counsel left active duty in November 1994 and has continued to represent Loving *pro bono* in order to at least provide continuity of representation. Since that time, Loving had a detailed counsel to assist in petitioning CAAF for reconsideration in late 1994 and a different detailed counsel to assist in representing Loving in the United States Supreme Court in 1995. Since 1995, Loving has not had specific detailed military counsel, but has periodically received assistance from the Chief of the Army Defense Appellate, of which there have been four since November 1994.

boxes of disorganized files with a good luck note attached thereto."[97] Judge Wiss further summarized:

> all three of these newly appointed counsel were "woefully underqualified to represent an accused in a capital case." . . . Indeed, appellant's lead counsel in this Court had no legal experience prior to entering the Army; was assigned directly out of the JAG basic class to the Defense Appellate Division; and little more than 1 year later was assigned as lead appellate counsel in this capital case, without having the benefit of trying a single case in a civilian or military courtroom. Ruefully, the backgrounds of the other two are no more substantial. The disadvantage to which this lack of training and experience put this defense team – brand new, with no continuity at all from prior counsel – is palpable.[98]

While it is difficult to assess specific prejudice to Loving from these circumstances, "the untoward picture of our appellate system" is clear.[99]

If Loving's execution is approved, the chaos with respect to representation provided by the military will only continue due to the military's consistent lack of concern for resolving the problems.[100] Specifically, Loving has been notified that he is entitled to detailed military counsel in federal habeas corpus proceedings. No attorney assigned to the Army Defense Appellate Division or the Trial Defense Service has any experience at all in federal habeas proceedings. While a few

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[97] *Loving*, 41 M.J. at 328 (Wiss, J., dissenting).

[98] *Id.*

[99] *Id.* at 329.

[100] An example of the Army's refusal to recognize and resolve the problems is found in the appointment of military counsel for federal habeas proceedings. In 1996, the ABA recommended that military death-sentenced inmates be provided with "the same opportunity for the assistance of counsel in seeking federal post-conviction relief as is now provided by federal law for persons sentenced to death in the civilian courts of this country." The military responded with the inadequate provision for military counsel. Barry at 110 n.190.

attorneys in these divisions may have minimal experience with current capital cases, those attorneys will likely rotate to new duty positions in approximately one year or less.

While any legal claim may escape judicial review because of the need to prove specific prejudice,[101] the President and the Secretary of the Army should not ignore "the failure" of the system to provide competent counsel and at least some "continuity that assures the client competent representation. . . ."[102] Given the constant failure of the military system to provide competent and continuous counsel to Loving, his sentence should be commuted to life imprisonment. Execution of a defendant represented at all stages of his proceedings by military counsel not qualified under any objective guideline such as the NLADA and ABA standards will bring no honor to the justice system and no guarantee of a just outcome.

V. The Death Sentence Should Be Commuted Because of Other Significant Issues Casting a Shadow on the Fairness and Legality of the Proceedings in Which Loving Was Sentenced to Death.

Aside from the specific concerns about the fairness of the military death penalty scheme addressed in the Cox Commission Report, the Commission recommended extensive review of the question "whether the modern military needs a death penalty, particularly during peacetime."[103] In addition to considering this question, which is appropriate here, the President and the Secretary of the Army should also consider other troubling aspects of the proceedings in which Loving was sentenced to death. Such a review will reveal that there are numerous other questions of fairness and

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[101] *See Bell v. Cone*, 535 U.S. 685, 122 S. Ct. 1843 (2002)

[102] *Loving*, 41 M.J. at 326 (Wiss, J., dissenting).

[103] Cox Commission Report at III.C.

legality, and inconsistent rulings by the Court of Appeals for the Armed Forces, such that commutation of Loving's death sentence is the only appropriate course of action.

A. Improper Consideration of the "Lack of Rehabilitative Potential," "Preservation of Good Order and Discipline," And Specific Deterrence in Sentencing Deliberations.

In allowing the states, the federal government, and the military services the latitude to impose capital punishment for some offenders, the United States Supreme Court recognized that capital punishment sometimes has "penological justification."[104] "The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders."[105] The death penalty clearly does not, however, serve the purpose of rehabilitation of the offender.

Here, Captain Bush, Loving's battery commander,[106] whose only contact with Loving was mostly indirect contact through Loving's line supervisors,[107] told the panel that he had recommended administratively discharging Loving prior to his arrest because of mounting disciplinary problems and lack of rehabilitative potential.[108] Complicating matters even further, the military judge specifically instructed the panel that it could consider as an aggravating circumstance:

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[104] *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (Opinion of Stewart, Powell, and Stevens, JJ.).

[105] *Id.*

[106] R. at 1537.

[107] R. at 1537-41.

[108] R. at 1541.

> the testimony of Captain Bush that the accused is of average intelligence and has been counseled on occasions in an effort to make him a satisfactory duty performer and, in his opinion, has no rehabilitative potential.[109]

The Court of Appeals for the Armed Forces agreed that the military judge erred in instructing the members to consider "lack of rehabilitative potential" as an aggravating circumstance.[110] The court found the error to be harmless though.[111]

B. The Panel Members Were Never Instructed That Loving Could Not Be Sentenced to Die on The Basis of The Aggregate or Cumulative Effect of all the Offenses.

The Court of Appeals for the Armed Forces held long ago in *United States v. Wheeler* that "a mere rote instruction of the maximum imposable sentence" is insufficient where one of the penalties was authorized only because of a peculiar circumstance in that case.[112] Nonetheless, during instructions on sentencing, the military judge instructed the panel that "a single sentence shall be adjudged for all of the offenses" and that the court was authorized to adjudge a sentence of death or the mandatory minimum sentence of life imprisonment.[113] The military judge failed, however, to instruct the panel that death was an authorized sentence *only* for the offenses of premeditated murder and felony murder. Since the panel was not instructed properly, Loving may have been sentenced

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[109]R. at 1871.

[110]*Loving*, 41 M.J. at 248.

[111]*Id.* at 249.

[112]17 U.S.C.M.A. 274, 276, 38 C.M.R. 72, 74 (1967); *see also United States v. Yocum*, 17 U.S.C.M.A. 270, 273, 38 C.M.R. 68, 71 (1967) ("the court-martial should know the crimes of which accused has been convicted are not ordinarily so severely punished"); *United States v. Hutton*, 14 U.S.C.M.A. 366, 34 C.M.R. 146 (1964) ("the court members should have been furnished the torch of enlightenment concerning the basis for the maximum permissible sentence").

[113]R. at 1864-65.

to die because the panel members felt that, although he did not deserve to die just for the murders he was convicted of committing, he certainly deserved to die when the extraneous robberies and the attempted murder of Mr. Harrison were thrown into the equation. This latter result is clearly improper.

The court was faced with similar circumstances in a capital case in *United States v. Matthews*.[114] The Army court in *Matthews* declared:

> Because the military judge instructed the court members only on the aggregate maximum sentence, it is possible that the court members did not know whether the death penalty was authorized for each of the offenses or only for murder.[115]

The Court of Appeals for the Armed Forces did not deal squarely with this issue because the sentence of death was set aside on other grounds. Judge Fletcher, however, opined that the instructions were inadequate for two reasons. First, *Wheeler* makes clear that a routine instruction is inadequate where a particular punishment is authorized "only because of peculiar circumstances existing in that individual case."[116] Second, because the decision to adjudge death is made at the same time that decisions on lesser punishments are made "`the qualitative difference of death from all other punishments' is clouded, and the greater reliability required in capital sentencing decisions . . . tend[s] to be diminished by the varied tasks before the members."[117]

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[114]16 M.J. 354 (C.M.A. 1983).

[115]13 M.J. 501, 532 (A.C.M.R. 1982).

[116]*Matthews*, 16 M.J. at 391 (Fletcher, J., concurring).

[117]*Id.* at 391-92.

In denying relief on this claim for Loving, the court relied on the military judge's instructions during findings, which identified the "capital offenses."[118] Even though the members received no clarification or further instruction, the court assumed the members recalled the instructions about "capital offenses" in sentencing, applied these instructions in sentencing, and understood, without any instruction, that "a 'capital' offense is punishable by death."[119]

[118] *Loving*, 41 M.J. at 252.

[119] *Id.*

C. The Panel Members Were Allowed to Consider an Improper Aggravating Circumstance.

In its prior review of this case, the United States Supreme Court held that "aggravating factors are necessary to the constitutional validity of the military capital punishment scheme as now enacted," because Article 118's "selection of the two types of murder for the death penalty . . . does not narrow the death eligible class in a way consistent with our cases."[120] A vivid example of the constitutional problem is that Article 118(4) has no *mens rea* requirement, thus permitting the death penalty to be imposed even if the accused had "no intent to kill."[121] After reviewing the military death penalty complex, the Court concluded that "additional aggravating factors establishing a higher culpability are necessary to save Article 118."[122]

Loving filed a petition for extraordinary relief in the military court system arguing that the aggravating factor with respect to his felony murder conviction did not establish the necessary mental culpability. The Army Court did not address the issue at all. The Court of Appeals for the Armed Forces agreed, however, that "felony-murder under Article 118(4) can pass constitutional muster as a capital offense only if it is combined with an aggravating factor sufficient to satisfy the narrowing requirement of *Zant v. Stephens*, *supra*, and culpability requirements of *Enmund* and *Tison*."[123] The Court of Appeals held, however, that the "actual perpetrator" aggravating factor sufficiently performed the narrowing function of *Zant* and supplied the requisite *mens rea* because "in this case

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[120] *Loving*, 517 U.S. at 748-49.

[121] *Id.*

[122] *Id.*

[123] *Loving*, 47 M.J. at 444 (citing *Zant v. Stephens,* 462 U.S. 862 (1983), *Enmund v. Florida,* 458 U.S. 782 (1982), and *Tison v. Arizona,* 481 U.S. 137 (1987)).

the court members understood the term to mean an intentional killing."[124] The court also declared that "the military judge's failure to define 'actual perpetrator of the killing' was not error under the particular facts of this case."[125] Alternatively, the court declared that "[e]ven assuming arguendo that an instruction defining 'actual perpetrator of the killing' should have been given . . . such a deficiency was harmless beyond a reasonable doubt because it could not possibly have affected the court-martial's finding of the aggravating factor."[126] Finally, the court held that any deficiency in the military judge's instructions occurred at the point only of determining "death eligibility." Thus, the court declared that any error was harmless beyond a reasonable doubt because at least one other valid aggravating factor was found by the panel.[127]

The Court of Appeals for the Armed Forces erred in a number of ways. First, the court simply assumed that the panel "understood" that they must find an intent or reckless indifference in order to find that Loving was the "actual perpetrator," even though no military trial or appellate judge or anyone else could have known of such a requirement until the court's opinion in this case. Indeed, the court made the completely unsupported assumption that the eight panel members, who failed to even follow the clear, objective standards that they were provided with respect to deliberation procedures, "understood" that they must find an intent to kill when at least one-third of the United States Supreme Court (Justices Souter, Scalia, and Breyer) did not "understand" the term

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[124] *Id.*

[125] *Id.* at 444-45.

[126] *Id.* at 445.

[127] *Id.* at 446.

"actual perpetrator" to mean an intentional killing during the oral argument before the Supreme Court.[128]

Second, while the Court of Appeals held that the panel unanimously found an intentional killing – despite no sentencing instruction to do so – it is undisputed that the panel was instructed on *both* premeditated murder and felony murder during the guilt-or-innocence phase of the trial. The panel did not, however, unanimously find that Loving premeditated Mr. Fay's murder.[129] In other words, the panel *rejected* the prosecutor's contention that Loving had the specific intent to kill Mr. Fay (at least as a unanimous finding required for a capital offense). Thus, the court's "finding" that the panel unanimously found an intent to kill is directly contradicted by the trial record.

Third, in finding any error to be harmless, the Court of Appeals inexplicably ignored the fact that the panel was informed that Loving had been convicted of two death eligible offenses when, in fact, he had been convicted of only one offense which could constitutionally support a death sentence. In finding no harm again, the court used circular reasoning and compounded its own error.

The court noted that in its mandatory review of this case, Loving complained that the panel had not been adequately instructed that he could only be sentenced to death for murder and could not be sentenced to death on the basis of the remaining conglomeration of felonies for which he had been convicted. In reviewing the issues surrounding Article 118(4), the court reversed itself and declared that "the military judge's identification of capital offenses was so minimal" that the panel members

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[128]*Loving v. United States*, 1996 WL 13954 (U.S. Oral Arg. Jan. 9, 1996) (No. 94-1966).

[129]R. at 1522.

clearly could not be affected by the identification of felony murder as a capital offense.[130] This finding is in direct contravention of the court's previous finding: *either* the panel was erroneously and unconstitutionally left with the misunderstanding that Loving could be sentenced to die for all of the offenses for which he had been convicted *or* the panel clearly understood the few instructions that it was given – that Loving could be sentenced to die for both premeditated murder and felony murder. In either case, the error clearly is not harmless because both would inject an arbitrary and constitutionally significant error in the sentencing proceedings.

Fourth, the Court of Appeals failed to factor into its harmless error analysis the prior determination that the military judge erred in characterizing evidence of Loving's lack of rehabilitative potential as an aggravating circumstance that could be considered in the weighing of aggravating and mitigating circumstances.[131] In other words, the court had already found a "thumb" on "death's side of the scale."[132] While the rehabilitative potential issue may have tipped the scales only slightly, the combination of this error and the improper consideration of the felony murder as a capital offense and the improper consideration of the actual perpetrator evidence as an aggravating factor certainly significantly changed the balance in favor of death.

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[130] *Loving*, 47 M.J. at 446.

[131] *Loving*, 41 M.J. at 248.

[132] *Loving*, 47 M.J. at 446 (quoting *Stringer v. Black*, 503 U.S. 222, 232 (1992)).

D. The Ineffective Assistance of Counsel at Trial.

Trial defense counsel did not retain a mitigation investigator or even request funding for an investigator,[133] and otherwise failed to conduct adequate investigation. As a result, the defense mitigation evidence at trial was a disjointed, piecemeal presentation of the testimony of a few family members, supervisors, and Loving's boxing coach, without any explanation of how this information was mitigating.

1. The "Mitigation" Evidence Presented During the Court-Martial.

The defense presented evidence that Dwight Loving was the youngest of eight children born to Joe Loving, Sr., and Lucille Williams. During her marriage to Joe, Sr., Lucille testified that she had numerous fights with Joe, because he would drink and get jealous. She thought that Joe would kill her a few times and she called the police on a "pretty regular" basis. After Loving was born, however, his father did not live in the house on a regular basis.

Ms. Williams testified that all of the boys in the family boxed when they were growing up in Rochester, New York. With the help of a police officer, she got them into boxing to keep them off the streets. Loving boxed from ages 10 - 15, but then "turned to the streets." He liked to follow his older brothers, particularly Ronnie, who went to prison and came back when he was about 19-20.[134]

Loving's brother, Army Specialist Harryl Loving, provided a written statement. He declared that when Dwight was growing up, he spent more of his time with Ronnie than with any of the brothers. "They were involved in getting high and playing basketball." He stated that Dwight "got

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[133]Def. App. Exh. Y.

[134]R. at 1574-1601.

into boxing but he was distracted by all the negative things in the streets." Harryl, with the help of trial defense counsel, summed his statement up as follows:

> I was raised in the same house, went to the most [sic] of the same schools, had the same parents as Dwight. I am a Specialist in the US Army and have never been in serious trouble.[135]

Another brother, Ronald Loving, testified that Rochester was a jungle for a kid because there were a lot of racial gangs and prejudices. He stated that he fought every day and, to avoid the fights, he had to stay in the house. He had been stabbed, hit in the head, hit by a car, and shot. He had also been to prison for theft and stabbing. He felt closer to Dwight than to his other brothers, because they "feed off the same things – survival."[136]

Loving's boxing coach, Lord Johnson, testified that Loving was one of the strongest boxers in New York State before he quit at age 15 because he was distracted by girls. His best friend, according to Coach Johnson, was Charles Capers, who was involved in gangs and went to prison well before Loving's court-martial. Johnson testified that Loving would do anything for his friends and he was a follower. He did not believe that Loving would be a danger in prison.[137]

Loving's first line supervisor, Sergeant James Key, testified that when he arrived in the unit in July 1987, Loving was having problems because he had gotten in a fight. At that point, the chain of command was considering administratively discharging Loving, but Sergeant Key took Loving under his wing. With his guidance, Loving became an outstanding soldier, but then he met Pessina

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[135]Def. Exh. U.

[136]R. 1607-13.

[137]Trial defense counsel also presented several witnesses from the Installation Detention Facility, who testified that Loving was not a disciplinary problem and had adjusted well to confinement. R. at 1638-51.

and was "overwhelmed with her. He was possessed."[138] He was enthralled with her even though, she was an admitted drug dealer,[139] and was married to another man[140] and talking about going back to her husband.[141]

Loving started showing up for work late and had repeated article 15s.[142] He would break restriction to be with her.[143] When he was counseled and told to stay away from her, he said, "I can't help myself."[144] By late 1988, Loving had begun "burning off a lot of money" and pawning personal equipment. He was having so many problems by the time of the offenses that Sergeant Key had talked to the chain of command and the paperwork had been started to get him discharged from the service.[145]

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[138]R. at 1387-94.

[139]R. at 1788-93.

[140]R. at 1027.

[141]R. at 1034.

[142]Non-judicial punishment, pursuant to U.C.M.J. article 15.

[143]R. at 1396-97.

[144]R. at 1397.

[145]R. at 1405.

2. The "Mitigation" Evidence That Was Available but Undiscovered and Not Presented.

Because Loving's trial defense counsel failed to adequately investigate and present the available evidence, the court-martial panel that sentenced Dwight Loving to die never heard, the following relevant information:[146]

- Both of Loving's parents came from poor sharecropping families riddled with violence, alcoholism, substance addiction, suicides, and mental illnesses.

- Loving was conceived during an on-again, off-again turbulent relationship. His mother wanted desperately to have an abortion, but could not get a doctor to perform it. Loving learned about his mother's desire to abort him while still only a child and was greatly upset.

- Loving was born underweight and malformed, due, in part, to oxygen deprivation during delivery.[147] His head was so deformed that siblings called him "wophead" and "hookhead."

- Loving's father, Joe Loving, Sr., was an abusive alcoholic, who would even give alcohol to his small children. Between 1959 and 1988 he was arrested 23 times for offenses ranging from vagrancy and DUI to possession of a firearm and assault on his wife.[148]

- The children often saw their father beat their mother. He would also beat the children with a leather belt so hard at times that their skin would be broken and they would bleed from the lashings.

- After years of abuse, Loving's mother began to fight back. She stabbed her husband on two occasions and on one occasion even threw hot grease on him. Loving witnessed this event.

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[146]Unless otherwise noted, the following information is contained in the affidavits of Lucille Williams, Gwendolyn Black, Wendolyn Black, Ronald Loving, and Harryl Loving, Def. App. Exhs. AA-EE.

[147]Strong Hospital Records.

[148]Rochester Police Department Records, Def. Exh. X.

- In addition to the physical abuse from their father, the younger Loving children also suffered abuse from their mother and oldest sister. Their mother beat them with switches, belts, and even an extension cord. Their older sister, who would babysit while their mother was at work, would hit them with a frying pan, a spoon or anything else. She beat them so badly that the younger children would beg to go to work with their mother.

- With little support from Joe Loving, Sr., and eight children, Loving's mother was forced to obtain welfare assistance and moved the family frequently in an effort to find a stable residence they could afford. The family moved five times before Loving was 10 years old. In each of these homes, Loving shared a bedroom with four older brothers.

- Following her final separation from Joe Loving, Sr., Loving's mother settled with another alcoholic abuser, James, "Johnny" Williams. While he was not physically abusive, Williams berated, belittled and humiliated both Lucille and the children on a daily basis. Every day he would yell at the children, "You ain't shit and you'll never be shit."

- Loving became addicted to alcohol and marijuana at an early age because his father, older brothers, and sisters introduced him to both drugs and alcohol and began providing it to him at a very early age. By the time he was sixteen, he had a serious alcohol addiction.

- In addition to alcoholism, the Loving family is riddled with mental illness. Loving's uncle has been hospitalized in psychiatric hospitals numerous times. Two of Loving's brothers, Darryl and Joe, Jr., have been hospitalized a number of times and diagnosed with paranoid schizophrenia.[149] Loving has a genetic predisposition to schizophrenia.[150]

- Street gangs were prevalent in the neighborhoods in which Loving lived. He often had to fight just for survival. He was first attacked by gang members when he was only eight years old. At various times, he was hit in the head with a baseball bat, beer bottles, bricks, and even shot at in the streets. When he was sixteen, gang members attempted to kill him by burning down his sister's house.

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[149]The undersigned counsel are informed and believe that another brother, Harryl, was discharged from the Army due to mental problems, even though he swore at the time of trial that he was not plagued by the same problems as Dwight Loving.

[150]Darryl Loving's Genessee Mental Health Records; Joe Loving, Jr.'s Navy Medical Center Records; Affidavit of Dr. Elizabeth Cheney, Def. App. Exh. P.

- In an attempt to escape the horrors of his life, Loving joined the Army. After some initial trouble adjusting to military life, Loving then came under the supervision of Sergeant James Key and progressed from one of the worst soldiers in his unit to one of the best. From August of 1987 through July of 1988, he achieved his GED degree, received no disciplinary actions, and had positive evaluations.[151]

- Everything crumbled when Loving met and fell in love with Nadia Pessina, a known drug-dealer who also worked as a waitress at a topless bar. Although she was married, she shared her home with Loving. She introduced him to hard drugs and supplied them to him. He started missing formation, coming to work under the influence of drugs and alcohol, and experiencing dramatic mood swings.[152]

- Ultimately, Loving committed his crimes, while heavily under the influence of alcohol, marijuana, and cocaine.[153]

Because of trial defense counsel's failure to investigate and present this evidence, the panel that sentenced Dwight Loving to die was not aware of, or allowed to consider, any of this information. Nonetheless, CAAF found counsel's representation to be "competent."[154]

Whether counsel's representation was unconstitutionally incompetent or not, the panel that sentenced Loving to die was clearly deprived of significant and relevant information. The Secretary of the Army and the President should consider both the information and the bias of the court-martial proceedings in the absence of this evidence. Such a review clearly reveals that commutation of Loving's death sentence is appropriate.

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[151]Military Records.

[152]Affidavit of Gerlinde Joseph, Def. App. Exh. Q; Affidavit of Sergeant Mark Barshaw, Def. App. Exh. GG.

[153]Joseph Affidavit, Def. App. Exh. Q; Affidavit of Beverly Sedberry, Def. App. Exh. R.

[154]*Loving*, 41 M.J. at 250.

VI. Recent Supreme Court Rulings Reveal That the Military Death Penalty Scheme under Which Loving Was Sentenced to Death Is Unconstitutional.

The Court of Appeals for the Armed Forces and the United States Supreme Court previously held that Congress could delegate to the President the authority to specify sentencing aggravating factors.[155] Since those decisions, however, the Supreme Court held in *Ring v. Arizona*[156] that aggravating factors identical to those in R.C.M. 1004(c) are "functional elements" of the crime of capital murder. Thus, the President's action in promulgating R.C.M. 1004(c) was an action that established "functional elements" of the crime of capital murder. This promulgation exceeded the President's authority to prescribe "procedures" for sentencing upheld in *Loving*. *Ring* reveals that the Supreme Court's holding in *Loving* is no longer valid as it was dependent upon aggravating factors being viewed only as sentencing factors rather than as elements of the offense of capital murder.

Ring and *Apprendi* also reveal the clear constitutional error in CAAF's prior decision rejecting the argument that the required finding that any mitigating circumstances are "substantially outweighed" by any aggravating factors[157] must be made beyond a reasonable doubt before imposition of a death sentence is constitutionally permissible.[158]

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[155] *United States v. Curtis*, 32 M.J. 252, 260 (C.M.A. 1991); *United States v. Loving*, 41 M.J. 213, 291 (1994), *modified on reconsideration*, 42 M.J. 109 (1995); *Loving v. United States*, 517 U.S. 748, 770-74 (1996).

[156] 122 S. Ct. at 2443.

[157] R.C.M. 1004(b)(4)(c).

[158] *See Loving*, 41 M.J. at 278, 291.

A. The President Exceeded His Delegated Authority in Promulgating Aggravating Factors in R.C.M. 1004(c) Because These "Factors" Are Elements of the Crime of Capital Murder.

The United States Supreme Court held in this case that, because Congress delegated to the President the power to "provide[] more precision in sentencing" than the U.C.M.J.,[159] the President could lawfully promulgate capital sentencing aggravating factors.[160] Specifically, the Court held that Congress, in Articles 18, 36, and 56 of the Uniform Code of Military Justice, delegated the power over sentencing matters to the President.[161]

Though the Court held that the R.C.M. 1004(c) factors were within the President's delegated powers, at the time *Loving* was decided, the Supreme Court, pursuant to *Walton v. Arizona*,[162] considered capital aggravating factors to be only sentencing factors and not elements of a crime. The Supreme Court's decision in *Ring v. Arizona* explicitly overruled *Walton v. Arizona* and now makes clear that "enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense.'"[163]

In light of these rulings, the reasoning of *Walton* – and by clear implication the Supreme Court's reasoning in this case – has now been explicitly rejected. The Court now clearly recognizes that, even though the prescribed statutory punishment for murder is death or life imprisonment, if

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[159] *Loving*, 517 U.S. at 770.

[160] *Id.* at 770-74.

[161] *Id.* at 772-73 (citing *United States v. Curtis*, 32 M.J. 252 (1991)).

[162] 497 U.S. 639, 648 (1990).

[163] *Ring*, 122 S. Ct. at 2443 (quoting *Apprendi*, 530 U.S. at 494 n.19); *see also Sattazahn v. Pennsylvania*, 123 S. Ct. 732, 739 (2003).

death may not be adjudged without an additional finding of an aggravating circumstance then that aggravating circumstance is in effect an element of the offense of capital murder.[164] Because the aggravating factors in R.C.M. 1004(c) are required before death may be imposed,[165] these factors are required elements of the offense of capital murder.

The Supreme Court in this case held only that Congress, in Articles 18, 36, and 56 of the Uniform Code of Military Justice, delegated the power over sentencing matters to the President.[166] The Court clearly did not hold that Congress had delegated the authority to the President to establish elements of a capital crime. The specific delegation in Article 18 and Article 56 allows the President to set "limitations" on punishment at any level but allows for the death penalty only "when specifically authorized" by Congress. Article 36 grants the President authority to establish procedures and rules of evidence. None of these articles grant (or even mention) the authority to change or add elements to capital offenses in the U.C.M.J.

The President was not delegated authority to create capital crimes or to add elements to the capital crimes of premeditated murder and felony murder under Article 118(1) and (4). In light of *Ring* and *Sattazahn,* the President exceeded the delegation of his authority. In light of CAAF's prior opinion in *Curtis*, Congress could not lawfully delegate the power to the President to establish elements of a capital crime in any event.[167] R.C.M. 1004(c) is, therefore, clearly unconstitutional. As a result, Loving's sentence should be commuted to life imprisonment or this proceeding should

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[164] *Ring*, 122 S. Ct. at 2443, *Sattazahn*, 123 S. Ct. at 739.

[165] *Loving*, 517 U.S. at 755.

[166] *Loving*, 517 U.S. at 770-71.

[167] 32 M.J. at 260.

be held in abeyance until CAAF has had a chance to resolve this issue, which is currently pending before the court.

B. The Required Finding That Mitigating Circumstances Are "Substantially Outweighed" by Aggravating Factors Prior to Imposition of a Sentence of Death Can Only Be Constitutional If Determined under the Standard of Beyond a Reasonable Doubt.

Under the current military capital scheme, a service member may not be sentenced to death unless the court-martial panel finds: (1) unanimously and beyond a reasonable doubt that the accused is guilty of a capital offense;[168] (2) unanimously and beyond a reasonable doubt that at least one enumerated aggravating factor exists;[169] and (3) unanimously "that any extenuating or mitigating circumstances are substantially outweighed" by any aggravating circumstances under R.C.M. 1001(b)(4) and aggravating factors under R.C.M. 1004(c).[170] "Only after these three gates are passed does an accused become 'death eligible.'"[171]

Unlike the determinations of guilt and of at least one aggravating factor, which are specifically required to be made beyond a reasonable doubt, there is no specified standard for the panel to use in finding that mitigating circumstances are "substantially outweighed" by aggravating circumstances. And, during Loving's court-martial, the members were given no instruction on the standard to use in making this finding.[172]

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[168]R.C.M. 1004(a)(2).

[169]R.C.M. 1004(b)(4)(A) & (C).

[170]R.C.M. 1004(b)(4)(C).

[171]*Loving*, 47 M.J. at 442.

[172]R. at 1870-71.

During the mandatory review before CAAF, Loving asserted that the failure to require this finding to be made beyond a reasonable doubt violates the Fifth and Eighth Amendments and U.C.M.J. article 59(a). The court held, however, that "[u]nlike findings of guilty or findings regarding aggravating factors under R.C.M. 1004(c), 'specific standards for balancing aggravating against mitigating circumstances are not constitutionally required.' *Zant v. Stephens,* 462 U.S. at 876 n.13, 103 S. Ct. at 2742 n.13, *citing Jurek v. Texas,* 428 U.S. 262, 96 S. Ct. 2950, 49 L.Ed.2d 929 (1976)."[173]

Under *Ring*, "Capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishments."[174] Under *Apprendi*, "the relevant inquiry" in this context "is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"[175] And, under *United States v. Gaudin*,[176] even where a question might superficially be only a "legal question," if the question is one that requires factual findings and is one that is an "element" of the offense, the Fifth Amendment right to Due Process (equally applicable to the military)[177] and the Sixth Amendment right to trial by jury (applicable due to the statutory construct of the U.C.M.J. and

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[173] *Loving*, 41 M.J. at 278, 291.

[174] 122 S. Ct. at 2432.

[175] 530 U.S. at 494.

[176] 515 U.S. 506 (1995).

[177] *United States v. Witham*, 47 M.J. 297, 301 (1997).

the Rules for Court-Martial prescribed by the President)[178] require that the element be submitted to the jury.

Thus, the "weighing" required by the members must be accomplished using a reasonable doubt standard. Because Loving was denied application of this constitutionally required standard, his death sentence should be commuted to life imprisonment or these proceedings should be held in abeyance until CAAF has had a chance to resolve this issue, which is currently pending before the court.

VII. The Unresolved Legal Questions and the Legitimate Criticisms of the Military Justice System Warrant Clemency.

Dwight Loving raised 69 points of legal error during the mandatory review before the Court of Appeals for the Armed Forces and has since raised additional issues in petitions for extraordinary relief. As is discussed previously, in some instances the courts have already determined that some legal errors occurred in the court-martial proceedings of Loving but determined that these errors were not significant enough to require reversal of the death sentence. In other instances, the Judges of the Court of Appeals for the Armed Forces have disagreed as to whether legal errors occurred and whether the death sentence should be set aside. In still other instances, the courts have determined that no legal error occurred while Loving maintains that there was legal error. The passage of time, the various court decisions, the ongoing studies of the military justice system, and the changes in law add more issues and raise more haunting questions concerning the appropriateness and legality of Loving's death sentence as each day and year pass.

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[178] *Id. See also United States v. New*, 55 M.J. 95, 104 (2001) (applying *United States v. Gaudin*, 515 U.S. 506 (1995)).

The Secretary of the Army and, ultimately, the President should not simply rely on the court system to ultimately resolve these issues. Whether Congress will address the merits of the Cox Commission recommendations or the courts will ever address the merits of Loving's claims and resolve them appropriately is an open question; whether a death sentence should be approved with so many lingering doubts is not an open question. Put into any proper perspective, the unresolved systemic issues and legal issues warrant executive clemency, which exists, in part, to provide relief from harshness or mistakes in the judicial process.[179]

Loving's death sentence was imposed by a system that has "failed to keep pace with the standards of procedural justice adhered to in the United States."[180] Issues of command influence, racial discrimination, and improper panel voting procedures – which were ignored by the courts based on technical legal evidentiary rules – will forever overshadow Loving's death sentence. Executing him while not promote justice or ensure good order and discipline any more than a sentence of life imprisonment.

The military has not carried out an execution since 1961. If the military is going to begin executing its own again, there should be no doubts such as those overshadowing the process in this case, specifically, and in the general application of the military death sentence in recent years. In the immortal words of Clarence Darrow, you "stand[] between the past and the future." Executing Dwight Loving "will turn your face toward the past. . . . [We are] pleading for the future. . . ."[181] A future where the military does not execute its own for non-military, peacetime offenses tried without

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[179] *See Ex parte Grossman*, 267 U.S. 87, 120-21 (1925).

[180] Cox Commission Report at sec. I.

[181] Clarence Darrow, *Mercy for Leopold and Loeb* (1924).

the benefit of the constitutional rights afforded the civilians that the servicemember is sworn to protect. A future where the military death penalty, if it is to exist at all, will not be influenced by race and "[t]he uniform [will] be . . . the great equalizer."[182] A future where the military death penalty will not be influenced by command influence and an "antiquated process of panel selection" rejected in civilian practice.[183] We urge you to turn your face to the future of the modern military without all of these questions haunting the system. We beg you to extend mercy by commuting Dwight Loving's death sentence to life imprisonment.

Respectfully Submitted,

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May __, 2003.

[182]Buckley at 434.

[183]Cox Commission Report at sec. III.A.