

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

RONALD A. GRAY,

Petitioner,

vs.

Case No. 08-3289-RDR

**JAMES W. GRAY, COLONEL, U.S. ARMY,
Commandant, USDB-Fort Leavenworth,**

Respondent.

RESPONSE TO PETITIONER'S TRAVERSE

Respondent James W. Gray, Colonel, U.S. Army, Commandant, USDB-Fort Leavenworth, by and through Barry R. Grissom, United States Attorney for the District of Kansas, and T.G. Luedke, Assistant United States Attorney for said District, for the Surreply, submits the following Response to Petitioner's Traverse to Respondent's Answer and Return, Supplements/Amendments to the Habeas Petition, and Motion for Evidentiary Hearing ["Traverse"], Doc. 42, and in support of Respondent's Answer and Return, Doc. 20, states as follows:

1. Respondent denies each and every material allegation in the Traverse, except as hereinafter may be expressly and specifically admitted. Further, Respondent denies Petitioner is entitled to any relief or additional review because: (a) Military Courts exercised proper jurisdiction over both Petitioner's offenses and sentence; (b) Petitioner was zealously represented by skilled, trained, and experienced military counsel at trial, and by military and civilian counsel both on appeal and during the clemency process; (c) Petitioner was repeatedly found to be competent to stand trial and participate in his appeals and was not entitled to an evidentiary hearing regarding his competency at any stage in the processing of his case; (d) Petitioner's case was carefully and

thoroughly reviewed and affirmed by The Judge Advocate General of the Army [“TJAG”], the Army Court of Military Review [“ACMR”], the Court of Appeals for the Armed Forces [“CAAF”], and the United States Supreme Court; and (e) Petitioner was afforded all rights to which he was entitled during his clemency proceedings and approval of his sentence under Article 71, Uniform Code of Military Justice [“UCMJ”].

2. Respondent answers that no further review or relief is warranted on Claims 1-18 of the Traverse which are the same as Claims 1-18 presented in the Petition [“Pet.”]. *See* (Doc 17, 8-103.) Respondent answers that these Claims received full and fair consideration by the military trial court and appellate courts, and therefore, merit no further consideration by this Court as demonstrated in the Answer and Return [“Answer”]. *See* (Doc. 20, at 25.) To the extent these errors were not raised in a timely manner during direct military appellate review of Petitioner’s general court-martial conviction and sentence, any claim Petitioner may have regarding these issues is waived. Therefore, his Petition should be denied. Furthermore, any issues that were not given full and fair consideration and are not subject to waiver do not warrant relief because these issues lack merit.

3. Respondent denies that Petitioner is entitled to further review with respect to additional Claims 19-21 which were not included in the original Petition. Viewed in light of the governing standard of review, Petitioner’s habeas grounds are either meritless or were given full and fair consideration by the military courts. Consequently, these grounds are not subject to additional review in habeas corpus proceedings. In a few instances, Petitioner has made minor changes to previously considered claims, and to the extent the Court considers these as new grounds, it should deem them waived.

4. Respondent requests that this Court immediately lift the stay of execution and deny Petitioner's Writ of Habeas Corpus, request for an evidentiary hearing, and request for discovery for all the reasons stated herein and cited in the Answer and Return (Doc 20).

5. Respondent requests, in the alternative, that this Court conduct expedited review¹ and dismiss the Petition as meritless on its face.

6. In support of the factual allegations contained herein, Respondent incorporates the following extracts from the original Record of Trial ["ROT"]² in the case of *United States v. Gray*:

Volume 1: Court-martial Proceedings (AR 0001-0242)

Volume 2: Transcript and Authentication of Court-Martial ROT (T0001-2638)

Volume 3: Appellate Review (A0001-3179)

7. Additionally, in support of the factual allegations contained herein, Respondent incorporates and attaches hereto, supplemental extracts from the original ROT, Volume 3, Appellate Review, in the case of *United States v. Gray* as follows:

Volume 3: Appellate Review (A3175-3179)

I. PETITIONER'S ADDITIONAL ALLEGATIONS

Petitioner's Traverse asserts the following additional claims for habeas corpus:

Ground 19: Petitioner was denied his rights to due process, to a fair sentencing proceeding, to a public trial, and against cruel and unusual punishment, as guaranteed by the Fifth, Sixth, and Eighth Amendments, where The President, acting in a judicial role,

¹ "[A] district court may, within the constraints of due process, expedite proceedings on the merits." *Lonchar v. Thomas*, 517 U.S. 314, 320 (1996).

² The administrative record consists of distinct volumes: the trial and post-trial documents/excerpts ("AR _"), the transcript ("T _"), the military's appellate consideration of this case are indicated as ("A _"). A certified copy of the completed ROT is located at the Army Litigation Division, Military Personnel Branch, and can be produced for review.

approved Petitioner's death sentence upon confidential reports that were not disclosed to Petitioner.

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

Ground 21: The military courts lacked jurisdiction to capitally prosecute Petitioner for crimes committed in the United States during peacetime because Congress' ostensible grant of jurisdiction to prosecute such crimes under the UCMJ was unconstitutionally in violation of the separation of powers and the Fifth, Sixth, and Eighth Amendments; the military courts likewise lacked jurisdiction to capitally prosecute Petitioner in the absence of an adequate service connection to his crimes.

See (Traverse, 183-201.)

II. STATEMENT OF FACTS³

The following statement of facts are intended to supplement those contained in the Answer and Return (Doc. 20) and Appendix A (Doc. 20-1) entitled Appellate Procedural History ["Append. A"] submitted with Respondent's Answer and Return (Doc. 20) and are incorporated herein by reference.

A. History of Petitioner's Psychological Evaluations.

Petitioner has had several psychological evaluations and two neuropsychological examinations conducted by various, and well-qualified, forensic psychiatrists and psychologists throughout the course of the legal proceedings in this case. Every single evaluation, with the exception of one, which was later amended as explained herein, concluded that Petitioner understood the wrongfulness of his criminal conduct, was competent to assist in his defense at trial, and has been competent throughout the years of appellate proceedings in this case. Petitioner asserts

³ The statement of facts is derived from the trial transcript and excerpts from Petitioner's ROT.

he was not competent at trial or during appellate proceedings. He also asserts that trial defense counsel and appellate defense counsel were ineffective for failing to litigate his obvious incompetence. However, every psychological evaluation Petitioner received, with the exception of one, concluded that Petitioner was competent throughout trial and appellate proceedings.

Prior to Petitioner's court-martial, the convening authority approved Petitioner's request for a sanity board⁴ to determine whether Petitioner was mentally responsible for the charged offenses and whether he had the mental capacity to stand trial.⁵ (A3063, A.E. XXXIII, T0100-0101.) On February 4, 1988, the sanity board, led by a forensic psychiatrist, found at the time of the alleged criminal conduct Petitioner did suffer from a mental disease or defect, but that the disease or defects were not severe. (A3063-64, A.E. XXXIII.) Petitioner was diagnosed with a personality disorder not otherwise specified, mild alcohol dependence, voyeurism and frotteurism.⁶ (A3063-64, A.E. XXXIII.) However, the board found that at the time of the conduct, Petitioner was able to appreciate the nature and quality or wrongfulness of his conduct. (A3064, A.E. XXXIII.) Finally, the board concluded that Petitioner had the mental capacity to stand trial. (A3064, A.E. XXXIII.)

⁴ The sanity board was conducted in accordance with Rule for Courts-martial (R.C.M.) 706. A mental examination pursuant to R.C.M. 706 is an inquiry into the mental capacity or mental responsibility of the accused.

⁵ Prior to his court-martial, in the General Court of Justice, Cumberland County, North Carolina, Petitioner pled guilty, pursuant to the advice of his attorneys, to the following offenses involving eight different women: two charges of second degree murder, one charge of assault with a deadly weapon with intent to kill inflicting serious injury, four charges of first degree rape, one charge of attempted first degree rape, five charges of first degree sexual offense, four charges of second degree kidnaping, two charges of robbery with a dangerous weapon, and two charges of first degree burglary, and one charge of first degree robbery. (A3002-6, A3057.) During the guilty plea, the State presented the substance of Petitioner's taped confession to the police which was made previously in the presence of Petitioner's two defense counsel - neither of whom represented him at his subsequent court-martial. (A3032-52.) Petitioner's confession and the testimony of the police detective relating the evidence collected on the above crimes detailed Petitioner's sexual attacks, robberies, and murders. (A3032-52.) The trial judge sentenced Petitioner to three consecutive and five concurrent sentences of life imprisonment. (A3057-61.)

⁶ Colonel David T. Armitage, Ph.D., a forensic psychiatrist on Petitioner's pre-trial sanity board, testified as a defense witness during Petitioner's pre-sentencing hearing and explained that frotteurism is a behavior in which an individual touches or rubs up against another individual, usually of the opposite sex, for sexual pleasure. (T2414.)

Two forensic psychiatrists and one psychologist testified on Petitioner's behalf during the pre-sentencing phase of his court-martial.⁷ The President of the sanity board, David T. Armitage, Ph.D., and Dr. Selwyn Rose,⁸ a defense chosen forensic psychiatrist, testified that while Petitioner had a personality disorder, he was competent and legally responsible for his actions at the time of the crimes. Both explained their ability to effectively communicate with Petitioner during the sanity board examinations. Dr. Armitage knew that Petitioner's defense counsel had difficulty communicating with him because Petitioner constantly spoke about religion. (T2417.) Dr. Armitage testified that he stressed to Petitioner the importance of being open and honest during their discussions and Petitioner cooperated with the examination. (T2417-18.) Dr. Armitage learned of Petitioner's troubled childhood and explained that there were several factors in Petitioner's development that led to his personality disorder.⁹ (T2431-33.) Dr. Rose testified that he met with Petitioner on three occasions. (T2449.) He explained that when given directions and told what to do, Petitioner responds appropriately and is able to communicate properly with others. (T2459.) Additionally, the defense called a psychologist to testify on Petitioner's behalf during his pre-

⁷ R.C.M. 1001 provides that after the findings of guilt have been announced that both the prosecution and the defense may present matters to aid the court-martial in determining an appropriate sentence.

⁸ Dr. Rose was recognized as an expert in forensic psychiatry in testifying for the defense. (T2449.) Dr. Rose testified that while Petitioner suffered from a personality disorder, he understood the difference between right and wrong at time he committed the offenses of pre-meditated murder, rape, and robbery. (T2451-52.) She further testified that, "[c]learly he knew and made efforts to cover up, which is a sure sign that he knew that those acts were legally wrong." (T2466.) She also testified that Petitioner had the ability to cooperate intelligently in his defense. (T2477.)

⁹ Dr. Armitage testified that Petitioner's substantial socioeconomic deprivation, multiple male figures in the home, multiple physical moves, poverty conditions, multiple school changes, and physical abuse are all contributing factors to Petitioner's personality disorder. (T24332-33.) However, Petitioner still possessed the capacity to discern right from wrong. (T2433-34.)

sentencing hearing. Dr. John F. Warren, III testified as an expert in psychology¹⁰ regarding the results of psychological testing he conducted on Petitioner.¹¹ Dr. Warren expressed that Petitioner was very cooperative, easy to test, and completed all of the testing. (T2504.) The tests revealed that Petitioner was of average IQ with some difficulties in the areas of attention and concentration.¹² (T2502.) All three of these mental health professionals examined Petitioner separately, and all agreed that while he has a personality disorder and some organic brain issues, he was competent to assist in his defense and understood the wrongfulness of his criminal conduct.

In August 1989, while Petitioner's appellate filings were pending at ACMR, appellate defense counsel referred Petitioner to the Department of Mental Health, U.S. Disciplinary Barracks ["USDB"], Fort Leavenworth, Kansas for a mental health evaluation.¹³ (A2982.) Pending the results of that evaluation, appellate defense counsel filed a "Brief on Behalf of Appellant" alleging

¹⁰ Dr. Rose requested Dr. Warren conduct psychological testing on Petitioner. (T2450.) Dr. Warren obtained a Ph.D. from Duke University, an M.D. from the University of North Carolina -Greensboro and a Bachelor's degree from Duke University and was recognized as an expert in psychology. (T2500.)

¹¹ Dr. Warren conducted several personality and intelligence tests on Petitioner to include: the Wechsler Adult Intelligence Scale, the Minnesota Multiphasic Personality Inventory Revised (MMPI), the Rorschach Psychodiagnostic Test, the Wechsler Memory Scale, and pencil and paper drawings. (T2501.) These tests provide objective, standardized data that, combined with Dr. Warren's interview of Petitioner, provided him a broad perspective on Petitioner's mental and emotional functioning. (T2510-11.)

¹² Dr. Warren testified that Petitioner's memory and concentration difficulties indicated cognitive problems consistent with organic brain problems. (T2505.)

¹³ During that same time period, Petitioner filed a "Motion to Hold Proceedings in Abeyance" (A2982) until a psychological evaluation could be conducted on Petitioner. Dr. Gahm conducted an evaluation of Petitioner. In support of that motion, Petitioner attached a letter from Captain Gregory A. Gahm, Ph.D. stating,

The evidence available indicates that inmate Gray is competent to assist in his own defense if he so chooses. He is able to understand questions asked of him although he often chooses not to cooperate as evidenced by his responding with alternate true/false answers to the MMPI. Although inmate Gray does report to have been under the influence of alcohol at the time of his offenses, he clearly remembers the circumstances and reported that he actually desired to plead guilty but could not because of the death sentence involved. His responses to the Rorschach clearly indicate a violent nature which is consistent with his offenses.

several legal errors by defense counsel.¹⁴ (A2908-70.) Of note is that Petitioner personally asserted twenty-six (26) *Grosteefon*¹⁵ errors in that brief. (A2967-69.) This provided conclusive proof that the Petitioner was capable of identifying issues and assisting in his own defense.

Captain William Kea, Ph.D.¹⁶ conducted that evaluation and diagnosed Petitioner with depressive disorder not otherwise specified, schizotypal personality disorder, antisocial personality disorder, alcohol abuse, and organic personality disorder.¹⁷ (A2856.) Dr. Kea's initial report concluded that, at the time of his criminal conduct, Petitioner suffered from a severe mental disease or defect which resulted in Petitioner's inability to appreciate the nature and quality or wrongfulness of his conduct. (A2857.) Additionally, the report concluded that Petitioner was not competent to assist in his defense at trial or during appellate proceedings. (A2857.) Subsequently, a more comprehensive evaluation was conducted by both Dr. Kea and Dr. Michael J. Marceau.¹⁸ (A2859-72.) The final report included the same diagnostic conditions. (A2871.) However, the report now concluded that Petitioner **may** have suffered from a severe mental disease or defect at the time of

¹⁴ The complete summary of the alleged legal errors can be found in Respondent's Answer and Return (Doc 20), Append. A (Doc 20-1, 4-6, A.2908-68.)

¹⁵ Pursuant to *United States v. Grosteefon*, 12 M.J. 431, 436 (C.M.A. 1982) defense appellate counsel are required to invite the attention of the Court of Military Review to all issues urged by the [Petitioner] and the Court of Military review must acknowledge that it has considered all of the issues enumerated by the Petitioner and indicate its disposition of those issues. The filing of these *Grosteefon* matters demonstrates Petitioner's ability to understand and assist in his appellate process.

¹⁶ William Kea, Ph.D., a clinical psychologist, was a Captain in the United States Army at the time he evaluated Petitioner in 1989. (A2857.)

¹⁷ In support of Petitioner's "Motion to Hold Proceedings in Abeyance" (A2982.), Dr. Kea wrote a letter requesting additional time to complete testing because, "[p]revious testing was deemed invalid due to Grays' lack of cooperation." (A2993.)

¹⁸ Dr. Michael J. Marceau, a United States Army Medical Corps Captain, was the Chief of Community Mental Health Services at the time he assisted Dr. Kea in evaluating Petitioner in 1989.

his criminal conduct and further evaluation was necessary to determine whether a severe mental disease or defect affected Petitioner's ability to appreciate the nature and quality or wrongfulness of his actions. (A2872.) The report also concluded that it was unclear whether Petitioner was competent at trial and a neurological examination would be useful in determining whether Petitioner was competent to cooperate in appellate proceedings. (A2872.) Petitioner "disclosed the circumstances of his crimes in great detail."¹⁹ Petitioner was subjected to neuropsychological testing contemporaneous with Dr. Kea and Dr. Marceau's evaluation. The testing concluded that Petitioner suffered from "diffuse and undifferentiated brain damage that could possibly be of long standing nature."²⁰ (A3179.) However, the report concluded that Petitioner's diffuse brain damage was not of a magnitude that would compromise legal criminal responsibility. (A3179.) The neuropsychological report noted that over the seven hours of testing, Petitioner was "able to maintain appropriate levels of concentration and awareness to the various tasks." (A3177.) Petitioner also "responded well to questioning with good spontaneous speech and verbal fluency." (A3178.) In conversations, Petitioner did not have any difficulties with "sustaining the flow of the topic." (A3178.) Petitioner was also noted to be able to sustain positive rapport and good verbal skills throughout many hours of contact during the testing. (A3179.)

¹⁹ Petitioner was able to recall many details of his offenses. (A) Petitioner even describes formulating a "roost" [Petitioner's word for "ruse"] in order to lure his female victims into an isolated situation so he could rape and murder them. (A2863-65.) Dr. Rose testified at Petitioner's pre-sentencing hearing that he also described to her his use of "ruses" to lure his victims to an isolated area so he could rape and murder them. (T2466-2467.)

²⁰ Dr. Kea telephonically consulted with Dr. (Lieutenant Colonel) Tom Waddell, an expert in neuropsychology and Chief of Psychology Services at William Beaumont Army Medical Center for the neuropsychological testing. (A3175.) The evaluation procedures included a review of Petitioner's medical records, EEG, and CT Scan reports, DMH treatment file, clinical interviews with Petitioner, review of psychometric testing and comprehensive neuropsychological testing conducted between 19 and 22 June 1990. The interviews, psychological testing and review of all relevant records were conducted by Dr. Kea. (A3179.)

On February 13, 1990, the ACMR ordered a second sanity board to conduct an inquiry into Petitioner's mental capacity to understand and cooperate intelligently in the appellate proceedings. (A2813-14.) On June 30, 1990, this three person sanity board, which was Petitioner's second such detailed and in-depth examination, unanimously concluded that: [Petitioner] has sufficient mental capacity to understand the nature of the court-martial proceedings and to conduct or cooperate intelligently in his defense at the time of the trial; and that [Petitioner] presently possesses sufficient mental capacity to understand the nature of the pending appellate proceedings and to conduct or cooperate intelligently in his appeal. (A2711-17.)²¹ Further, the report noted that Petitioner spoke slowly, precisely, and clearly and his thought processes and content were "clear, coherent, and consistent with the information he disclosed." (A2714.) Petitioner was able to discuss the purpose of the sanity board, the circumstances surrounding his conviction, and the purpose and actions of his court-martial proceedings. (A2714.) He was also able to "identify the functions for the various participants involved in his case." (A2714.) Further, the board noted that Petitioner "did not exhibit a prominent delusional system, active psychosis, hallucinations, or poor ideas of reference." (A2714.) The sanity board concluded that Petitioner did not suffer from a severe mental disease or defect at the time of the offenses, he was able to appreciate the wrongfulness of his conduct, he has sufficient mental capacity to understand the court-martial proceedings and cooperate in his defense both at trial and during his appellate proceedings. (A2716.)

Less than two years later, on December 16, 1991, Petitioner filed a "Motion to Compel Appropriate Army Authorities to Perform Additional Medical and Neuro-Psychological Tests of

²¹ The sanity board consisted of Captain William P. Kea, Ph.D., Captain Sandra Edwards, M.D., and Captain Michael J. Marceau, M.D. (A3489.) The board interviewed Petitioner for over two hours, reviewed the psychological and neuropsychological evaluation conducted at the USDB in 1989 by Dr. Kea, the record of trial, medical records and Directorate of Mental Health records. (A3489.)

Appellant.” (A2459-65.) Petitioner asked for the additional medical testing to “obtain an accurate diagnosis of [Petitioner]’s mental condition; which in turn is a critical factual prerequisite for addressing issues such as whether [Petitioner] received a fair trial, sentence appropriateness, and ineffective assistance of trial defense counsel.” (A2461.) On December 31, 1991, the ACMR granted the defense motion and ordered the Government to conduct every additional medical test which Petitioner requested.²² (A2446-48.) The Chief of the Psychology Service and Clinical Neuropsychology in the Department of Psychiatry and Neurology at the Womack Army Medical Center, Captain Fred Brown, Ph.D., conducted neuropsychological testing on Petitioner.²³ On February 18, 1992, Dr. Brown published a Neuropsychological Evaluation Report detailing the tests he performed to evaluate Petitioner’s mental health, the information discerned from interviewing Petitioner, Petitioner’s cognitive skills, and Dr. Brown’s assessment of Petitioner.²⁴ (A2080-2100.) In March 1992, Dr. Brown signed an affidavit detailing his diagnosis of Petitioner. (A1101-10.) Dr. Brown opined that Petitioner’s organic brain syndrome did not constitute a severe mental disease or defect and that Petitioner is able to fully appreciate the nature and quality or the wrongfulness of his acts. (A1104.)

²² See *United States v. Gray*, 51 M.J. 1, 9 (C.A.A.F. 1999). The ACMR ordered a Magnetic Resonance Imaging (MRI) scan of Petitioner’s brain, a 20-channel scalp electrode, sleep-deprived EEG, and a SPECT scan of the brain, as well as intellectual, neuropsychological, academic, psychological, and personality tests. (A2446-48.)

²³ Dr. Brown’s *circum vitae* provides the court with his extensive qualifications. (A1105-1109.) Dr. Brown graduated *cum laude* with a B.A. from University of Rochester in 1980; received a Ph.D. from Texas Tech University Department of Psychology in 1988; completed a fellowship in neuropsychology in 1990 at the Madigan Army Medical Center; and was on the National Dean’s List in 1979. (A1105, 1109.) He obtained his psychologist license from North Carolina in 1991. (A1105.)

²⁴ Captain Fred H. Brown, Ph.D. is a clinical neuropsychologist. Dr. Brown examined Petitioner over a three day period in which he administered a comprehensive evaluation which included a myriad of neurological tests which lasted approximately 16 hours. (A2980-81.) Additionally he interviewed Petitioner, reviewed Petitioner’s medical records since incarceration, and interviewed Petitioner’s aunt and mother. (A2081.) Dr. Brown’s evaluation of Petitioner included an assessment of Petitioner’s childhood and background. (A2081-2083.)

As discussed, Petitioner received multiple psychological examinations throughout his trial and appellate process. Every evaluation, except one that initially found to the contrary and was later amended, concluded that he was competent to understand and assist in his defense both at trial and during appellate proceedings.

B. Clemency Proceedings and Sentence Approval Under Article 71, UCMJ.

Upon the completion of Petitioner's military appeals, he submitted a habeas petition to the United States Supreme Court. On March 19, 2001, the Supreme Court denied Petitioner's request for certiorari, marking the completion of direct appellate review of Petitioner's capital courts-martial following over twelve years of legal challenges, extraordinary writs, mental competency determinations, and pursuit of a new trial. Petitioner's 1988 conviction and sentence were affirmed. (A0002.)

On March 24, 2003, Petitioner's lead counsel was notified, at the direction of TJAG, that because Petitioner's case had completed appellate review, the case was to be transferred to the Secretary of the Army. Petitioner's counsel was provided the opportunity to submit any matters he wished for TJAG to consider and he was advised that TJAG would include those matters with Petitioner's case. Petitioner's lead counsel was notified of the regulatory right to request the assistance of detailed military defense counsel for pursuing federal habeas review. Petitioner's lead counsel was also informed that "[t]he processing of [Petitioner's] case will not be held in abeyance after [May 8, 2003]." (AR0216.)

On April 14, 2003, TJAG denied a request for additional time to submit clemency matters previously submitted by the senior Army defense attorney on behalf of Petitioner. (AR0212.)

On April 23, 2003, Petitioner's lead counsel requested another extension until June 9, 2003 to submit matters. (A0213.) TJAG granted that request. (A0209.)

On April 24, 2003, TJAG denied a request for funding of a mitigation expert because "Petitioner's background is throughly detailed in the record of trial" for which the mitigation expert was requested. (A0203.)

On June 9, 2003, Petitioner's lead counsel again stated, "[a]s *pro bono* counsel for [Petitioner], I write to inform you that I will be unable to submit written matters to the [TJAG] on behalf of [Petitioner] by today." Petitioner's lead counsel stated that he would be meeting with Petitioner within the month and indicated that he would provide written materials to the TJAG "within the next thirty days." (AR0208.)

On September 1, 2005, TJAG notified Petitioner's lead counsel that Petitioner's death sentence had been reviewed by TJAG, the Secretary of the Army, and the Secretary of Defense and "it has been forwarded to the White House." (AR0218.)

On January 26, 2006, Petitioner's lead counsel requested funding from the Army to visit Petitioner. (AR0221-222.) The Army denied his request because there was no fiscal authority to fund civilian travel but did provide Petitioner the assistance of detailed military defense counsel. (AR0220.)

On September 12, 2006, the Army notified Petitioner's lead counsel that the Department of Justice was reviewing Petitioner's death sentence as part of the clemency process. (AR0229.)

On August 1, 2007, the Army notified Petitioner's lead counsel that the Department of Justice completed review of the case file and had returned it to the White House. (AR0230.)

C. Presidential Approval of the Death Sentence.

On July 28, 2008, the President of the United States approved the death sentence adjudged on April 12, 1988. (AR0231.) That same day, Petitioner was notified of the President's action. (AR0232.)

At no time after April 2001 did Petitioner's lead counsel or military defense counsel submit additional clemency matters to TJAG.

III. STANDARD OF REVIEW

A. Full and Fair Consideration is the Appropriate Standard of Review Because Petitioner's Claims Were Substantively Reviewed by both an Army Appellate Court and a Military Court of Appeals.

Petitioner asserts that civil courts must ultimately retain responsibility for the death sentences of citizens convicted of capital crimes in the United States during peacetime, regardless of whether those citizens are Soldiers. (Traverse 17.) Petitioner further argues that due process, and a historical limitation on military courts' power to capitally prosecute common law felonies, requires Petitioner's case receive substantive review from an Article III civil court (Traverse 11-22.) Petitioner argues that his claims have not yet received full and fair consideration because his case has not been reviewed by an Article III civil court. Petitioner's assertion is wholly without merit.

Petitioner's argument rests on the faulty premise that his appellate review under the UCMJ was not subject to civil court review or Article III review. Following review by the ACMR, Petitioner's case received substantive review by the CAAF".²⁵ CAAF has mandatory jurisdiction

²⁵ The CAAF was formerly the Court of Military Appeals ["CMA"]. Pursuant to Article 67(a)(1), UCMJ; 10 U.S.C. § 867(a)(1), the CMA shall review the record in all cases in which the sentence, as affirmed by a Court of Military Review, extends to death.

over capital cases pursuant to Article 67(a)(1).²⁶ 10 U.S.C. §867(a)(1). A cornerstone principle underlying the creation of CAAF was to provide for direct civilian review over military justice. *Noyd v. Bond*, 395 U.S. 683, 694 (1969). The creation of the CAAF guaranteed civil court oversight of military capital cases, an area that had been traditionally only entrusted to civil courts. The CAAF is a court designed to ensure civilian oversight of the military justice system. “Five civilian judges appointed by the President and confirmed by the Senate constitute the court.” *Ryder v. United States*, 515 U.S. 177 (1995) (citing 10 U.S.C. §942). The CAAF was “created in 1950 as an instrument of civilian oversight imposed upon the military services[.]” *United States v. Weiss*, 36 M.J. 224 (C.M.A. 1992), *aff’d*, 510 U.S. 163 (1994).²⁷ (“Atop the system is the Court of Military Appeals, which consists of five civilian judges who are appointed by the President, with the advice and consent of the Senate, for fixed terms of 15 years.”). *Id.* at 169. Additionally, Petitioner’s case, like all capital cases under the UCMJ, is subject to the Supreme Court’s discretionary Article III jurisdiction.²⁸

Deference to the military system of appellate review is not only consistent with this Court’s precedent in reviewing military cases, but consistent with the statutory scheme in habeas review of criminal state proceedings. Federal habeas review of state court decisions is strictly limited to whether the state court’s ruling “(1) resulted in a decision that was contrary to, or involved an

²⁶ Article 67(a)(1) only requires the CMA to review capital cases in which the Court of Military Review approved a death sentence.

²⁷ “By enacting the Uniform Code of Military Justice in 1950, and through subsequent statutory changes, Congress has gradually changed the system of military justice so that it has come to more closely resemble the civilian system.” *United States v. Weiss*, 510 U.S. 163, 174 (1994).

²⁸ The UCMJ and a separate federal statute authorize the Supreme Court to review by a writ of certiorari the judgments or “decisions” of the CAAF. Article 67(h)(1), UCMJ, at 10 U.S.C. § 867(h)(1); and 28 U.S.C. § 1259(3). The opinion of the United States Supreme Court denying Petitioner’s writ of certiorari is reported at 532 U.S. 919 (2001).

unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding.” 28 U.S.C. 2254(d)(1). Even in a capital case, “[t]he question . . . is not whether a federal court believes the state court’s determination was incorrect but whether that determination was unreasonable—a substantially higher threshold.” *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). Nothing about this deferential standard renders capital sentences in state courts “unreliable” or subject to additional substantive review. The same deference should be afforded to the military appellate process, which includes substantive review by a military appellate court, a civil court, and an Article III tribunal.

B. Recent Supreme Court Law Does Not Support Petitioner’s Assertion that his Petition is Entitled to Substantive Review.

Petitioner’s reliance on recent Supreme Court decisions as support of a requirement that Article III courts substantively review petitions for habeas corpus is misplaced. Neither *Boumediene v. Bush*, 553 U.S. 723 (2008) nor *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) considered the UCMJ with all of its accompanying rights and protections. *Boumediene* and *Hamdi* addressed the detention of enemy combatants prior to any trial or criminal conviction, not the standard of review accorded a post-trial collateral attack on a criminal conviction at a court-martial. *Boumediene*, 553 U.S. at 773; *Hamdi*, 542 U.S. at 509. Unlike Petitioner’s case, there had not been a trial or appeal, and there were factual questions as to the basis for detention. *Boumediene*, 553 U.S. at 774. None of the cases Petitioner cites support his assertion that he is entitled to substantive review of claims which were fully and fairly reviewed by military appellate courts.

Similarly, *INS v. St. Cyr*, 533 U.S. 289 (2001) fails to support Petitioner’s argument that he is entitled to substantive review. In *INS v. St. Cyr*, the Supreme Court considered whether a federal

district court retained jurisdiction under the general habeas corpus statute, 28 U.S.C. §2241, to entertain an alien’s challenge of the Attorney General’s conclusion concerning the inapplicability of a statutory provision regarding waiver of deportation.²⁹ The Court held that habeas jurisdiction under § 2241 was not repealed by the Anti-terrorism and Effective Death Penalty Reform Act [“AEDPA”] and Illegal Immigration Reform and Immigrant Responsibility Act [“IIRIRA”] and St. Cyr’s writ petition was reviewable. *Id.* at 314. Petitioner’s reliance upon this case to support his argument that he is entitled to substantive review is misplaced. *INS v. St. Cyr* addressed the jurisdictional application of the Writ of Habeas Corpus to an executive administrative decision. The executive administrative decision in *INS v. St. Cyr* had not received substantive judicial review prior to the filing of the habeas petition in federal district court. Unlike St. Cyr, Petitioner already received extensive judicial review. Accordingly, the scope of this Court’s habeas review is limited.

Petitioner incorrectly relies upon *Hamdi*³⁰ and *Boumediene* to suggest that he is entitled to substantive *de novo* review of his case. *Hamdi v. Rumsfeld* addressed not only the jurisdictional nature of a writ of habeas corpus but also the standard of review in certain circumstances. 542 U.S. 507 (2004) (plurality opinion). In *Hamdi v. Rumsfeld*, the threshold question before the Court was whether the executive branch has the authority to detain citizens who qualify as “enemy combatants.” *Id.* at 516 (2004). While the Court found that the Executive branch had such authority, it also held that a citizen-detainee seeking to challenge his classification as an enemy combatant is entitled to notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decision maker. *Id.* at 538. The Court

²⁹ *INS v. St. Cyr*, 533 U.S. 289, 297 (2001). St. Cyr’s habeas petition challenged the Attorney General’s conclusion that, as a matter of statutory interpretation, he was not eligible for discretionary relief from deportation. *Id.*

³⁰ 542 U.S. 507 (2004).

recognized that this standard could have been satisfied by an appropriately authorized and properly constituted military tribunal.³¹ *Id.* “In the absence of such process, however, a court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved.” *Id.* Thus, the Court held that petitioner was entitled to due process regarding his detention. “Any process in which the Executive’s factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short.” *Id.* The Court further held Hamdi was entitled to substantive review of his petition because the “some evidence” standard of review is, “ill suited to the situation in which a habeas petitioner has received no prior proceedings before any tribunal and had no prior opportunity to rebut the Executive’s factual assertions before a neutral decision maker.” *Id.* at 537. Petitioner’s case is factually distinguishable from the facts in *Hamdi v. Rumsfeld*. Petitioner has received extensive substantive review by both a military tribunal and a civil court. The standard of review articulated in *Hamdi* is inapplicable to Petitioner’s case. The proper standard of review is limited to whether Petitioner received full and fair consideration.

In *Boumediene* the Supreme Court addressed a purely jurisdictional issue concerning the ability of aliens designated as enemy combatants to file a writ of habeas corpus in federal court challenging their detention. *Boumediene*, 553 U.S. at 732. Petitioners were aliens designated as enemy combatants and detained at the United States Naval Station at Guantanamo Bay, Cuba. *Id.*

³¹ In fact, the Court noted, “that military regulations already provide for such process in related instances, dictating that tribunals be made available to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention. See Headquarters Depts. of Army, Navy, Air Force, and Marine Corps, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190-8, ch. 1, § 1-6 (1997).” *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).

Petitioners questioned whether they had the constitutional privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause, U.S. Const. Art. I, §9, cl.2. *Id.* The Supreme Court made specific findings that procedures in the Detainee Treatment Act [“DTA”] established in response to the plurality opinion in *Hamdi* were not a sufficient substitute for habeas review. *Id.* at 792. The Supreme Court found that the DTA’s limits on the Court of Appeals prevented the appellate court from reviewing the legal basis for a detainee’s detention or from ordering his release, which necessitated the availability of independent habeas review. *Id.* at 789-91. The detention review process at issue in *Boumediene* bears no resemblance to appellate courts convened under the UCMJ. Their appellate authority not only mirrors the federal appellate courts in most respects, but includes even greater authority to set aside the findings and sentence in favor of an accused. See 10 U.S.C. § 866(c); *United States v. Parker*, 36 M.J. 269, 271 (C.M.A. 1993) (Service courts “are something like the proverbial 800-pound gorilla when it comes to their ability to protect an accused” using “their ‘awesome, plenary, *de novo* power of review’ under Article 66(c).”); *Loving v. United States*, 62 M.J. 235, 256 (C.A.A.F. 2005) (citing *Noyd v. Bond*, 395 U.S. 683, 695, n.7 (1969)) (power of military courts to issue writs of habeas corpus under All Writs Act).

Application of the established deferential standard of review – full and fair consideration – demonstrates that Petitioner is not entitled to habeas relief. Just as with the state courts, the military justice system is entitled to respect and deference when its decisions are collaterally attacked. “The military justice system relies upon courts that must take all appropriate means, consistent with their statutory jurisdiction, to ensure the neutrality and integrity of their judgments.” *United States v.*

Denedo, 129 S.Ct. 2213, 2224 (2009). Deference to, and respect for, military appellate court review does not undermine the “reliability” of Petitioner’s conviction and sentence.

C. Stone v. Powell and Rose v. Mitchell Support Limited Review in this Case.

Petitioner argues he is entitled to substantive review because many of his claims challenge systemic military judicial issues or require military courts to sit in judgment of their own faulty decisions. (Traverse, 26.) Petitioner’s reliance upon *Stone v. Powell*, 428 U.S. 465 (1976) and *Rose v. Mitchell*, 443 U.S. 545 (1979) as support for this argument is misplaced.

The Supreme Court’s decision in *Rose v. Mitchell* addressed an allegation of racial discrimination in the selection of a Tennessee grand jury foreman in a murder case. *Rose*, 443 U.S. at 547. The Court considered whether a claim of racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment was cognizable in a federal petition for habeas corpus in light of the decision in *Stone v. Powell*. *Id.* at 549. The Court departed from the restrictive view of habeas application it took in *Stone* because, “claims that the state judiciary itself has purposely violated the Equal Protection Clause are different.” *Id.* at 561. The Court concluded that cases alleging constitutional errors in a state grand jury system requires “an independent means of obtaining review by a federal court.” *Id.* “A federal forum must be available if a full and fair hearing of such claims is to be had.” *Id.* The Court concluded that

[f]ederal habeas review is necessary to ensure that constitutional defects in the state judiciary’s grand jury selection procedure are not overlooked by the very state judges who operate that system.

Id. at 563. To ensure that Petitioner in *Rose v. Mitchell* received full and fair review of such allegations, the Court held that substantive habeas review was appropriate in such cases. *Id.* at 563.

Petitioner's case is distinguishable from *Rose v. Mitchell*. Only Petitioner's claims 1, 2, 9, 10 and 15 even allege defects with military procedural rules that may require a military appellate court to review procedures within which it operates. However, those same claims were fully and fairly considered by the CAAF, a civil court. As previously argued, the CAAF was created to ensure civilian oversight of the military court-martial system. CAAF conducted a substantive review of these claims and found them meritless. Thus, Petitioner's claims regarding systemic defects of the court-martial system have already been reviewed by an independent court. As such, Petitioner is not entitled to substantive review of those claims.

IV. ARGUMENT

This Court should dismiss the Petition because no additional review or relief is necessary. Ground Nineteen challenges the President's approval of Petitioner's sentence without disclosure of inter-agency documents containing recommendations regarding approval of his sentence. Respondent asserts this claim is waived because Petitioner has not exhausted military remedies and he makes no allegations nor presents any evidence to show cause and prejudice for failing to do so. Moreover, this claim lacks merit.

All issues asserted in Claim Twenty were given full and fair consideration. Petitioner's court-martial received full and fair consideration as demonstrated by the ROT, the statement of facts contained herein, and the procedural history located at Append. A. (Doc 20-1.). It is clear from this appellate history that the ACMR, the CAAF, and the Supreme Court fully reviewed and disposed of the claims that Petitioner now brings before this Court. As the Supreme Court stated:

It is not the duty of the civil courts simply to repeat that process – to examine and reweigh each item of evidence of the occurrence of events which tend to prove or disprove one of the allegations in the applications for habeas corpus. It is the limited

function of the civil courts to determine whether the military have given fair consideration to each of these claims.

Burns v. Wilson, 346 U.S. 137, 142 (1953). Petitioner alleges no facts indicating that the military appellate courts manifestly refused to consider any of his claims or applied improper legal standards. Thus, any further review of Claim Twenty is precluded. Petitioner's dissatisfaction with the results of the previous reviews does not, in itself, allow a de novo review because he must satisfy the four *Dodson*³² factors.³³ *Dodson v. Zelez*, 917 F.2d 1250, 1252-53 (10th Cir. 1990).

Lastly, Petitioner asserts in Claim Twenty-one that the military lacked jurisdiction to prosecute Petitioner for crimes committed in the United States during peacetime and that the military courts lacked jurisdiction to capitally prosecute him in the absence of an adequate service connection to his crimes. Petitioner is not entitled to any relief on either of these issues because his claims are meritless.

Accordingly, no relief under 28 U.S.C. § 2241 is available on any of Petitioner's additional claims and Petitioner's request for a writ of habeas corpus should be denied.

³² In *Lips v. Commandant, USDB*, 997 F.2d 808, 810 (10th Cir. 1993), the Tenth Circuit restated the rule that "review by a federal district court of a military conviction is appropriate *only* if the following four conditions are met":

- (1) the asserted error **must be of substantial** constitutional dimension;
- (2) the issue [must be] **one of law rather than of disputed fact** already determined by the military tribunals;
- (3) **there are no military considerations** that warrant different treatment of constitutional claims; and
- (4) the **military courts failed to give adequate consideration** to the issues involved or failed to apply proper legal standards.

Id., 997 F.2d at 811 (citing *Dodson v. Zelez*, 917 F.2d 1250, 1252-53 (10th Cir. 1990)).

³³ A full analysis of the *Dodson* factors can be found in Respondent's Answer & Return (Doc 20, 20-22.)

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

Petitioner alleges that he was denied his rights to due process, a fair sentencing proceeding, a public trial, and against cruel and unusual punishment because the President, in approving petitioner's death sentence, acted in a judicial role and relied upon confidential reports that were not disclosed to him. (Traverse 183-190.) Petitioner's claim mistakenly relies upon the assumption that the President's approval or disapproval of the imposed death penalty is judicial action. In fact, his assertion that the President plays a judicial role in approving a death sentence is directly controverted by recent court precedent. Such Presidential action is "akin to a state governor's action, and as such is not part of the direct judicial review of the case." *Loving*, 62 M.J. at 247. Nevertheless, Petitioner argues that because Presidential approval of his sentence is a judicial act he is entitled to review the documents the President considered and submit rebuttal matters. Even if that were the case, which it is not, Petitioner was afforded all the due process to which he was entitled. Petitioner's due process rights were strictly honored in that he was given notice and the opportunity to submit written matters prior to his case being forwarded to the President. Petitioner failed to submit any clemency matters.

Petitioner asserts he is entitled to review the documents provided to the President for the purposes of approving or disapproving his death sentence, namely, recommendations of the Judge Advocate General, the Secretary of the Army, and the Secretary of Defense. Petitioner was not entitled to these documents and thus, his claim is without merit. Further, the documents Petitioner seeks are properly protected from release by the presidential communications privilege and the

deliberative process privilege. In acting under Article 71, the President must be afforded the opportunity to consult with his advisors, as such rights have long been held a privilege to the Presidential office. See generally *Judicial Watch, Inc. v. Dep't. of Justice*, 365 F.3d 1108 (D.C. Cir. 2004). Just as the Court in *Loving v. Department of Defense* found, this court should find that the documents Petitioner requests are not subject to disclosure as they are protected by the Presidential communications and deliberative process privileges. 496 F. Supp. 2d 101, 107-09 (D.D.C. 2007). The documents Petitioner seeks are the same class of documents which were sought by appellant in *Loving* and as such, this court should deny the request by petitioner and refrain from interfering with the "...President's ability to obtain candid and informed opinions from his advisors and to make decisions confidentially." *Judicial Watch, Inc.* 365 F.3d at 1112. Petitioner's claim is meritless.

A. Petitioner's Opportunity to Submit Clemency Matters Is Untimely and Waived.

As an initial matter, Petitioner's challenge to the President's review of the documents should be dismissed as moot and untimely, because Petitioner had ample opportunity to submit clemency matters to the President, and failed to do so. Therefore this matter should be deemed waived due to the Petitioner's inaction.

After Petitioner's case was reviewed and affirmed by CAAF, the Supreme Court in May 2001, after full briefing by Petitioner's counsel (A0018-31, A0081-346) and the Solicitor General (A0032-56), denied Petitioner's request for reconsideration of its March 2001 denial of Petitioner's petition for writ of certiorari (A0003.). Between 2001 and 2008, Petitioner's case was submitted for clemency review as required by the UCMJ through the Secretary of the Army and the Secretary of Defense to the President of the United States. Petitioner was apprised annually of the status of the transfer of his case for clemency review to the Department of Justice and to the White House

(A0218, A0227-30), but at no time from April 2001, until July 28, 2008, did Petitioner's lead counsel or military defense counsel submit additional clemency matters to the TJAG. The President ultimately approved petitioner's sentence of death. (AR 231.)

Petitioner had numerous opportunities to submit matters for clemency. On March 24, 2003, Petitioner's lead counsel was notified, at the direction of TJAG, that because Petitioner's case had completed appellate review, the case was to be transferred to the Secretary of the Army. Petitioner's counsel was invited to submit matters for TJAG consideration and he was advised that TJAG would include those matters with Petitioner's case. Petitioner's lead counsel was notified of the regulatory right to request the assistance of detailed military defense counsel for pursuing federal habeas review. Petitioner's lead counsel was also informed that "[t]he processing of [Petitioner's] case will not be held in abeyance after [May 8, 2003]." (AR0216.)

On April 14, 2003, TJAG denied the request for delay to submit clemency matters that was previously submitted by the senior Army defense attorney on behalf of Petitioner. (AR0212.) On April 23, 2003, Petitioner's lead counsel stated, "I have represented [Petitioner] since 1999 when I gave him my word that I would continue to represent him *pro bono* until his case was finally resolved." Petitioner requested and received a 30-day extension to submit matters, up to June 9, 2003. (A0213.) On April 24, 2003, TJAG denied the request for funding of a mitigation expert made on Petitioner's behalf by his Army defense attorney because the record thoroughly detailed the mitigation evidence concerning Petitioner's background. (A0203.) On June 9, 2003, Petitioner's lead counsel again provided notice that, "[a]s *pro bono* counsel for [Petitioner], I write to inform you that I will be unable to submit written matters to the [TJAG] on behalf of [Petitioner] by today." Petitioner's lead counsel stated that he would be meeting with Petitioner within the month and

indicated that he would provide written materials to the TJAG “within the next thirty days.” (AR0208.)

On September 1, 2005, the Army notified Petitioner’s lead counsel that Petitioner’s death sentence had been reviewed by TJAG, the Secretary of the Army, and the Secretary of Defense and “it has been forwarded to the White House.” (AR0218.) On January 26, 2006, Petitioner’s lead counsel requested funding from the Army to visit Petitioner. (AR0221.) The Army denied his request because there was no fiscal authority to fund civilian travel but did provide Petitioner the assistance of detailed military defense counsel. (AR0220.) On September 12, 2006, the Army notified Petitioner’s lead counsel that the Department of Justice was reviewing Petitioner’s death sentence as part of the clemency process. (AR0229.) On August 1, 2007, the Army notified Petitioner’s lead counsel that the Department of Justice completed review of the case file and had returned it to the White House. (AR0230.) Despite being offered multiple opportunities to submit clemency matters, Petitioner failed to do so. His claim attacking the Presidential review process should be dismissed as untimely.

B. Presidential Approval of Petitioner’s Sentence Was Not Judicial So He Was Not Entitled to the Requested Documents.

With respect to the challenge against the President’s review of the aforementioned documents, Petitioner correctly states that Article 71, UCMJ (37 U.S.C. §871) requires Presidential approval for those court-martial sentences extending to death. That provision further provides that in such cases, “the President may commute, remit, or suspend the sentence, or any part thereof, as he sees fit.” *Id.* Petitioner’s assumption, however, that the President’s role is judicial, is mistaken. Petitioner relies upon three cases adjudicated by the Supreme Court in the late 1800’s: *United States*

*v. Fletcher*³⁴, *United States v. Page*³⁵, and *Runkle v. United States*³⁶; and an 1864 Attorney General Opinion in support of his position. In *Fletcher*, *Page*, and *Runkle*, the Court refers to the Presidential approval of the sentences in the cases as “judicial.” However, none of the cases involved Presidential review of the imposition of a death sentence. More importantly, they pre-date the enactment of the UCMJ. The courts in *Fletcher*, *Page*, and *Runkle* all addressed the issue of what constituted a sufficient record of presidential approval or disapproval of sentences for the purposes of carrying out the adjudged dismissal of officers from the United States Army. (*Fletcher*, 148 U.S. at 88, addressing the issue of whether the order approving the sentence of a court-martial was void because it did not appear the president personally approved the proceedings; *Page*, 137 U.S. at 680, holding that “where the record discloses that the proceedings have been laid before the president for his orders in the case, the orders subsequently issued thereon are presumed to be his, and not those of the secretary by whom they are authenticated; *Runkle*, 122 U.S. at 560, addressing the issue of whether the record showed positively and distinctly that the sentence dismissing service member from the service was approved by the President). The cases involved issues pertaining to the administrative processing of the review not the appropriateness of a death sentence. Furthermore, these cases analyzed courts-martial prosecuted under the former Articles of War, which, in 1950 were substantially revised and consolidated into the UCMJ. *See* Act of May 5, 1950, ch. 169, 64 Stat. 107. Since that time, the UCMJ has been further revised, including revisions in 1968, 1983, 2005, and again in 2008. The UCMJ is codified at 10 U.S.C. §§801-946. Under the

³⁴ 148 U.S. 84 (1893).

³⁵ 137 U.S. 673 (1891).

³⁶ 122 U.S. 543 (1887).

UCMJ, Presidential approval of sentences was not required in all cases involving the dismissal of officers. By contrast, the Articles of War required Presidential approval of the sentences in *Fletcher*, *Runkle*, and *Page*. See 10 U.S.C. §871.

The President's role in military death sentence cases adjudicated under the modern UCMJ, is one of clemency, not judicial review. The CAAF recently examined the issue of "finality" with respect to Presidential approval of a death penalty sentence in *Loving v. United States*, 62 M.J. 235 (2005). In *Loving*, the CAAF was presented with the issue of whether it had jurisdiction to hear two writs sought by Loving, a convicted military prisoner sentenced to death, in the period after there was a final judgment as to the legality of the proceedings under Article 71(c)(1), but before Presidential approval and finality under Article 76, UCMJ. *Id.* To address jurisdiction, the Court identified five threshold issues pertaining to Loving's petitions, one of which was whether the writs sought by Loving were both necessary and proper in light of alternate remedies available for petitioner to present his legal challenges. *Id.* at 237. To answer the question, the court analyzed its authority to review writs brought under the "All Writs Act" and in doing so applied the United States Supreme Court's opinion in *Clinton v. Goldsmith*, 526 U.S. 529, 119 S.Ct. 1538 (1999), which stated that "a writ may not be used ... when another method of review will suffice." *Id.* at 537. As the case concerned the imposition of the death penalty, the court then analyzed the Presidential approval action, and in finding that later presidential action did not render their review unnecessary or inappropriate, concluded that "...presidential action is not an adequate remedy at law. Presidential action is akin to a state governor's action, and as such is not part of the direct judicial review of the case." *Loving*, 62 M.J. at 247. In coming to this conclusion, the court acknowledged that Article 71, UCMJ, requires Presidential approval of death penalty sentences, but also

acknowledged that prior to such Presidential action, the CAAF must complete a judicial review and the Supreme Court must resolve any petition for a writ of certiorari filed with it. *Id.* The CAAF also reviewed the legislative history of the 1983 amendments of Article 71, that “suggests [the amendments] were intended to separate the executive clemency powers of the President from the judicial review of the proceedings.” *Id.* The Senate report itself specifically stated:

This legislation continues the present requirement that death sentences receive Presidential approval and that dismissal of an officer be approved by the Secretary of the Military Department concerned before such sentences are executed under Article 71. Such reviews are conducted after all legal reviews are completed, and *do not involve a review of the legality of the proceedings; rather, they are conducted as a matter of clemency* (emphasis added).

S.Rep. No. 98-53, at 24 (1983), reprinted in Index and Legislative History, Uniform Code of Military Justice 550 (1984).

Despite the plain identification of the President’s action as one of clemency, Petitioner asserts that the President is akin to the “sentencer” and as such, he is entitled to review and rebut all matters considered by the President. (Traverse 185.) Petitioner relies upon the cases of *Espinosa*³⁷, *Lambrix*³⁸ and *Proffitt*³⁹ in his characterization of the President as “sentencer,” and then utilizes that characterization to argue that the precedent announced in *Gardner v. Florida*⁴⁰, applies to the present case. Review of these cases, however, demonstrates that in each case, the “sentencers” referred to are the judges and the juries. The issues in these cases are easily distinguished from the present

³⁷ *Espinosa v. Florida*, 505 U.S. 1079 (1992).

³⁸ *Lambrix v. Singletary*, 520 U.S. 518 (1997).

³⁹ *Proffitt v. Florida*, 428 U.S. 242 (1976).

⁴⁰ *Gardner v. Florida*, 430 U.S. 349 (1977).

case, in that the Courts reviewed the actions of the judges and juries who imposed the sentence, where as here Presidential action was taken after the sentence had been adjudged by a military jury.⁴¹

The cases Petitioner cites involved sentencing by a judge and jury, not the President. All three cases, *Proffitt*, *Espinosa*, and *Lambrix*, addressed the procedures utilized by the Florida judicial system in imposing a death sentence upon convicted prisoners. In *Proffitt*, the Supreme Court discussed the Florida capital sentencing proceedings and summarized the process. 428 U.S. at 248-49. The Court stated, “the sentence is determined by the trial judge rather than by the jury.” *Id.* at 252. Petitioner himself cites to this fact. (Traverse at 185.) Sixteen years later in *Espinoza*, the Supreme Court again reviewed Florida sentencing procedures in a death penalty case and announced that “where a weighing state decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances.” 505 U.S. at 1082. The “two actors” referred to by the Court were the judge and jury at the trial court level. *Id.* The *Espinosa* court faced the limited issue of determining whether an Eighth amendment violation existed where a Florida jury considered an invalid aggravating circumstance in recommending the death penalty, but the Judge, as sentencer, independently weighed the aggravating and mitigating circumstances to determine whether the sentence would be life or death. The issue in *Espinosa* was limited and the case did not involve a military prisoner, nor did it address the issue presently before this Court. In *Lambrix*, the Supreme Court again reviewed a Florida death penalty case and, as before, stated that under Florida law, the “trial court,” not the jury, is the sentencer. 520 U.S. at 533-34. The determinations in each of these three cases all stem from the simple fact that it was the judge who heard the facts of the case, reviewed the jury’s recommendation and issued a sentence

⁴¹ A six member military jury sentenced Petitioner to be reduced to the rank of Private, to forfeit all pay and allowances, to be Dishonorable Discharged from the service, and to be put to death. (T2583.)

to the accused. Hence, the judge “sentenced” the accused. This is completely unlike the President’s action in approving or disapproving the petitioner’s death sentence. Unlike the judges in Florida, or the juries elsewhere, it is not the President who hands down a sentence to an accused. The President’s ability to commute or remit a death sentence is limited to just that: commutation or remission. Unlike a judge or jury sitting as trier and sentencer, were a court to determine that death were not warranted in any given case, the President does not possess the authority to intervene and sentence an accused to death. Indeed, the President is not the sentencer and does not have that authority. The President may only alleviate the ultimate penalty levied upon an accused. Accordingly, his action in approving a death sentence, already adjudged and upon completion of appellate review, signals a denial of clemency. It is not, as Petitioner asserts, the President sentencing the accused to death. In light of the actual holdings and facts in the above cited cases, petitioner’s assertion that “[p]residential review and approval or disapproval of a court martial death sentence under 10 U.S.C. 871(a) is therefore indistinguishable from a judicial sentencing proceeding” (traverse at 185) is incorrect and the claim should be dismissed.

Nevertheless, Petitioner attempts to equate the Presidential action to that of a “sentencing procedure” such as those in *Gardner v. Florida*⁴² and *Paxton v. Ward*.⁴³ Petitioner’s reliance on these cases fails because the courts in *Gardner* and *Ward* dealt with actions that occurred during the judicial proceedings, not Presidential clemency action or action “akin to a state governor’s action...” *Loving*, 62 M.J. at 247. In *Gardner*, the Supreme Court held that a petitioner was denied due process of law when a death sentence was imposed, in part, on the basis of information which

⁴² 430 U.S. 349 (1977).

⁴³ 199 F.3d 1197 (10th Cir. 1999).

petitioner had no opportunity to deny or explain. 430 U.S. at 362. The facts in *Gardner*, however, are vastly different than the case at hand. The *Gardner* court faced an issue in which the trial judge who imposed the death sentence relied on portions of a presentence investigation which were not disclosed to the petitioner (430 U.S. at 351). In the present case, the adversarial process has been completed and Petitioner fully participated in the pre-sentencing phase of his trial. The trial court sentenced Petitioner to death and he is not asserting that any secret information was wrongfully given to the trial court, who ultimately sentenced him. Similarly, the Court's holding in *Paxton v. Ward* is also inapplicable to Petitioner's situation. 199 F.3d 1197 (10th Cir. 1999). In *Ward*, the Tenth Circuit faced the issue of a prosecutor who misrepresented facts during closing arguments at a capital sentencing proceeding. 199 F.3d at 1216. In affirming the district court's decision to uphold the appellant's conviction, while reversing the death sentence pending a new sentencing hearing, the Court held that petitioner had no "...effective means for rebutting the prosecution's statements." *Id.* at 1218. Again, the issue faced by the Tenth Circuit in *Ward* is different than the case at hand, because in *Ward*, the trial court was in the process of sentencing the accused. By contrast, Petitioner has already been sentenced by a jury and the adversarial process at the trial level has long been completed.⁴⁴

For the foregoing reasons, Petitioner's claim of a violation of his Constitutional rights to a public trial are also without merit. As stated, Petitioner was convicted at a general court-martial and sentenced to death, and his appeals raising substantive issues within the military justice system resulted in no relief. Petitioner does not assert that the trial judge, jury, or other members in the

⁴⁴ See decision of CMR at *United States v. Gray*, 37 M.J. 730 (A.C.M.R. 1992), determining that the findings and sentence in petitioner's case were correct in law and fact and denying petitioner's appeal and supplemental assignments of error; affirmed by *United States v. Gray*, 51 M.J. 1 (C.A.A.F. 1999); cert. denied by *United States v. Gray*, 532 U.S. 1035 and 532 U.S. 919 (2001).

military justice process relied upon secret information that was not presented to petitioner at the trial court. The President did not conduct another trial on the merits of the case. The President's action in approving or disapproving clemency was not a judicial action and therefore did not violate the Petitioner's right to a public trial. Because the President is not a judge and does not have the authority to impose a sentence on an accused, the President's action can only be construed as that "akin to a state governor's action." *Loving*, 62 M.J. at 247.

C. Petitioner is Not Entitled to the Requested Documents Because They Are Privileged.

In addition to relying on the characterization of the President's action as judicial, Petitioner's request to obtain the documents reviewed by the President for the purposes of approving or disapproving his death sentence naturally relies upon the assumption that he is entitled to such documents. Petitioner, however, is not entitled to the documents for both the reasons cited above and because the documents are protected from release by the presidential communications privilege and the deliberative process privilege.

The Presidential communications privilege is a "presumptive privilege for [p]residential communications," *United States v. Nixon*, 418 U.S. 683, 708, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), and it preserves the President's ability to obtain candid and informed opinions from his advisors and to make decisions confidentially. See *Loving v. Department of Defense*, 550 F.3d 32, 37, 384 U.S. App. D.C. 32, 37 (2008) (citing *Judicial Watch, Inc. v. Dep't. of Justice*, 365 F.3d 1108, 1112 (D.C. Cir. 2004)). "The deliberative process privilege protects 'documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *Loving*, 550 F.3d at 38, citing *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001). "For the deliberative

process privilege to apply, the material must be ‘predecisional’ and ‘deliberative.’” *Loving*, 550 F.3d at 38, citing *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997). These privileges apply to the present case and petitioner’s claim of constitutional violation based upon this premise should be dismissed and any request for the documents should be denied.

The United States Court of Appeals for the District of Columbia faced nearly identical facts to those presented in the present case in *Loving v. Department of Defense*. 550 F.3d at 35 (cert. denied, 130 S.Ct. 394, 175 L.Ed.2d 267 (2009)). In *Loving*, the appellant was convicted of capital murder by a military court-martial and filed suit in the United States District Court for the District of Columbia under the Freedom of Information Act (FOIA) seeking disclosure of Department of Defense and Army memoranda prepared for the President in connection with his statutory review of the appellant’s death sentence. *Id.* As in the present case, *Loving* specifically sought memoranda from the Army Judge Advocate General, the Secretary of the Army, the Defense Secretary, and the Department of Defense Office of General Counsel [“DODOGC”] to the President which concerned recommendations regarding *Loving*’s death sentence. *Id.* at 36. The District Court denied the appellant’s request, finding that three of the documents were protected by the presidential communications privilege and that the fourth document was protected by the deliberative process privilege. *See Loving v. Dep’t of Def.*, 496 F.Supp.2d 101, 107-09 (D.D.C.2007). In affirming the district court’s ruling, the Court of Appeals found that the memoranda from “the Army and Defense Secretaries” sent to the president “advising him on his Article 71(a) review of *Loving*’s capital sentence” fell squarely within the presidential communications privilege. *Loving*, 550 F.3d at 39. The Court also found that the Judge Advocate General’s memorandum was protected by the privilege because the document was solicited by the President through Rule for Court-Martial

(R.C.M.) 1204(c)(2), which requires the Judge Advocate General to transmit his recommendation through the Secretary concerned for Presidential action. *Id.* at 40. The court also affirmed the district court's holding that the DODOGC memorandum fell within the deliberative process privilege. *Id.* at 40-41.

In light of the fact that Petitioner seeks documents which were created by the President's advisors in an effort to give him "candid and informed opinions," this Court should find that the documents are not subject to disclosure as they are protected by the presidential communications and deliberative process privileges and should refrain from interfering with the "...President's ability to obtain candid and informed opinions from his advisors and to make decisions confidentially." *Judicial Watch, Inc.* 365 F.3d at 1112.

Petitioner's Constitutional rights were not violated by the Presidential clemency process prescribed in the UCMJ. Petitioner received a public trial at which he was convicted and sentenced to death. Further, in exercising his authority to deny clemency after legal proceedings were completed, the President properly relied upon the communications and reports of his staff, documents to which the Petitioner is not entitled.

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

Petitioner's claims in Ground Twenty are divided into three issues: an allegation that Petitioner was tried and received appellate review while incompetent in violation of his Sixth and Eighth Amendment rights; an allegation that the trial and appellate courts erred in failing to conduct a hearing regarding Petitioner's competency; and an allegation that trial and appellate defense

counsel were ineffective for failing to litigate Petitioner's incompetence. (Traverse, 191-199.) This Court should dismiss the first issue (Traverse , 191-194) because the military courts gave it full and fair consideration. *Burns*, 346 U.S. at 142. This Court should also dismiss the second and third issues (Traverse, 195-198) because the underlying claims were given full and fair consideration. To the extent that Petitioner is raising something other than what he raised before the military courts, he has waived the issue. *Watson v. McCotter*, 782 F.2d 143, 145 (10th Cir. 1986). Moreover, no further review of Ground Twenty is warranted because Petitioner fails to satisfy all four *Dodson* factors as required for this Court to review the merits of his claims. 917 F.2d at 1253-4. Finally, if this Court does review any of the allegations in Ground Twenty, Petitioner is not entitled to any relief because his claims are meritless.

A. The Military Courts Fully and Fairly Considered Petitioner's Challenges.

Contrary to Petitioner's assertions, the trial and appellate courts fully and fairly considered the issue of Petitioner's competency. Petitioner received a sanity board evaluation prior to his court-martial in order to evaluate his competency to assist in his own defense and during the appellate process. Appellate defense counsel obtained a sanity evaluation and neuropsychological testing of Petitioner while he was incarcerated at the USDB at Fort Leavenworth in 1989, early in his appellate process. Additionally, the ACMR ordered an additional sanity board evaluation and extensive neuropsychological testing at defense counsel request in 1990 and 1992. All psychological evaluations found Petitioner competent. Appellate defense counsel litigated Petitioner's competency at every stage of the appellate process and also litigated the effectiveness of his trial defense counsel and appellate counsel. The ACMR and CAAF properly denied Petitioner's claims. This Court

should dismiss the claims asserted in Ground Twenty because they were given full and fair consideration. *Burns*, 346 U.S. at 144.

1. *Petitioner's Competency was Evaluated at Both the Trial and Appellate Levels.*

Petitioner argues that “the record is clear” that he has serious mental health impairments that prevented him from understanding the trial and appellate proceedings and assisting his defense counsel. (Traverse, 195.) Petitioner supports this argument by relying on affidavits from a carefully chosen selection of mental health professionals involved in evaluating Petitioner during trial and appellate proceedings. (Traverse, Ex. 4 Warren Decl., Ex. 5 Dr. Kea Decl.) These affidavits allege that these professionals now believe their original diagnosis and conclusions regarding his competency are unreliable based on background information not previously provided to them. A closer examination of the information available to these affiants at the time of their original evaluations, as well as their reports and testimony at the time, reveal they relied upon the same background information now provided to them, although such information was not as extensive. Petitioner also relies upon retrospective mental health evaluations in support of his claim he was incompetent during trial and through the appellate proceedings. It is no surprise that mental health professionals may disagree. However, all reports and evidence available contemporaneously with Petitioner’s trial and appellate proceedings were professionally administered and are well documented. With the exception of one equivocal report every single mental health evaluation conducted during Petitioner’s trial and appellate proceedings concluded that Petitioner was competent and able to assist in own defense both at trial and during his appellate process.

Rule for Courts-martial [“RCM”] 909 mandates that no person may be court-martialed if that person is suffering from a mental disease or defect rendering him or her “mentally incompetent to

the extent that he or she is unable to understand the nature of the proceedings against them or to conduct or cooperate intelligently in the defense of the case.” An individual facing trial by court-martial is presumed to have the mental capacity to stand trial unless there is a preponderance of evidence to the contrary. RCM 909(b). The military judge may order a hearing to determine the mental capacity of an accused either *sua sponte* or upon the request of either party. RCM 909(d). Trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the proceedings. RCM 909(e)(2). All available and reasonable evidence before both the trial and military appellate courts concluded that Petitioner was competent to face trial and participate in appellate proceedings. There was no evidence before either the trial or appellate courts to trigger a competency hearing in this case under RCM 909(e).

A conscientious effort was made on the part of all of the mental health professionals who examined the petitioner. They all ultimately concluded the petitioner was competent to stand trial and assist in his own defense. In total, there were two separate sanity boards convened by the military consisting of six separate mental health professionals. These boards were unanimous in their conclusion regarding the Petitioner’s competence. A separate forensic psychiatrist, Dr. Selwyn Rose, also examined the Petitioner and testified at the Petitioner’s trial. Doctor Rose was retained by the Petitioner. Doctor Rose came to the same conclusion; the petitioner was competent at the time of the offense and competent to stand trial and assist in his defense. At the presentencing phase of the case the Petitioner called psychologist Dr. John Warren. Once again the opinion was the same. Although the Petitioner had some organic brain dysfunction it was not severe and he was competent at the time of the offense and competent to stand trial and assist in his defense.

Further anecdotal evidence of the Petitioner's competence was his personal assertion of alleged legal errors committed by his trial defense counsel and his appellate counsel. These issues were solicited directly from the Petitioner and conclusively demonstrate his competence.

In all, approximately 11 mental health professionals examined the Petitioner. They were all ultimately unanimous in their conclusion that the Petitioner was competent to stand trial and assist in his defense at trial and on appeal. Against this backdrop of exhaustive testing and consistent results it is impossible to maintain that any of the Petitioner's rights were violated. The sheer number of examinations is indicative of the effort expended by the military justice system to address this issue. Simply because the Petitioner did not get the result he was looking for does not mean he was denied his rights.

2. *Both Trial and Appellate Military Courts Gave Full and Fair Consideration to Petitioner's Competency.*

The trial and appellate courts fully and fairly considered the extensive evidence and testimony regarding Petitioner's competency. The trial court heard testimony from two forensic psychiatrists and one neuropsychologist, all of whom came to the conclusion that Petitioner was competent to cooperate in his own defense during the trial proceedings. Several motions were litigated at the ACMR regarding Petitioner's competency and were fully and fairly considered by that court. In fact, the ACMR even ordered a sanity evaluation of Petitioner to determine his competency to stand trial and participate in appellate proceedings. Further, the CAAF also reviewed and considered the issue of Petitioner's competency and fully considered his competency throughout the trial and appellate process.

As discussed previously, two forensic psychiatrists testified at Petitioner's pre-sentencing hearing. Both Dr. Armitage and Dr. Rose testified before the trial military judge and the panel

members regarding Petitioner's competency. Upon the conclusion of questioning by both defense counsel and the prosecutor, the trial judge asked Dr. Armitage questions to confirm his opinion regarding Petitioner's ability to understand the wrongfulness of his criminal conduct and competency to stand trial. (T2434-2436.) While the trial judge did not specifically inquire about Petitioner's competency, there was no reason for him to do so. Dr. Armitage had already explained that he believed Petitioner to be competent and the military judge had heard the full extent of Dr. Armitage's assessment of Petitioner. Further, after hearing Dr. Rose's testimony about her initial meeting with Petitioner in which she believed he was psychotic, the military judge inquired about that issue. (T2474.) The military judge specifically sought clarification with Dr. Rose that, despite her initial impression that Petitioner was psychotic, her subsequent meetings led her to agree with Dr. Armitage's diagnosis that Petitioner merely suffered from a personality disorder. (T2474.) The inquiries by the military judge demonstrate he was listening closely to this testimony and assessing whether there was any doubt as to Petitioner's competency or sanity at the time of the offenses. There was no evidence before the trial court that Petitioner was incompetent. In fact, all evidence and testimony was to the contrary. The military judge considered the evidence and determined there was no doubt as to Petitioner's competency and allowed the trial to continue. Based on the evidence before the trial court, Respondent contends there was no requirement to hold a competency hearing. To the extent this Court believes such a requirement exists, it was satisfied by the testimony of Dr. Armitage, Dr. Rose, and Dr. Warren before the trial military judge.

Subsequent to his court-martial conviction, in August 1988, the record of Petitioner's trial was forwarded to and received by the U.S. Army Defense Appellate Division. The ACMR constitutes the first level of appeal following a court-martial conviction. The review conducted by a three-judge

panel of the ACMR is not cursory. Pursuant to Article 66(c), UCMJ, the ACMR must review the entire record of trial *de novo* and independently arrive at a decision that the findings and sentence are correct “in law and fact.” The ACMR conducts this review for error whether or not errors are assigned by the appellant.⁴⁵ In conducting this review, the ACMR reviewed and considered the full testimony of Dr. Armitage, Dr. Rose, and Dr. Warren regarding Petitioner’s sanity and competency.

In addition to the trial testimony regarding Petitioner’s competency, the ACMR also considered additional sanity and neuropsychological evaluations. On February 13, 1990, pursuant to a motion filed by appellate defense counsel,⁴⁶ the ACMR ordered a sanity board to conduct an inquiry into Petitioner’s mental capacity to understand and cooperate intelligently in the appellate proceedings. (A2813-2814.) On June 30, 1990, this three person sanity board, which was Petitioner’s second such detailed and in-depth examination, concluded Petitioner: did not suffer from a severe mental disease or defect at the time of the offenses for which he has been convicted; was able to appreciate the nature and quality or wrongfulness of his conduct at the time of the alleged criminal conduct; had sufficient mental capacity to understand the nature of the court-martial proceedings and to conduct or cooperate intelligently in his defense at the time of the trial; and possessed sufficient mental capacity to understand the nature of the pending appellate proceedings and to conduct or cooperate intelligently in his appeal. (A2711-2717.) Direct appellate review

⁴⁵ The Army Court of Military Review is now known as the Army Court of Criminal Appeals [“ACCA”].

⁴⁶ On December 22, 1989, Petitioner filed a “Motion to Admit Defense Exhibits A Through D; Motion to Direct a Sanity Board and Hold the Case in Abeyance; and Motion to Set Aside Findings and Sentence and Dismiss the Charges.” (A2828-2837.) On January 2, 1990, the U.S. Army Government Appellate Division [“GAD”] filed an “Opposition to [Petitioner’s] Motion to Set Aside Findings and Sentence and Dismiss the Charges” (AR 2819-2827) and a separate “Motion for Inquiry Into [Petitioner]’s Mental Capacity” to determine Petitioner’s ability to understand, and to conduct and cooperate intelligently in the appellate proceedings. (A2815-2818.)

resumed upon this determination that Petitioner was competent to participate in his appellate proceedings.

In addition to submitting his case to the ACMR for direct review, Petitioner simultaneously sought extraordinary relief to develop new evidence to collaterally attack his conviction and sentence. On December 27, 1990, Petitioner filed a “Motion for Funding Expert Psychiatrist, Attorney, and Investigator.” (A2652-88.) Petitioner specifically requested \$15,000.00 to retain defense mental health expert(s) to examine and evaluate Petitioner and to provide expert assistance to appellate defense counsel; to retain defense counsel qualified to represent a capital defendant in the appeal of his convictions and sentence; and, to retain a defense investigator to conduct a complete investigation of the facts and circumstances surrounding the life of Petitioner and the crimes of which he has been convicted. (A2657-58.) On March 12, 1991, after hearing oral argument and considering the briefs, the ACMR construed the defense motion as a petition for extraordinary relief in the nature of a writ of mandamus and denied the petition because Petitioner failed to demonstrate that expert mental health assistance and an investigator were necessarily required, or that defense appellate counsel is not qualified to represent Petitioner. *United States v. Gray*, 32 M.J. 730 (A.C.M.R. 1991); (A2618-26.)

On December 31, 1991, the ACMR granted a defense motion and ordered the Government to conduct every additional neuropsychological medical testing which Petitioner requested.⁴⁷ (A2446-48.) A report was provided by Dr. Fred Brown detailing his findings. As noted previously,

⁴⁷ On December 16, 1991, Petitioner filed a “Motion to Compel Appropriate Army Authorities to Perform Additional Medical and Neuro-Psychological Tests of Appellant.” (A2459-65.) Petitioner asked for the additional medical testing to “obtain an accurate diagnosis of [Petitioner]’s mental condition; which in turn is a critical factual prerequisite for addressing issues such as whether [Petitioner] received a fair trial, sentence appropriateness, and ineffective assistance of trial defense counsel.” (A2461.) On December 23, 1991, the GAD opposed the motion. (A2455-58.)

they were consistent with all the prior findings. This evidence was considered and reviewed by ACMR prior to completing appellate review of Petitioner's case.

Earlier, on August 7, 1991, Petitioner also renewed his request to hire experts by filing a second "Motion for Funding for Expert Psychiatrist and Investigator" requesting an initial sum of \$10,000.00 to retain these two experts. (A2516-53.) On August 23, 1991, the ACMR summarily denied the defense motion. (A2553.) On September 17, 1991, Petitioner filed a "Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and Application for Emergency Stay" with the CAAF requesting funds for a mental health expert and qualified investigator to evaluate [Petitioner] and assist in the appeal of his convictions and death sentence. (A2390-2402.) On October 18, 1991, the CMA summarily denied the writ appeal petition. (A2367.)

On February 26, 1992, [Petitioner] filed a "Supplementary Assignment of Errors and Brief on Behalf of [Petitioner] in Response to Court Order" raising nine (9) additional assignments of error before the ACMR which included the following claims:

- XIX[a].⁴⁸ [Petitioner]'s sentence and conviction should be set aside and the case remanded for a new trial concerning whether and to what extent [Petitioner] may be held criminally responsible in view of newly discovered evidence that [Petitioner] suffers from the mental disease or defect known as organic brain damage.
- XX. [Petitioner] was convicted and sentenced to death in violation of the Fifth, Sixth, and Eighth Amendments of the United States Constitution because the sentence and convictions are founded at least in part upon misinformation concerning his mental health.

In March 1992, pursuant to Article 73, UCMJ, the Petitioner filed a "Petition for a New Trial" based upon newly discovered evidence that Doctor Pincus, a private physician who conducted no independent testing or direct meetings with Petitioner, diagnosed Petitioner with organic brain

⁴⁸ Petitioner misnumbered this assignment of error XIX because he previously numbered an assignment of error XIX in his September 15, 1989, "Brief on Behalf of Appellant." To avoid confusion, Respondent refers to this assignment of error as number XIX[a].

damage on February 18, 1992. (A2315-21.) Doctor Pincus's diagnosis was based, in part, upon the medical tests the ACMR ordered the government to perform on December 31, 1991. (A2317.) On April 8, 1992, the ACMR heard oral argument upon the assignments of error and Petition for New Trial. (A1967.) On December 15, 1992, the ACMR issued a published opinion denying relief. *United States v. Gray*, 37 M.J. 730 (A.C.M.R. 1992). The court noted that Petitioner raised twenty-seven (27) assignments of error and questioned the appropriateness of the sentence, but that several issues raised were already resolved against Petitioner by the CMA and did not merit further discussion. (A1964.) The ACMR found that no error prejudiced Petitioner's substantial rights, that the *Grostejon* matters asserted by Petitioner lacked merit, and that the sentence of death was appropriate. (A1965.) The ACMR accordingly affirmed the findings of guilt and the sentence. (A1965.) The ACMR also denied the "Petition for a New Trial" because the diagnosis of organic brain damage was not "new evidence" because Petitioner conceded that there were "clear indicators of [Petitioner]'s organic brain damage present at the time of trial" and the mere existence of conflicting psychiatric opinions did not require a new trial. (A1978-79.)

Petitioner's claim has been fully and fairly considered. The ACMR conducted a de novo review of Petitioner's case, ordered a sanity board evaluation, ordered additional neuropsychological testing subsequent to the sanity evaluation, and granted oral arguments for motions regarding Petitioner's mental health. The ACMR fully considered all of Petitioner's mental health evaluations and determined no need for a competency hearing. The ACMR did not err by failing to hold a hearing regarding Petitioner's competency because all reasonable evidence before the court concluded Petitioner was competent.

The CAAF also fully and fairly considered Petitioner's competency. Pursuant to Article 67(a)(1), UCMJ, once the ACMR affirms a sentence of death, the CAAF must review the case.

On June 30, 1994, Petitioner filed his "Brief on Behalf of Appellant" to the CAAF consisting of sixty-nine (69) issues which included the following claims:

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

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

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

(A1123-1575.) With the CAAF's permission, Petitioner also filed a "Supplemental Issue on Behalf of Appellant" presenting an additional issue.⁴⁹ On May 28, 1999, the CAAF issued a published opinion after considering the briefs, record of trial, and the post-trial submissions by Petitioner.⁵⁰ The CAAF then proceeded to consider all seventy (70) issues and the additional thirty-one (31) *Grostefon* matters personally raised by Petitioner and after careful consideration of the matters, the CAAF affirmed the ACMR's order and all of the related decisions by the ACMR on the matters submitted by Petitioner. (A772.)

On August 14, 1999, Petitioner filed a "Petition for Reconsideration" arguing: the CAAF misapprehended several facts in finding a "service connection" existed in Petitioner's case; the CAAF misapprehended the facts and law in holding that sufficient evidence of Petitioner's organic brain

⁴⁹ LXX. Whether the [Petitioner] was denied due process of law in violation of the Fifth, Sixth, and Eighth Amendments because he was tried by court-martial for capital murder during peacetime. (A840-41.)

⁵⁰ *United States v. Gray*, 51 M.J. 1, 14 (C.A.A.F., 1999) (A604-793.)

damage was presented to the panel; Petitioner was denied due process of law when the CAAF denied Petitioner's request for funding to hire experts; the CAAF erred by finding Petitioner's pretrial statements were admissible; civilian defense counsel was ineffective; the CAAF erred by holding Defense Exhibit V was cumulative; and, the CAAF erred by holding the panel was adequately instructed to consider Petitioner's background as a mitigating factor. (A485-97.) On April 6, 2000, the CAAF summarily denied the petition for rehearing. (A409.) On April 18, 2000, Petitioner filed a "Second Petition for Reconsideration." (A355-400.) On June 26, 2000, the CAAF summarily denied the "Second Petition for Reconsideration." (A348.)

The trial and appellate courts fully and fairly considered Petitioner's competency at the trial level and every stage of his appellate proceedings. The trial court heard live sworn testimony regarding Petitioner's competency. The ACMR reviewed the trial testimony from the two forensic psychiatrists and forensic neuropsychologist. Additionally, the ACMR granted Petitioner's request for a sanity evaluation. When Petitioner was not satisfied with that evaluation, the ACMR granted Petitioner's request for further psychological testing. The results of those examinations, concluding that Petitioner was competent, were considered by the ACMR in its appellate *de novo* review of Petitioner's case. The ACMR also reviewed Petitioner's claims that these evaluations were not conducted by competent mental health experts and considered oral argument on all of Petitioner's appellate claims. (A1967.) The CAAF also considered Petitioner's competency based upon the claims filed by Petitioner before that Court. Petitioner has received full and fair consideration of his competency by every court throughout his trial and appellate process. This Court should dismiss this claim asserted in Ground Twenty-one because it was given full and fair consideration. *Burns*, 346

U.S. at 144. In light of the record that has been developed in this case it is inconceivable to conclude that the issue of the Petitioner's mental health was not fully and fairly considered.

3. *The Military Courts Fully and Fairly Considered Petitioner's Ineffectiveness Claims.*

Petitioner argues that his trial defense counsel provided ineffective assistance of counsel for failing to request a competency hearing during the trial proceedings. (Traverse, 196.) Petitioner also argues that his appellate counsel provided ineffective assistance of counsel for, "failing to raise competency at the time of their representation and for failure to raise the claim that Petitioner was incompetent at trial." (Traverse, 197). The Court should dismiss these claims because they have been fully and fairly reviewed by the military courts. *Burns*, 346 U.S. at 142.

On February 26, 1992, Petitioner filed a "Supplementary Assignment of Errors and Brief on Behalf of Petitioner in Response to Court Order" raising nine (9) additional assignments of error before the ACMR.⁵¹ Petitioner raised an ineffective assistance of counsel for failing to challenge the competency of the pretrial evaluations of Petitioner by the two forensic psychiatrists and to ensure a complete and competent mental health evaluation of Petitioner was performed before trial in Assignment of Error XXIII. (A2156-2288.) On April 8, 1992, the ACMR heard oral argument upon the assignments of error and Petition for New Trial. (A1967.) On December 15, 1992, the ACMR issued a published opinion denying relief. *United States v. Gray*, 37 M.J. 730 (A.C.M.R. 1992).

On June 4, 1994, Petitioner filed an appellate brief before the CAAF. (A1123-1576.) He claimed ineffective of assistance of trial defense counsel in Assignments of Error VI by alleging

⁵¹ All nine assignments of error are outlined in Append. A of Respondent's Answer and Return. (Doc 20-1, 12-13.)

defense counsel failed to challenge the competency of his pre-trial evaluations. (A1239.) The CAAF denied the claim for the following reasons:

[W]e note that [Petitioner] had **already been personally examined by three psychiatric experts** at trial, two of whom were personally chosen by the defense. *See Wright, 151 F.3d at 163; Martin v. Wainwright, 770 F.2d 918, 935 (11th Cir. 1985), cert. denied, 479 U.S. 909 (1986)*. **Four more psychiatric experts examined [Petitioner] post-trial** as a result of a sanity board ordered by the [ACMR] and the **additional psychiatric testing also ordered post-trial** by [the ACMR]. They **specifically addressed** the question of [Petitioner's] **organic brain damage and rejected it** as negating his criminal responsibility. *37 M.J. at 743*. [Petitioner] also had, in post-trial affidavit form, the defense expert opinions of Doctor Pincus, a neurologist, that he was not mentally responsible at the time of the offense, and of Doctor Merikangas that earlier evaluations by others were defective. *See 770 F.2d at 934-35; see Lawson v. Dixon, 3 F.3d 743, 753 (4th Cir. 1993), cert. denied, 510 U.S. 1171, 127 L. Ed. 2d 556, 114 S. Ct. 1208 (1994)*. Finally, he had the results of the testing ordered by the [ACMR] which indicated organic brain damage of some type in appellant. *See Nichols, 21 F.3d at 1018; Shaw, 762 F. Supp. 853, 862*. Thus, the [ACMR] had a sufficient basis in the record for considering the mental-state issues before it and concluding that additional defense psychiatric expenditures were not reasonably necessary. *See Wright v. Angelone, supra; Martin, 770 F.2d at 935* (numerous defense or independent evaluations already conducted justified denial of additional testing); *see also Vickers, 144 F.3d at 616* (weight-of-prior-evidence standard).

(A0646-47) (emphasis added.) The CAAF also considered and denied Petitioner's *Grostefon* claims that he received ineffective assistance of counsel for failure to fully investigate his mental health history. (A773-6.)⁵²

As noted by the record, Petitioner's claims of ineffective assistance of counsel for failing to litigate his competency were considered by the appellate courts when he challenged his counsel's ineffectiveness for failing to challenge his sanity and competency evaluations. Further, the military courts provided Petitioner the opportunity to brief this specific claim of ineffective assistance of

⁵² The CAAF attached Petitioner's *Grostefon* matters to the court's opinion. *See United States v. Gray, 51 M.J. 1 (C.A.A.F. 1999)*.

appellate counsel, but he failed to do so. Nevertheless, appellate defense counsel zealously represented Petitioner's interests before the military courts. Those courts considered his claims, reviewed the record of trial, reviewed the post-trial submissions, and after applying the proper legal standards denied his claims on the merits. *Burns*, 346 U.S. at 139.

4. *Petitioner Has Waived Review of His Claim of Ineffective Assistance of Counsel for Failure to Litigate his Competency.*

Alternatively, Petitioner has waived this specific issue of ineffective assistance of appellate counsel by failing to raise it before the military courts. *See Watson*, 782 F.2d at 145. Petitioner's lead counsel has represented Petitioner since 1999, prior to the completion of Petitioner's direct appeal under the UCMJ. (AR0221.) The CAAF affirmed Petitioner's conviction and sentence to death on May 28, 1999. (A0604, A0772.) On August 14, 1999, the military defense appellate counsel filed a 107-page "Petition for Reconsideration." (A0485-A0602.) In that motion, Petitioner argued that: the CAAF misapprehended several facts in finding a "service connection" existed to establish jurisdiction; the CAAF misapprehended the facts and law in holding that sufficient evidence of Petitioner's organic brain damage was presented to the panel; Petitioner was denied due process of law when the CAAF denied Petitioner's request for funding to hire experts; the CAAF erred by finding Petitioner's pretrial statements were admissible; state court civilian defense counsel was ineffective; the CAAF erred by holding Defense Exhibit V was cumulative; and the CAAF erred by holding the panel was adequately instructed to consider Petitioner's background as a mitigating factor. (A0485-87.) On April 6, 2000, the CAAF summarily denied the petition for rehearing. (A0409.) Petitioner did not raise the current version of his ineffective assistance of appellate defense counsel ground as an error.

On April 18, 2000, military defense appellate counsel filed a 35-page “Second Petition for Reconsideration.” (A0355-A400.) This motion alleged legal and factual errors in the record before the CAAF relating to the size of Petitioner’s court-martial panel and alleged that the CAAF made erroneous findings of fact and conclusions of law on this issue. (A0361) . Additionally, Petitioner did not raise the current version of his ineffective assistance of appellate defense counsel ground as an error. Instead, military defense appellate counsel asserted that the prior briefings by both parties incorrectly stated that Petitioner was convicted by an 8-member panel as opposed to a 6-member panel. (A0364.) On June 26, 2000, the CAAF summarily denied the “Second Petition for Reconsideration.” (A0348.)

On September 25, 2000, Petitioner’s lead counsel filed a Petition for Writ of Certiorari with the Supreme Court. (A0081.) That petition posed three questions: the size of the court-martial panel, which is presented in Ground One of the present case; the selection of court-martial panel members by the convening authority, which is presented in Ground Two of the present case; and the *Batson* issue, which is presented in Ground Three of the present case. However, Petitioner’s lead counsel did not assert the current version of his ineffective assistance of appellate defense counsel claim to the Supreme Court. As demonstrated in these reconsideration requests to the CAAF and in the Petition for Writ of Certiorari, it is clear that Petitioner was provided the opportunity to have his ineffective assistance of defense appellate counsel claims heard. Likewise, Petitioner could have raised this claim at any time after his defense appellate counsel were denied the requested funding. However, Petitioner never raised the current version of his ineffective assistance of defense appellate counsel before the military courts or the Supreme Court on direct review. Absent a showing of

cause and prejudice for failing to raise these issues, no further review is permitted. *See Watson*, 782 F.2d at 145.

Consequently, this Court should deny review of Petitioner's claim of ineffective assistance of counsel for failing to litigate his competency claim in Ground Twenty. (Traverse, 196.)

B. No Further Review Is Permitted where Petitioner Fails to Satisfy the *Dodson* Factors.

This Court should not review this claim on the merits because Petitioner fails to satisfy the four *Dodson* factors required to warrant review of his allegations. In *Dodson v. Zelez*, 917 F.2d 1250 (10th Cir. 1990), the Tenth Circuit Court of Appeals set forth a four part test for determining when a military conviction can be reviewed by the federal courts. Those factor are the following: (1) The asserted error must be of substantial constitutional dimension; (2) the issue must be one of law rather than of disputed fact already determined by the military tribunals; (3) military considerations may warrant different treatment of constitutional claims; (4) The military courts must give adequate consideration to the issues involved and apply proper legal standards.

1. *Petitioner Fails to Satisfy Dodson to Warrant Review of His Claim He Was Incompetent During Trial and Appellate Proceedings.*

Petitioner claims that he was incompetent to stand trial and during appellate proceedings. He now asks this Court to review what he claims are "additional facts" that were known, or should have been known, to counsel and the courts during his trial and appellate process regarding his incompetence. While Petitioner's raises a Constitutional questions, his claim fails to satisfy *Dodson* factors two and four.

Petitioner's claim that he was incompetent during his trial and appellate proceedings raises a pure question of fact. He asks this court to consider additional facts and evidence regarding his

competency. There was ample and reliable evidence before the trial and appellate courts that ineluctably led to the sole conclusion that Petitioner was competent.

Petitioner satisfies the third *Dodson* factor because his claim does not raise military considerations that warrant a different treatment of his claim.

Petitioner fails to satisfy the fourth *Dodson* factor because, as shown above, the two sanity boards, mental health evaluations and numerous psychological tests all concluded that Petitioner was competent at trial and during the appellate process. These tests and evaluations were conducted by medical professionals who were accepted as experts at trial. Petitioner asks this court to consider retrospective opinions regarding his competency both to stand trial and during the appellate process. From this he requests that the court conclude he was incompetent. However, it was certainly within the wide range of professionally competent assistance for Petitioner's defense counsel to rely on properly selected experts. *Harris v. Vasquez*, 949 F.2d 1497 (9th Cir. 1990). The defense counsel and the military courts all relied upon professionally competent mental health experts in finding Petitioner competent. Simply because those experts did not render an opinion favorable to Petitioner does not require this Court to reevaluate evidence that was already given full and fair consideration. In fact, the only way this Court can re-evaluate the evidence is if it found the military court did not fully and fairly consider it. Such a finding would be contrary to the record in this case. This Court should deny Petitioner's request for de novo review and dismiss Ground Twenty.

2. *Petitioner Fails to Satisfy Dodson to Warrant Review of His Claim that Both the Trial and Appellate Courts Erred in Not Conducting Competency Hearings.*

Petitioner's claim that both the trial and appellate courts erred in failing to conduct a competency hearing does not present a substantial Constitutional question. Petitioner's claim fails

to demonstrate why he was constitutionally entitled to a competency hearing despite the fact that all evidence before the trial court concluded Petitioner was competent and that the appellate courts litigated and considered appellate's competency. The Petitioner's competency to stand trial was unambiguously determined by his first sanity board that delivered its opinion prior to the commencement of the Petitioner's court martial.

Petitioner fails to satisfy the fourth *Dodson* factor because, as shown above, the military courts considered trial testimony regarding his competency and sanity, reviewed his mental health claims, examined the record of trial and the post-trial submissions, applied the proper legal standard, and specifically found that Petitioner was competent based upon multiple and reliable sanity and competency evaluations. Petitioner invites this Court to reconsider his social, mental, educational, neurological, and family histories; to consider retrospective psychological evaluations and affidavits of defense counsel to determine, in hindsight, whether he was entitled to a competency hearing both at trial and during his appellate proceedings. This, however, is not the proper standard. The standard is whether his claims were fully and fairly considered. The trial and appellate courts fully and fairly considered Petitioner's competency at the trial level and every stage of his appellate proceedings. The trial court heard live sworn testimony regarding Petitioner's competency. The ACMR reviewed the trial testimony from the two forensic psychiatrists and forensic neuropsychologist. Additionally, the ACMR granted Petitioner's request for a sanity evaluation. When Petitioner was not satisfied with that evaluation, the ACMR granted Petitioner's request for further psychological testing. The results of those examinations, concluding that Petitioner was competent, were considered by the ACMR in its appellate *de novo* review of Petitioner's case. The ACMR also reviewed Petitioner's claims that these evaluations were not conducted by competent

mental health experts and considered oral argument on all of Petitioner's appellate claims. (A1967.) The ACMR fully considered all sworn testimony from Petitioner's trial and the multiple sanity evaluations.

The CAAF considered Petitioner's competency based upon the claims filed by Petitioner before that Court. The CAAF also found Petitioner's claim of failure to investigate overlooked Petitioner's own failure to disclose his social background to his counsel and the presentation of substantial mitigating evidence presented by Petitioner's family and the expert witnesses. (A0639-41.) Re-weighing how the trial and appellate courts reviewed Petitioner's tenuous claim of organic brain damage and whether they should have held a competency hearing is simply beyond the scope of habeas review. This Court should deny Petitioner's request for de novo review and dismiss Ground Twenty.

3. *Petitioner Fails to Satisfy Dodson to Warrant Review of His Claim Ineffective Assistance of Trial and Appellate Counsel for Failure to Litigate his Competency.*

Petitioner claims that his trial defense counsel and appellate defense counsel provided ineffective assistance for failing to request a competency hearing during the trial and appellate proceedings. (Traverse, 196-197) Petitioner essentially claims that trial and appellate counsel were ineffective because they simply failed to request a competency hearing despite having requested several sanity board evaluations and neuropsychological testing all which concluded Petitioner was competent. While ineffective assistance of counsel is a constitutional issue, Petitioner's claim fails to demonstrate why he was constitutionally entitled to a competency hearing when all reasonable evidence available to his defense counsel concluded he was competent.

The second *Dodson* factor disfavors review because this is a mixed question of law and fact. Petitioner alleges that despite all factual evidence available to his defense counsel, they should have

requested a competency hearing. Moreover, Petitioner simply wishes to re-litigate the multitude of facts and develop new facts that were available to the military courts in denying Petitioner's requests for additional sanity boards and appointment of additional mental health professionals to meet the prejudice prong of *Strickland*. Not only has Petitioner failed to cite any authority for such an inquiry, such fact-finding is outside the scope of habeas review.

Petitioner again fails to satisfy the fourth *Dodson* factor because, as shown above, the military courts reviewed his claims, examined the record of trial and the post-trial submissions, applied the proper legal standard, and specifically found that counsel's performance did not result in any prejudice because Petitioner did not meet his burden to justify additional sanity evaluations, or expert assistance. This Court should deny Petitioner's request for de novo review and dismiss Ground Twenty.

C. Even if This Court Reviews This Ground, Petitioner's Claims are Meritless.

To the extent Petitioner raises a habeas claim, this Court should find full and fair consideration was given and that this Court can go no further. Alternatively, the *Dodson* factors counsel against review. Even if this Court determines that review is appropriate, this ground is meritless and no relief is due. As evidenced by the ROT and as noted by the ACMR and the CAAF, the military appellate defense counsel zealously advocated on Petitioner's behalf and raised all colorable claims on appeal. The central issue is whether Petitioner can satisfy the test under *Strickland* regarding the efforts of his trial defense counsel and appellate defense counsel to litigate Petitioner's competency. *See Wiggins v. Smith*, 539 U.S. 510 (2003). Here, it is abundantly clear that Petitioner was zealously represented by trial defense counsel and his military defense appellate counsel, all of whom provided meaningful representation in obtaining both pre-trial and post-trial

mental health testing of Petitioner to develop direct review of Petitioner's capital court-martial. Even a cursory reading of the procedural history reveals that Petitioner's detailed trial defense counsel and military appellate defense counsel requested, and received, several sanity evaluations conducted by professional and qualified mental health experts and raised all reasonable issues on appeal. *See* Appendix A, Procedural History. The military justice system cannot withstand a requirement that trial defense counsel and/or defense appellate counsel will be deemed to have rendered ineffective assistance simply for failing to obtain the result Petitioner seeks. This Court should quickly dispense with such a meritless argument.

Ground 21: The military courts lacked jurisdiction to capitally prosecute Petitioner for crimes committed in the United States during peacetime because Congress' ostensible grant of jurisdiction to prosecute such crimes under the UCMJ was unconstitutionally in violation of the separation of powers and the Fifth, Sixth, and Eighth Amendments; the military courts likewise lacked jurisdiction to capitally prosecute Petitioner in the absence of an adequate service connection to his crimes.

Petitioner's Claim Twenty-one raises two issues: an allegation that the military lacked jurisdiction to prosecute Petitioner for crimes committed in the United States during peacetime; and an allegation that the military courts lacked jurisdiction to capitally prosecute Petitioner in the absence of an adequate service connection to his crimes. (Traverse, 200-202.).

Petitioner's assertion that Congress violated the principle of separation of powers in authorizing the military to capitally prosecute certain felony offenses during peacetime with the enactment of the UCMJ is meritless. Petitioner's assertion ignores the broad Congressional Constitutional authority to legislate and regulate the land and naval forces. Additionally, Petitioner argues that military courts lacked jurisdiction to prosecute him for a capital offense in absence of an adequate service connection to his offenses. (Traverse, 202.) The Supreme Court was clear in

Solorio in overruling the service connection requirement created in *O'Callahan v. Parker*, 395 U.S. 258 (1969) and announcing that such requirement should be “abandoned.” *Solorio v. United States*, 483 U.S. 435, 441 (1987). Even if this Court finds that the military was required to present evidence of a service connection to Petitioner’s crimes, there was more than ample evidence of a service connection in this case. Therefore, this Court should dismiss Petitioner’s claims as meritless.

A. Congressional Grant of Authority to the Military to Capitially Prosecute Peacetime Felony Offenses Under the UCMJ is Consistent With its Powers Under the United States Constitution.

Petitioner argues that Congress violated the principle of separation of powers in authorizing the military to capitially prosecute certain felony offenses during peacetime with the enactment of the UCMJ in 1950. (Traverse, 200.) Petitioner thus asserts that this unconstitutional grant of authority deprived military courts of jurisdiction to prosecute Petitioner for capital murder in violation of his rights under the Fifth, Sixth, and Eighth Amendments. (Traverse, 200.) Petitioner’s assertion ignores the broad Congressional Constitutional authority to legislate and regulate the land and naval forces and is therefore, without merit.

Congress is the sole branch of our Government empowered with legislative abilities. “All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” U.S. Const., Art. I. §8, cl. 1. Our Framers further dictated that Congress shall have the authority “[t]o make Rules for the Government and Regulation of the land and naval forces.” U.S. Const., Art. I. §8, cl. 14. While the Bill of Rights limited Congressional power over land and naval forces to some degree, it did not “alter the allocation to Congress of the ‘primary responsibility for the delicate task of balancing the rights of

servicemen against the needs of the military,” *Loving v. United States*, 517 U.S. 748, 767 (1996)⁵³ (citing *Solorio*, 483 U.S. at 447-48). In *Loving* the Supreme Court further emphasized, “we give Congress the highest deference in ordering military affairs.” *Loving*, 517 U.S. at 768; *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981). It is well settled jurisprudence that the judiciary gives Congress the highest deference in regulating military affairs, including the grant of authority to capitally prosecute peacetime offenses such as murder. *Weiss v. United States*, 510 U.S. 163, 177 (1994);⁵⁴ *Chappell v. Wallace*, 462 U.S. 296, 301 (1983). This deference is grounded in the Framers’ doctrine of the separation of powers and the idea that each branch is separate but equal. In allocating specific powers and responsibilities to a branch best qualified for the task, “the Framers created a National Government that is both effective and accountable.” *Loving*, 517 U.S. at 757. Article I’s framework regarding representation, bicameralism and voting ensures that Congress is the branch most qualified with the task of lawmaking. See *Id.*; *INS v. Chadha*, 462 U.S. 919, 951 (1983). The assignment of distinct power to each branch, “allows a citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance.” *Loving*, 517 U.S. at 758. Congressional exercise of authority in authorizing the military to capitally prosecute offenses such as murder, in peacetime, does not violate the doctrine of separation of powers. In fact, such action is wholly consistent with the doctrine and an appropriate exercise of Congressional authority and discretion.

⁵³ Respondent recognizes that the issue in *Loving* concerned the “authority of the President, in our system of separated powers, to prescribe aggravating factors that permit a court-martial to impose the death penalty upon a member of the Armed Forces convicted of murder.” *Loving v. United States*, 517 U.S. 748, 751 (1996). However, the Court’s analysis of Congressional authority and the separation of powers is relevant to the present case.

⁵⁴ The Constitution contemplates that Congress has “ ‘plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline.’ ” (quoting *Chappell*, 462 U.S. at 301).

Petitioner further argues that historical Congressional restriction of military authority to capitally prosecute felony crimes committed in peacetime supports his assertion that the grant of such authority is unconstitutional. Specifically, Petitioner argues that such grant of jurisdiction violated his Constitutional rights under the Fifth, Sixth, and Eighth Amendments. However, Petitioner ignores the landscape and context in which such authority was eventually bestowed to the military. Respondent recognizes that the jurisdiction to capitally prosecute common law felonies in peacetime was historically withheld from the military and reserved for civil courts. However, Congress's motivation for authorizing capital prosecution of felony peacetime offenses was directly relevant to the enactment of the UCMJ in 1950. The UCMJ provided a comprehensive framework for the prosecution of criminal offenses in courts-martial while protecting the rights of service-members. In 1950, in enacting the UCMJ, Congress considered the issue of the jurisdictional scope of military courts-martial. "Congress, confident in the procedural protections of the UCMJ, gave to courts-martial jurisdiction the crime of murder." *Loving*, 517 U.S. at 768-769; See also *Solorio*, *supra*, at 450-451. Congress further authorized the military to impose the death penalty for service members who committed premeditated murder and felony murder. 10 U.S.C. §918(1), (4). In balancing the rights of servicemen against the needs of the military, Congress established the CMA in Article 67 of the UCMJ. 10 U.S.C. §867. The Court of Military Appeals was also given mandatory jurisdiction over capital cases, in Article 67(a)(1).⁵⁵ 10 U.S.C. §867(a)(1). A cornerstone principle of creating the CMA, was "to assure direct civilian review over military justice." *Noyd v. Bond*, 395 U.S. 683, 694 (1969). The creation of the CMA allowed for civil court oversight of

⁵⁵ Article 67(a)(1) only requires the CMA to review capital cases in which the Court of Military Review approved a death sentence.

military capital cases, an area that had been traditionally only entrusted to civil courts. Confident in the protections provided by the Articles of the UCMJ, Congress entrusted the military with the ability to prosecute capital offenses committed in peacetime. The protections inherent in the UCMJ ensured that the prosecution of peacetime capital offenses remained consistent with the Fifth Sixth, and Eighth Amendment⁵⁶ rights of service-members. The protections provided by the UCMJ ensure that Petitioner's rights have not been violated under the Fifth, Sixth, or Eighth Amendments.⁵⁷

B. Service Connection Evidence is No Longer a Jurisdictional Prerequisite in Military Courts-Martial. Even If Such Evidence Were Required, There Was Ample Service Connection Evidence in This Case.

Petitioner argues that military courts lacked jurisdiction to prosecute him for a capital offense in the absence of an adequate service connection to his offenses. (Traverse, 202.) Petitioner's reliance upon Justice Stevens' concurring opinion in *Loving* is misplaced. *Loving, supra*, 774. The Supreme Court was clear in *Solorio* in overruling the service connection requirement created in *O'Callahan*, 395 U.S. 258 (1969) and announcing that such requirement should be "abandoned." *Solorio*, 483 U.S. at 441. Even if this Court finds that the military was required to present evidence

⁵⁶ Respondent recognizes that the CMA confronted a challenge to the constitutionality of the military capital punishment scheme in light of *Furman v. Georgia*, 408 U.S. 238 (1972). The CMA found one fundamental defect: the failure of either the UCMJ or the RCM to require that court-martial members "specifically identify the aggravating factors upon which they have relied in choosing the death penalty." *United States v. Matthews*, 16 M.J. 354, 379 (C.M.A. 1983). Therefore, the court reversed Matthews' death sentence but ruled that either Congress or the President could remedy the defect. *Id.* at 380-382. The President responded to *Matthews* in 1984 with an Executive Order promulgating RCM 1004 prescribing the requisite aggravating factors for imposing a death sentence. The scheme created in RCM 1004 was later challenged as an unconstitutional delegation of Congressional authority to the President. *Loving, v. United States*, 517 U.S. 754-755. The Supreme Court held that the delegation to the President, as Commander in Chief, of the authority to prescribe aggravating factors and the promulgation of RCM 1004 was well within Congressional delegated authority. *Id.* at 773-774. RCM 1004 narrows the scope of death-eligible defendants as required by the Eighth Amendment.

⁵⁷ "By enacting the Uniform Code of Military Justice in 1950, and through subsequent statutory changes, Congress has gradually changed the system of military justice so that it has come to more closely resemble the civilian system." *Weiss v. U.S.*, 510 U.S. 163, 174 (1994).

of a service connection to Petitioner's crimes, there was more than ample evidence of a service connection in this case. Therefore, this Court should dismiss Petitioner's claim as meritless.

Exercising its authority to regulate the land and naval forces, Congress empowered courts-martial to try service-members for the crimes proscribed in the UCMJ. Arts 2, 17, 10 U.S.C. §802, 817. In a series of decisions spanning from 1866 to 1960, the Supreme Court interpreted the Constitution as "conditioning the proper exercise of court-martial jurisdiction over an offense on one factor: the military status of the accused." *Solorio*, 483 U.S. at 439.⁵⁸ In 1969, the Supreme Court departed from the straightforward status test, and ruled that the armed forces must show a connection between the charged offenses and the military in order to exercise court-martial jurisdiction over a military member. *O'Callahan*, 395 U.S. at 258. However, the Supreme Court recognized that the service connection test was too tenuous and confusing, and in 1987 it overruled *O'Callahan*, reverting back to a status test for military jurisdiction; that is, whether the service member was on active duty at the time of the charged offense. *Solorio*, 483 U.S. at 448, 450.⁵⁹ The Court did not distinguish between "wartime" and "peacetime" in its jurisdictional analysis. In fact, *Solorio* dealt with non-military offenses during peacetime.

Nine years later, the Supreme Court decided *Loving v. United States*, 517 U.S. 748 (1996), and upheld the procedures for the military death penalty found in R.C.M. 1004. In his concurring

⁵⁸ *Gosa v. Hayden*, 413 U.S. 665, 673 (1973) (plurality opinion); see *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 240-241, 243 (1960); *Reid v. Covert*, 354 U.S. 1, 22-23 (1957) (plurality opinion); *Grafton v. United States*, 206 U.S. 333, 348 (1907); *Johnson v. Sayre*, 158 U.S. 109, 114 (1895); *Smith v. Whitney*, 116 U.S. 167, 183-185 (1886); *Coleman v. Tennessee*, 97 U.S. (7 Otto) 509, 513 (1879); cf. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 15 (1955); *Kahn v. Anderson*, 255 U.S. 1, 6-9 (1921); *Givens v. Zerbst*, 255 U.S. 11, 20-21 (1921).

⁵⁹ Justice Stevens concurred in *Solorio* on the grounds that the offenses in that case met the "service connection test," and maintained that service connection was required for all offenses under the UCMJ. *Solorio*, 435 U.S. at 451-52 (Stevens, J., concurring).

opinion, Justice Stevens noted that the Supreme Court's ruling did not address whether the "service connection" test would still apply in capital cases, even though it was discarded by *Solorio*. *Loving*, 517 U.S. at 774 (Stevens, J., concurring). Petitioner seizes upon the concurring opinion in *Loving* as evidence that the ability of Congress to impose the death penalty under the UCMJ is still in doubt (Traverse at 200). However, Justice Stevens went on to state that the issue did not need to be addressed because there was a clear service connection to support jurisdiction over Private Loving's offenses, and therefore he was properly sentenced to death. *Loving*, 517 U.S. at 774 (Stevens, J., concurring). Petitioner's reliance upon Justice Stevens' concurring opinion fails upon a complete reading of the majority and concurring opinions in *Loving*.

First, a concurring opinion does not trump binding precedent. "If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). *Solorio* established a clear and firm rule for determining subject-matter jurisdiction of courts-martial, with no distinction between capital and non-capital offenses. The majority opinion in *Loving* consistently relied on *Solorio* in its analysis, and never hinted that an exception was carved out for death penalty cases, as suggested by Justice Stevens. *Loving*, 517 U.S. at 760, 763, 765, 766, 767, and 768-69. Petitioner's reliance upon a concurring opinion is misplaced and unpersuasive. This Court should rely upon the reasoning and binding precedent of the case which directly controls this issue, *Solorio*. The Court was clear in *Solorio* that the service connection requirement no longer exists.

Second, the majority and concurring opinions in *Loving* concern subject-matter jurisdiction, something that is not affected by the nature of the punishment. The majority in *Loving* found that Congress established the UCMJ in 1950 to establish a jurisdiction:

appropriate for Armed Forces of colossal size, stationed on bases that in many instances were small societies unto themselves. Congress, confident in the procedural protections of the UCMJ, gave to courts-martial jurisdiction of the crime of murder. Cf. *Solorio*, supra, at 450-451 (Congress may extend court-martial jurisdiction to any criminal offense committed by a service member during his period of service). *It further declared the law that service members who commit premeditated and felony murder may be sentenced to death by a court-martial. There is nothing in the constitutional scheme or our traditions to prohibit Congress from delegating the prudent and proper implementation of the capital murder statute to the President acting as Commander in Chief.* *Loving*, 517 U.S. at 769 (emphasis added).

The majority specifically acknowledged Congress' authority to declare that service-members accused of premeditated murder could be sentenced to death.⁶⁰ In his concurring opinion in *Loving*, Justice Stevens never questioned whether the military could assert jurisdiction over a capital case, only whether the military must first demonstrate a service connection. *Loving*, 517 U.S. at 774 (Stevens, J., concurring). If this Court were to address Justice Stevens' "open question," there is simply no legal basis for the proposition that a capital sentence changes the jurisdictional analysis. By Petitioner's logic, if the Government had not sought the death penalty, the Government would have subject matter jurisdiction and would not need to show a service connection. Alternatively, jurisdiction could also re-appear if the Government demonstrated that the premeditated murder was service-connected. This type of ad-hoc jurisdictional analysis is exactly what the Supreme Court rejected when it overruled *O'Callahan*. See *Solorio*, 483 U.S. at 44-450.

⁶⁰ In his concurring opinion in *Loving*, Justice Stevens never questioned whether the military could assert jurisdiction over a capital case, only whether the military must first demonstrate a service connection. *Loving*, 517 U.S. at 774 (Steven, J., concurring).

However, this Court need not resolve the “open question” raised by Justice Stevens’ concurring opinion in *Loving* because there was ample evidence of a service connection to Petitioner’s crimes. The CAAF, in considering this very issue on direct appeal, found that even if the service connection test still applied to capital cases, the premeditated murders petitioner committed met that standard. *Gray*, 51 M.J. at 11. Similar to Private Loving, the CAAF noted that petitioner “was a member of the military; one of his murder victims was a member of the military and the other was a civilian who did business on post; and both their bodies were found on post. Finally, we agree with the Government that there was overwhelming evidence presented in this case that the murders were committed on post.” *Id.*; see also *Loving*, 517 U.S. at 774 (Stevens, J., concurring) (service connection test satisfied where “[Loving’s] first victim was a member of the Armed Forces on active duty and that the second was a retired serviceman who gave petitioner a ride from the barracks on the same night as the first killing.”). These factors demonstrate a service connection for Petitioner’s crimes even if *O’Callahan* were still applicable. *Gray*, 51 M.J. at 11 (citing *O’Callahan*, 395 U.S. at 272; and *Relford v. Commandant*, 401 U.S. 355, 369, (“a serviceman's crime against the person of an individual upon the base . . . is ‘service connected’”)).

Supreme Court precedent is clear that there is no jurisdictional service connection requirement for courts-martial after the decision in *Solorio*. Even if this Court finds that Stevens’ concurring opinion in *Loving* left open the question of the service connection requirement in capital cases, such requirement was satisfied in this case. Thus, Petitioner’s argument of lack of jurisdiction for failure to prove a service connection to Petitioner’s crimes is meritless.

V. OPPOSITION TO REQUEST FOR DISCOVERY AND HEARING

Respondent opposes Petitioner's request for discovery and an evidentiary hearing. (Pet. 104-05). *See* Answer and Return, Appendix B (Doc 20-2).

VI. CONCLUSION

Petitioner seeks to have this Court reconsider claims which the military appellate courts gave full and fair consideration. Petitioner cannot "simply demand an opportunity to make a new record, to prove de novo in the District Court precisely the case which he failed to prove in the military courts. Due regard for the limitations on a civil court's power to grant such relief precludes such action." *Davis v. Lansing*, 202 F. Supp. 2d 1245, 1256 (D. Kan. 2002) (*quoting* Burns, 346 U.S. at 145-146).

WHEREFORE, for the reasons stated herein, Respondent respectfully requests this Court to dismiss the Petition and deny the relief requested.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2010, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a copy to the following CM/ECF participants:

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