HYPOTHETICALLY SPEAKING: THE CONSTITUTIONAL PARAMETERS OF CAPITAL VOIR DIRE IN THE MILITARY AFTER *MORGAN V. ILLINOIS*

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> *Were voir dire not available to lay bare the foundation of petitioners challenge for cause against those prospective jurors who would always impose death following conviction, his right not to be tried by such jurors would be rendered as nugatory and meaningless as the States right, in the absence of questioning, to strike those who would never do so.*[1]

I. Introduction

In *Morgan v. Illinois*,[2] the Supreme Court reversed the Illinois Supreme Court, finding that inadequate voir dire called into question the constitutionality of petitioner's death sentence.[3] In reaching this conclusion, the Court delved into two topics; whether a defendant is "entitled to challenge for cause and have removed on the ground of bias a prospective juror who will automatically vote for the death penalty irrespective of the facts or the trial court's instructions on law" and "whether on voir dire the court must, on defendant's request, inquire into

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[1] Morgan v. Illinois, 504 U.S. 719, 733-34 (1992).

[2] *Id.* at 719.

[3] *Id.* at 739.

prospective juror's views on capital punishment."[4]

Since the Supreme Court's decision in *Morgan*,[5] state and federal courts have had to decide whether hypothetical questions designed to test juror bias in a capital case are permitted, required, or prohibited; with disparate results. Hypothetical questions can take many forms, as will become apparent through the course of this paper. The difficulty is often in deciphering exactly in what form and to what end a hypothetical question has been formulated. For example, some questions are directed at prospective panel members or jurors' willingness to consider different sentences given certain facts, while others are directed at determining prospective panel members or jurors' willingness to consider certain mitigation and extenuation evidence given certain facts. For purposes of the analysis, this paper will rely primarily on a district court case, *United States v. Johnson*[6], discussed in detail in Section II.B *infra*, for its formulation of the five different types of categories of hypothetical questions. To the extent certain cases contain unique or notable formulations, they will be highlighted and discussed. Until *United States v. Hennis*,[7] military appellate courts have not had to address this issue.[8]

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[4] *Id.* at 726.

[5] *Id.* at 719.

[6] United States v. Johnson, 366 F. Supp. 2d 822 (N.D. Iowa 2005).

[7] United States v. Hennis, No. 20100304 (Headquarters, XVIII Airborne Corps and Fort Bragg, Fort Bragg, N.C., Apr. 15, 2010). Defense counsel in United States v. Martinez also used hypothetical questions, similar to those used in United States v. Hennis, to test panel member bias during voir dire. However, that case resulted in a full acquittal, so there were never any appellate litigation of the issue. Tom Brown, *U.S. Soldier Acquitted in Iraq "Fragging: Case*, REUTERS, Dec. 5, 2008, http://www.reuters.com/article/us-usa-iraq-trial-idUSTRE4B44X220081205.

[8] Although military appellate courts have addressed case-specific hypothetical questions, they have never done so in the capital setting. The most recent case, *United States v. Nieto*, dealt with case-specific hypothetical questions from the trial counsel as to the members' willingness to convict in a drug use case where there were deviations from the standard operating procedures for collection of the sample. United States v. Nieto, 66 M.J. 146 (C.A.A.F. 2008). This case can be distinguished from the other two cases to which it cites, *United States v. Reynolds*, 23 M.J. 292 (C.M.A. 1987), and *United States v. Heriot*, 21 M.J. 11 (C.M.A. 1985). Both of those cases involved challenges to members who demonstrated some inflexibility toward a proper sentence, based solely on the charged offenses. While *Reynolds* and *Heriot* are more applicable to the question posed here, neither are capital cases, and, therefore, do not carry the same constitutional considerations as to panel member attitudes toward appropriate sentence. Furthermore, it is well settled in the military context, even in capital cases, that an inflexible disposition toward the appropriate sentence, based solely on the charged offenses, will sustain a challenge for cause under

Based upon the peculiarities of military practice, hypothetical questions, specifically, those hypothetical questions in categories two through four, as identified by *Johnson,*[9] are not only permissible, but are constitutionally required in order to protect the due process rights of the accused. Furthermore, in order to avoid "stake-out" questions, military courts should adopt *Johnson's* three-part inquiry to differentiate between an improper "stake-out" question and a constitutionally required "case-specific" question.[10]

The first part of this paper will explore the cases leading up to *Morgan* and the developments since *Morgan*.[11] The second part will examine the differences between panel selection procedures in military courts and jury selection procedures in federal courts, as well as sentencing procedures in military and federal courts. It will also provide background on capital voir dire practices generally. Two case studies will form the basis of the analysis of capital voir dire in the third part of this paper. The first is *United States v. Hennis*,[12] a military capital case currently on appeal at the Army Court of Criminal Appeals.[13] The second is *United States v.*

RCM 912. United States v. Akbar, 74 M.J. 364 (C.A.A.F. 2015). Even so, in finding no plain error in *Nieto*, the Court of Appeals for the Armed Forces noted that not only was the court "presented with a question that . . . is a matter of first impression with this Court, but also a matter on which there is little guidance from other federal courts." *Nieto*, 66 M.J. at 150. In reaching its conclusion, the court cited to a smattering of federal and state court decisions. However, its list is far from exhaustive and includes only one capital case, *State v. Ball*, 824 So. 2d 1089, 1110 (La. 2002). *Nieto* can best be understood to preview the difficult task the military appellate courts will face in deciding the exact issue presented in *Hennis*. Although all five Judges agreed on the result in *Nieto*, the case resulted in three different opinions, with Judge Stuckey providing the deciding "vote" in his concurring opinion for the two-judge majority opinion's rationale.

[9] *Johnson*, 366 F. Supp. 2d at 836-40.

[10] *Id.* at 845.

[11] Morgan v. Illinois, 504 U.S. at 719.

[12] *Hennis*, No. 20100304.

[13] On October 6, 2016, the Army Court of Criminal Appeals rendered its decision in the case, granting no relief. In its decision, the court found that the military judge did not prevent defense counsel from using the Colorado Method.

> We appreciate appellate defense counsel's citation to Matthew Rubenstein's, *Overview of the Colorado Method of Capital Voir Dire*, for it offers an excellent survey of the technique. However, when we compare roughly 2,000 pages of voir dire transcript in this case to the method's principles, appellant's argument is unpersuasive, for it is difficult to imagine a defense voir dire more strictly adherent to the Colorado Method. We recognize the Colorado Method is not the standard for assessing the sufficiency of voir dire; we briefly focus on it, however, to illustrate our conclusion

Tsarnaev,[14] commonly known as the Boston Marathon bomber case. Relying on the differences between the two systems—military and federal—the final part of this paper will analyze why certain types of hypothetical questions designed to test juror bias are constitutionally required in military capital cases, using the voir dire and sentencing from the two case studies as examples.

II. *Morgan* and its Progeny

Morgan v. Illinois[15] is the reference point for what is constitutionally required during capital voir dire. In *Morgan*, the State was allowed to inquire, under *Witherspoon v. Illinois,*[16] whether jurors would be unalterably opposed to the death penalty, no matter the circumstances.[17] By contrast, the petitioner was not allowed to ask: "'If you found Derrick Morgan guilty, would you automatically vote to impose the death penalty no matter what the facts are?'"[18] On appeal, the State argued that "general fairness" and "follow the law"[19] questions, used in this case, were sufficient to detect those jurors that would automatically vote for the death penalty.[20] The Supreme Court disagreed. "[T]he belief that death should

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> after reviewing this record that the military judge's involvement did not prevent the defense from using it.

Id. at 50. The court did not address the underlying issue of whether such voir dire was constitutionally required. *Id.* Rather, the court decided the issue based primarily on the wide latitude given to military judge's in overseeing voir dire generally. *Id.* at 51. The case is currently pending appeal before the United States Court of Appeals for the Armed Forces. United States Court of Appeals for the Armed Forces, http://www.armfor.uscourts.gov/newcaaf/journal/2017Jrnl/2017Mar.htm (last visitedMay 15, 2017).

[14] United States v. Tsarnaev, No. 13-10200-GAO (D. Mass. May 15, 2015).

[15] *Morgan*,504 U.S. at 719.

[16] *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968) (holding that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction").

[17] *Morgan*, 504 U.S. at 722 ("[T]he trial court, over opposition from the defense, questioned each venire whether any member had moral or religious principles so strong that he or she could not impose the death penalty 'regardless of the facts.' . . . All of the jurors eventually empaneled were also questioned individually under Witherspoon . . . 'Would you automatically vote against the death penalty no matter what the facts of the case were?'").

[18] *Id.*

[19] Such questions generally include those aimed at confirming whether potential jurors will follow the judge's instructions on the law, even if they do not agree. *Id.* at 723-24.

[20] *Id.* at 734.

be imposed *ipso facto* upon conviction of a capital offense reflects directly on that individual's ability to follow the law."[21] However, as the Court noted, without being pressed on that particular issue, a juror may not realize that he or she has in fact predetermined the sentence. "It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him from [following the dictates of the law]."[22]

In reaching its conclusion, the Court delved into two topics. First, the Court grappled with whether a defendant is "entitled to challenge for cause and have removed on the ground of bias a prospective juror who will automatically vote for the death penalty irrespective of the facts or the trial court's instructions of law."[23] Second, and related to the first topic, the Court inquired "whether on voir dire the court must, on defendant's request, inquire into prospective juror's views on capital punishment."[24] The majority determined that the answer to both questions was yes.

As the Court noted with regard to the first issue, a "juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do." [25] The presence or absence of aggravating or mitigating circumstances is "entirely irrelevant" to a juror who has already formed an opinion "on the merits."[26]

With regard to the second issue, the Court began by noting that the adequacy of voir dire "is not easily the subject of appellate review."[27] Although a great deal of voir dire must be left to the "sound discretion" of the court, there are "certain inquiries" which must be made "to effectuate constitutional protections."[28] One of those areas of inquiry is prospective juror views of the death penalty. "Petitioner was entitled, upon his request,

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[21] *Id.* at 735.
[22] *Id*.
[23] *Id.* at 726.
[24] *Morgan*, 504 U.S. at 726.
[25] *Id.* at 729.
[26] *Id*.
[27] *Id.* at 730 (citing Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) ("The trial judge's function at this point in the trial is not unlike that of the jurors later on in the trial. Both must reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence and of responses to questions. In neither instance can an appellate court easily second-guess the conclusions of the decisionmaker who heard and observed the witnesses.") (citations omitted)).
[28] *Morgan*, 504 U.S. at 729-30.

to inquiry discerning those jurors who, even prior to the State's case in chief, had predetermined the terminating issue of the trial, that being whether to impose the death penalty."[29]

A. Developments since *Morgan*

United States v. Johnson,[30] a 2005 district court case, is the most important case to interpret *Morgan*.[31] *Johnson* held that "case specific" hypothetical questions were "appropriate—indeed necessary—during voir dire of prospective jurors to allow the parties to determine the ability of jurors to be fair and impartial in the case actually before them, not merely in some 'abstract' death penalty case."[32] Importantly, the district court noted:

> While the decision in *Morgan* establishes the *minimum* inquiry constitutionally required to life-qualify[33] a jury, it does not, on its face, require, permit, or prohibit any degree of case-specificity in voir dire questions for the purpose of life- or death-qualifying prospective jurors, because the inquiry proposed by the defendant in that case did not involve any case-specific component.[34]

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[29] *Id.* at 739. As the Court pointed out, in response to the State's argument that "general fairness" and "follow the law" questions were adequate to effectuate this inquiry, if this were true, "the State's own request for questioning under *Witherspoon* and *Witt*" would be "superfluous." *Id.* at 734.

[30] United States v. Johnson, 366 F. Supp. 2d at 822.

[31] *Morgan*, 504 U.S. at 719. John H. Blumea et al., *Probing "Life Qualification" Through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209 (2001). This article discusses applying *Morgan* to civilian juries. Importantly, it does not contain an analysis of the military system and it was written prior to *Johnson* and other decisions that have attempted to interpret and give effect to *Morgan*.

[32] *Johnson*, 366 F. Supp. 2d at 850.

[33] As *Morgan* explained the concept, to "life-qualify" is to allow a defendant, upon his request, "to inquiry discerning those jurors who, even prior to the State's case in chief, had predetermined the terminating issue of his trial, that being whether to impose the death penalty." *Morgan*, 504 U.S. at 736. This line of inquiry is sometimes referred to as "reverse-*Witherspoon*," after the Supreme Court case which gives the government the right to inquire whether a potential juror will refuse to impose the death penalty under any circumstances, but does not go so far as to grant the government the ability to challenge for cause any potential juror who might "express[] conscientious or religious scruples against its infliction." Witherspoon v. Illinois, 391 U.S. 510, 522 (1950). *See also* Blumea, *supra* note 31, n.4.

[34] *Johnson*, 366 F. Supp. 2d at 831.

Johnson is a particularly useful case, as it lays out the different types of hypothetical questions. It also proposes a test for determining the difference between a permissible "case-specific" hypothetical question and a "stake-out" question.

The first type identified by *Johnson* was the "abstract question."[35] "The quintessential example of an 'abstract question' is, of course, the question proposed by the defendant and approved by the Court in *Morgan*: 'If you found [the defendant] guilty, would you automatically vote to impose the death penalty no matter what the facts are?'"[36]

The second type identified by *Johnson* was the "defendant status question."[37] Such questions "do not raise facts about the alleged crime, but rather are about the defendant's status separate and independent of the alleged crime."[38] Examples of defendant status questions include questions about race, past convictions, or youth as a mitigating factor.[39]

The third type identified by *Johnson* is the "case categorization question."[40] "Such a question asks a prospective juror about his or her ability to consider a life or death sentence, or both, in the particular category of capital case, such as murder-for-hire, felony-murder, or rape-murder, that the jurors would hear."[41]

The fourth type is the "case-specific" question.[42] "This court defines 'case-specific' questions as questions that ask whether or not jurors can consider or would vote to impose a life sentence or a death sentence in a case involving stated facts, either mitigating or aggravating, that are or might be actually at issue in the case that the jurors would hear."[43]

The fifth and final type is the "stake-out" question.[44] These types of questions "seek to ask a juror to speculate or precommit to how that juror might vote based on any particular facts . . . ."[45] In order to differentiate

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[35] *Id.* at 835.
[36] *Id.* (quoting *Morgan*, 504 U.S. at 723).
[37] *Johnson*, 366 F. Supp. 2d at 836.
[38] *Id.* at 837.
[39] *Id.*
[40] *Id.*
[41] *Id.* at 837-38.
[42] *Id.* at 840.
[43] *Id.*
[44] United States v. Johnson, 366 F. Supp. 2d at 842.
[45] *Id.*

between a "stake-out" question and a "case-specific" question, the court in *Johnson* formulated a three-part inquiry:

> (1) Does the question "ask a juror to speculate or precommit to how that juror *might vote* based on any particular facts" or (2) Does it "seek to discover in advance *what a prospective juror's decision will be* under a certain state of evidence" or (3) Does it "seek to cause prospective jurors to pledge themselves to a future course of action and indoctrinate [them] regarding potential issues before the evidence has been presented and [they] have been instructed on the law."[46]

As the court in *Johnson* recognized, "courts generally agree that first-category ('abstract') questions are permissible, but that the fifth-category ('stake-out') questions are not. However, what is also apparent is that courts do not always agree on the permissibility of questions in the second ('defendant's status'), third ('case-categorization'), or fourth ('case-specific') categories, or even which questions fall into which categories."[47] Even so, the court recognized that "the clear majority of courts reject '*Morgan* questions' with any degree of case specificity."[48]

Two months after *Johnson*,[49] another United States district court issued an opinion, *United States v. Fell*, endorsing the use of "case-specific" hypothetical questions, as long as they were not "stake-out" questions.[50] In *Fell*, the court noted: "There is a crucial difference between questions that seek to discover how a juror might vote and those that ask whether a juror will be able to fairly consider potential aggravating and mitigating evidence."[51] Even so, the court in *Fell* was clear that while it would allow "case-specific" hypothetical questions that were

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[46] *Id.* at 845 (citations omitted).
[47] *Id.* at 844.
[48] *Id.* at 840 (citing United States v. McVeigh, 153 F.3d 1166, 1207-08 (10th Cir. 1998), *overruled in part by* Hooks v. Ward, 184 F.3d 1206, 1227 (10th Cir. 1999); Richmond v. Polk, 375 F.3d 309, 329-31 (4th Cir. 2004); Oken v. Corcoran, 220 F.3d 259, 266 n.4 (4th Cir. 2000); Trevino v. Johnson, 168 F.3d 173, 183 (5th Cir. 1999); United States v. Tipton, 90 F.3d 861, 879 (4th Cir. 1996), *cert. denied*, 520 U.S. 1253 (1997); United States v. McCullah, 76 F.3d 1087, 1113 (10th Cir. 1996), *cert. denied*, 520 U.S. 1213 (1997); *Ball*, 824 So. 2d at 1110; Schmitt v. Commonwealth, 547 S.E.2d 186, 196 (Va. 2011); Lucas v. State, 555 S.E.2d 440, 446-47 (Ga. 2001); Hogwood v. State, 777 So. 2d 162, 177-78 (Ala. Crim. App. 1998)).
[49] United States v. Johnson, 366 F. Supp. 2d at 822.
[50] United States v. Fell, 372 F. Supp. 2d 766 (D. Vt. 2005).
[51] *Id.* at 771.

"reasonably directed towards discovering whether the juror will be able to fairly and impartially weigh aggravating and mitigating factors" it would strike questions that were an "attempt to commit the juror to a particular position."[52]

By comparison, in *United States v. Wilson*, the District Court for the Eastern District of New York ruled against a defense motion to include "case-specific" hypothetical questions concerning potential mitigating and/or aggravating factors to be raised during the penalty phase.[53]

> This court finds that the five questions posed by the Defendant . . . are not constitutionally required in order to select a jury that is both "life qualified" and "death qualified" pursuant to *Morgan v. Illinois* and *Witherspoon v. Illinois*. Moreover . . . the court believes that such questioning is not necessary to serve the primary goal of voir dire, *i.e.* to ensure a fair trial by empaneling an impartial jury.[54]

Subsequently, in *United States v. Basciano*, a United States district judge issued a ruling on the defendant's proposed "case-specific" hypothetical questions.[55] Citing to *Johnson*,[56] the court allowed "case-specific" hypothetical questions, however, it rephrased the questions[57] and

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[52] *Id.* at 773. *See also* United States v. Dervishaj, No. 13-CR-668 (ENV), 2015 U.S. Dist. LEXIS 78622, at *5 (E.D.N.Y. Jun. 17, 2015) (discussing the prohibition against "stake-out" questions in a non-capital case).

[53] United States v. Wilson, 493 F. Supp. 2d 402, 403 (E.D.N.Y. 2006).

[54] *Id.* (citations omitted).

[55] United States v. Basciano, No. 05-CR-060 (NGG), 2011 U.S. Dist. LEXIS 11077, at *1 (E.D.N.Y. Feb. 4, 2011).

[56] United States v. Johnson, 366 F. Supp. 2d at 822.

[57] For example:

> Proposed Question 1: "Are your views on the death penalty such that you would find it difficult to consider a sentence of life without the possibility of release for someone who planned and premeditated an intentional murder and was found to be a future danger to others?"
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> Rephrased Question 1: "Are your views on the death penalty such that you would be unable to consider a sentence of life without the possibility of release if the evidence at trial showed a defendant allegedly planned and premeditated an intentional murder?"

disallowed one question.

> The court will not include . . . proposed Question 3, which asks: "What would be important to you in making the decision to choose between a sentence of the death penalty or life in prison without the possibility of release?" Given that potential jurors will not be fully instructed on the law applicable to the jury's sentencing decision or the specific facts of the case at the time the jury questionnaire is filled out, asking potential jurors to speculate on what factors will be important to their decision will not effectively reveal bias and is unduly open ended and vague to serve a permissible purpose.[58]

The confusion on what is allowed in capital voir dire extends beyond proposed defense questions. In another district court case, *Harlow v. Murphy*, the judge granted a writ of *habeus corpus* based in part on the trial court's "refusal to allow trial counsel for Mr. Harlow to engage in meaningful voir dire of prospective jurors."[59] However, in that case, the court focused on the trial judge's prohibition on the defense counsel's ability to "follow-up on jurors who proffered or volunteered case-specific reasons limiting their ability or willingness to impose a life sentence."[60] This was because, as the court pointed out, "the jurors already knew much about the case through the media."[61] According to the district court, "Counsel explained that he wished to ascertain whether jurors could realistically consider a life sentence if the State's basic allegations were proven, not whether jurors would tend to vote for a particular sentence under particular facts."[62]

In 2012, a United States district court judge in Puerto Rico cited approvingly to *Fell* and issued an order allowing defense counsel to "*properly* inquire about the jurors' ability to consider mitigating and

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Basciano, 2011 U.S. Dist. LEXIS 11077, at *1, 8. As the court noted, "[a] question combining aggravators together does not effectively reveal juror bias and instead requires potential jurors to prejudge and reveal how they will weigh the evidence at the penalty phase." *Id.* at *7.

[58] *Id.* at *9-10.

[59] Harlow v. Murphy, No. 05-CV-039-B, 2008 U.S. Dist. LEXIS 124288, at *2 (D. Wyo. 2008).

[60] *Id.* at *221-22.

[61] *Id.*

[62] *Id.* at *225-26.

aggravating factors."[63] Echoing the court in *Fell*, the district court stated that "properly formulated" hypothetical questions may expose juror bias.[64]

> For example, a juror may not be asked whether evidence of rape would lead him or her to vote for the death penalty. However, a juror may be asked if, in a murder case involving rape, he or she could fairly consider either a life or death sentence. The first question is an improper stake-out question. The second question is not a stake-out question because it only asks whether the juror is able to fairly consider the potential penalties.[65]

State appellate courts have also recently considered the issue. In 2010 the Arizona Supreme Court took on the use of hypothetical questions from the government's perspective.[66] In that case, the court found no error where the trial judge allowed "the State to ask prospective jurors if they could consider imposing a death sentence if a defendant had not actually shot the victim."[67] The State was not asking jurors to "precommit to a specific position," but to fairly consider the death penalty in a circumstance where state law authorized it.[68]

The Georgia Supreme Court weighed in on the issue in 2012. On appeal, the appellant argued that the trial court erred when it did not allow him to ask whether prospective jurors would automatically impose the death penalty and not consider life with or without the possibility of parole, in a case involving the murder of two young children.[69] The court agreed, affirmed the convictions, but reversed the sentence.[70] With reference to a Georgia statute describing the scope of voir dire in criminal and civil cases, the court found that while state case law is clear that counsel may not ask questions which seek to precommit prospective jurors to a particular outcome, the statute did not preclude the type of questioning sought by the appellant.[71] Furthermore, the court determined that it was error for two reasons under the specific facts of the case. First, "experience, common

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[63] United States v. Montes, No. 06-009-01 (JAG), 2012 U.S. Dist. LEXIS 49916, at *7 (Apr. 7, 2012) (emphasis added) (citing *Fell*, 372 F. Supp.2d at 771).
[64] *Id.* at *7 (citing *Fell*, 372 F.Supp.2d at 771).
[65] *Id.* at *6-7.
[66] State v. Garcia, 226 P.3d 370 (Ariz. 2010).
[67] *Id.* at 378.
[68] *Id.* (citing United States v. Johnson, 366 F. Supp. 2d at 845).
[69] Ellington v. State, 735 S.E.2d 736, 750 (Ga. 2012).
[70] *Id.* at 750.
[71] *Id.* at 753-54.

sense, and background law" all pointed to the fact that the child victims were the "critical issue."[72] Second, the court looked to the way in which the State tried the case. "After strenuously objecting to any inquiry about the jurors' views as to child victims, the prosecutor focused on that fact from opening statement in the guilt/innocence phase to closing argument in the sentencing phase as a principal reason that Ellington should receive the death sentence."[73]

The Kansas Supreme Court considered the limitations of *Morgan* late last year in *State v. Robinson*.[74] In a lengthy opinion the court found that the trial judge's limitations did not prevent defense counsel from disclosing case-specific facts and inquiring whether such facts "rendered prospective jurors unable to be impartial and prevented them from meaningfully considering mitigation evidence or a life sentence."[75] The court first recognized that "since *Morgan*, the majority of federal appellate courts have rejected the notion that the Constitution mandates case-specific questioning during voir dire in capital proceedings."[76] Second, the court recognized that among the minority of courts that had found case-specific hypothetical questioning to be required under certain circumstances, "these courts have adopted a balancing approach, finding it improper to categorically deny case-specific questioning but also recognizing that such questioning is not without limits and cannot be used to stake-out jurors."[77]

The most recent state court appellate litigation occurred in Pennsylvania in 2015. There, the appellant argued, with reference to *Morgan*, that the trial court erred when it refused to permit the following voir dire question: "'You will hear that [appellant] was convicted, by plea of guilty, to the crime of [v]oluntary [m]anslaughter in 1980. Is there any one of you who feels that[,] because of the defendant's prior convictions,

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[72] *Id.* at 755. While the appeal was specific to the trial court ruling precluding the use of case-specific hypothetical questions designed to test juror bias, the Georgia Supreme Court's decision relied heavily on the fact that prospective jurors should be made aware of the fact of child murder victims in order to allow for proper voir dire. In making this distinction, the court cited approvingly to its decision in Lucas while highlighting similarly premised decisions of two other state courts involving child victims. Id. at 759 (citing Lucas, 735 S.E.2d at 446; State v. Jackson, 836 N.E.2d 1173, 1192 (Oh. 2005); State v. Clark, 981 S.W.2d 143, 147 (Mo. 1998)).

[73] *Ellington*, 735 S.E.2d at 755.

[74] State v. Robinson, No. 90,196, 2015 Kan. LEXIS 929, at 1 (Kan. Nov. 6, 2015).

[75] *Id.* at 235.

[76] *Id.* at 231.

[77] *Id.* at 235-36.

that you would not consider a sentence of life imprisonment[?]'"[78] The court found no error on the basis that appellant's question was "designed to elicit what the jurors' reactions might be when presented with a specific aggravating circumstance."[79] In his dissent, the Chief Justice of the Pennsylvania Supreme Court took issue with the majority's conclusion.

> I recognize that the form of case-specific questions geared to assessing juror biases should be controlled by trial courts, and that Appellant's specific framing was not ideal, in that the interrogatory was not couched conditionally, in terms of what the trial evidence might show. Nevertheless, since the Commonwealth clearly had committed to pursuing the relevant aggravator and the Appellant's proposed question did not require jurors to commit to a particular result, but rather, concerned whether they could fairly consider the evidence at large and the trial court's instructions, I do not find this factor to be dispositive. Indeed, only a modest adjustment to the query was required to bring it into conformance with *Johnson's* sound guidance.[80]

Since the Supreme Court's decision in *Morgan*,[81] only two petitioners have sought certiorari at the Supreme Court. The Supreme Court denied both summarily.[82] As expected, litigation continues with no end in sight. While most federal courts have settled on *Johnson*[83] as their operative case to interpret *Morgan*, state courts have been deciding the issue piecemeal, often with reference to state statute. However, as the next section will make clear, one of the primary difficulties in this area is that even if most courts can agree that "stake-out" questions are impermissible, many cannot agree what a "stake-out" question looks like. Hypothetical questions can take many different forms in a multitude of contexts, leading to the problem of comparing apples to oranges when it comes to deciding whether a proposed question is required, permissible, or prohibited.

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[78] Commonwealth v. Smith, No. 681 CAP, 2015 Pa. LEXIS 3002, at *18 (Pa. Dec. 21, 2015) (citing Morgan v. Illinois, 504 U.S. at 736-37).
[79] *Id.*
[80] *Id.* at *27-28 (Taylor, C.J., dissenting) (citing United States v. Johnson, 366 F. Supp. 2d at 849).
[81] Morgan, 504 U.S. at 719.
[82] United States v. Tipton, 90 F.3d at 879, *cert. denied*, 520 U.S. at 1253; United States v. McCullah, 76 F.3d at 1113, cert. denied, 520 U.S. at 1213.
[83] Johnson, 366 F. Supp. 2d at 822.

The next section will focus on the differences between the military and the federal systems in terms of panel/jury selection procedures and sentencing procedures. It will not examine state schemes. The reason for this is two-fold. First, the military is a federal system and many of its rules are modeled on the federal rules, making for a more straightforward comparison. Second, while state case law can be persuasive, military appellate courts look to federal case law first when no military case law exists.[84]

B. Military Panel and Federal Jury Selection Procedures

The differences between selection procedures for military panels and federal juries differ vastly, even in the non-capital context. These differences have been the subject of criticism, discussion, and defense by an endless stream of commentators.[85] In the capital context, however, the differences are even more notable, and important. This section will, first, discuss military and federal civilian capital selection procedure. It will reference notable differences, in order to inform the analysis of why certain categories of hypothetical questions should be constitutionally required during military capital voir dire. Second, it will provide a basic overview of voir dire in a capital case, which is treated differently by judges, military and civilian alike, in addition to being the subject of specialized training for prosecutors and defense counsel.

1. Comparing the Two Systems

Article 25 of the Uniform Code of Military Justice (UCMJ) governs

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[84] United States v. Klemick, 65 M.J. 576, 579 (N-M. Ct. Crim. App. 2006).

[85] *See*, *e.g.*, Victor Hansen, *Symposium, Avoiding the Extremes: A Proposal for Modifying Court Member Selection in the Military*, 44 Creighton L. Rev. 911, 940-44 (2011); Major James T. Hill, *Achieving Transparency in the Military Panel Selection Process with the Preselection Method*, 205 Mil. L. Rev. 117 (2010); Major Christopher W. Behan, *Don't Tug on Superman's Cape: Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 176 Mil. L. Rev. 190 (2003); Colonel James A. Young, III, *Revising the Court Member Selection Process*, 163 Mil. L. Rev. 91, 107 (2000); Major Guy P. Glazier, *He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three--Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 Mil. L. Rev. 1, 4 (1998); Brigadier General John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 Mil. L. Rev. 1, 25 (1998).

eligibility criteria for panel members in capital and non-capital cases.[86] According to Article 25, the convening authority,[87] pursuant to RCM 503(a)(1),[88] shall detail members who are "in his opinion, best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."[89] There are no specific provisions that bar discrimination based on age, sex, or any other basis.[90] Because of the way in which command functions, an Army convening authority can only practically choose panel members from within his own command.[91] The selection procedure reflects this reality. Normally, the Staff Judge Advocate compiles a list of potential panel members from across the command, as supplied by the various units in response to an official tasking, from which the General Court Martial Convening Authority makes his selections in accordance with Article 25.

In the federal system, jurors are chosen randomly, in accordance with the Jury Selection and Service Act of 1968 [hereinafter Jury Selection Act].[92] The pool is defined by the district or division in which the district court sits.[93] By contrast to the UCMJ, the Jury Selection Act explicitly bars exclusion specifically on account of "race, color, religion, sex, national origin, or economic status."[94] Otherwise, any person is qualified to serve, so long as they do not fall into one of the categories listed in 28 U.S.C. § 1865(b)(1)-(5).[95]

Article 25a requires twelve members for a capital case, "unless twelve members are not reasonably available because of physical conditions or

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[86] UCMJ art. 25 (2012).

[87] "Convening authority" is defined as a "commissioned officer in command for the time being and successors in command." MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 103(6) [hereinafter MCM]. Rule for Courts-Martial 504 discusses the role of the convening authority in convening a court-martial. *Id.* at R.C.M. 504.

[88] *Id.* at R.C.M. 503(a)(1).

[89] *Supra* note 86.

[90] *Id.* During voir dire, however, "[n]either the prosecutor nor the defense may engage in purposeful discrimination on the basis of race or gender in the exercise of a peremptory challenge." United States v. Chaney, 53 M.J. 383, 384 (citing Batson v. Kentucky, 476 U.S. 79 (1986)). As the court explained in *Chaney*, if one party believes the other has done so, it may raise an objection, thereby forcing the challenging party to offer a race or gender neutral basis for the challenge. Chaney, 53 M.J. at 384.

[91] *See* MCM, *supra* note 87, R.C.M. 503(a)(3).

[92] 28 U.S.C. §§ 1821-69 (2006).

[93] 28 U.S.C. § 1861 (2006).

[94] 28 U.S.C. § 1862 (2006).

[95] The five categories cover citizenship, literacy and fluency, mental and physical infirmities, and criminal history.

military exigencies."[96] Even so, no capital case can be tried with less than five members.[97] In that regard, the military system is now aligned with the federal system which provides for twelve jurors, in both capital and non-capital cases, absent agreement by the parties to a lesser number.[98] However, where the federal system contains a provision for empaneling alternate jurors in both capital and non-capital cases,[99] the military does not have such a provision.[100]

As to how to arrive at the required number of panel members or jurors, that is a matter of discretion, for both convening authorities and federal judges. The Jury Selection Act does not mandate a certain number of initial jurors. In drafting the *Resource Guide for Managing Capital Cases, Volume I: Federal Death Penalty Trials* [hereinafter *Resource Guide for Managing Capital Cases]*, the authors interviewed federal judges[101] on their jury pool procedures.

> The judges we interviewed summoned from 125 to 500 jurors for their death-penalty cases, the average being about 225. One judge who did not give an absolute number said he summoned a panel about twice the size he would normally summon for a criminal case, although he later determined that was unnecessary. Similarly, a judge who had two death-penalty trials summoned a smaller

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[96] *Supra* note 86.

[97] Article 25a was enacted as part of the 2002 National Defense Authorization Act. Pub. L. No. 107-107, 115 Stat. 1012 (2001). *See* United States v. Curtis, 32 M.J. 252, 267-68 (C.A.A.F. 1991) (citing Williams v. Florida, 399 U.S. 78 (1970); Ballew v. Georgia, 435 U.S. 223 (1978)).

[98] Fed. R. Crim. P. 23(b)(1).

[99] Fed. R. Crim. P. 24(c).

[100] Rule for Courts-Martial 505(c)(2)(A) governs changes to members after assembly and RCM 505(c)(2)(B) governs the detailing of new members where an excusal results in a reduction below quorum. MCM, *supra* note 87, R.C.M. 505(c)(2)(A), RCM 505(c)(2)(B). Rule for Courts-Martial 805 governs the procedures for resuming trial after the addition of a new member pursuant to RCM 505(c)(2)(B). MCM, *supra* note 88, R.C.M. 505. However, in the Discussion, it notes that "[w]hen the court-martial has been reduced below a quorum, a mistrial may be appropriate." *Id.* at discussion. *See* UCMJ art. 29(b) (2012); United States v. Vazquez, 72 M.J. 13 (C.A.A.F. 2013).

[101] According to the authors, they used the following methodology to select judges for interviews: "In preparing this guide, FJC staff did the following: reviewed case materials from twenty of the first twenty-five federal judges who had handled post-Furman federal death-penalty cases; interviewed sixteen of those judges . . . ." Molly Treadway Johnson & Laura L. Hooper, *Resource Guide for Managing Capital Cases* (2004), http://www.fjc.gov/public/home.nsf.

> jury panel the second time (150 jurors) than she had the first time (200 jurors). In addition to the fact that the case is a capital one, other factors—such as the amount of local publicity the case is receiving—will have an influence on the size of the panel to be summoned.[102]

Unfortunately, the military has no comparable study or publicly available compendium for the conduct of capital cases, in terms of panel selection pool. Rule for Courts-Martial 504 contains no additional guidance for convening capital cases.[103]

The use of juror questionnaires appears consistent between the two systems. Rule for Courts-Martial 912(a)(1) specifically authorizes the use of juror questionnaires, to "expedite voir dire and . . . permit more informed exercise of challenges." The trial counsel is required to submit questionnaires to members upon defense request. In the federal system, juror questionnaires are employed, in all types of cases. This is done pursuant to Federal Rule of Criminal Procedure 24 and provides federal judges' "ample discretion in determining how best to conduct the voir dire."[104] In the Federal Judicial Center's[105] Benchbook for U.S. District

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[102] *Id. See also* United States v. Hammer, 25 F. Supp. 2d 518, 519 (M.D. Pa. 1998) (noting that more than 200 additional jurors were required to be summoned during the jury-selection process to supplement the 250 originally summoned).

[103] MCM, *supra* note 88, R.C.M. 504.

[104] *Rosales-Lopez*, 451 U.S. at 182. *See also* United States v. Gambino, 809 F. Supp. 1061, 1068 (S.D.N.Y. 1992) (discussing the utility of juror questionnaires in anonymous jury cases to ensure both the Government and defense counsel will have "an arsenal of information" about each potential juror . . . to intelligently exercise their challenges for cause and peremptory challenges") (quoting United States v. Barnes, 604 F.2d 121, 142 (2d Cir. 1979)). This use of juror questionnaires is to be distinguished from the use of questionnaires to determine the initial pool. The United States federal courts website instructs those who have been summoned to federal jury service to contact their local district court website to complete a "Juror Qualifications Questionnaire." UNITED STATES COURTS, http://www.uscourts.gov/services-forms/jury-service, (last visited May 16, 2017). Ostensibly, this form is meant to identify those who are not qualified to serve and those who are exempt pursuant to the Jury Selection Act. Each federal district also maintains its own excusal policy and procedure, in addition to the excusal provision for "undue hardship or extreme inconvenience" in the Jury Selection Act. U.S. COURTS, http://www.uscourts.gov/services-forms/jury-service/juror-qualifications, (last visited May 26, 2017) (quoting 28 U.S.C. § 1866(c)(1)). According to the federal courts website, "[e]xcuses for jurors are granted at the discretion of the court and cannot be reviewed or appealed to Congress or any other entity." U.S. COURTS, *supra*.

[105] "The Federal Judicial Center is the research and education agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620-29), on the

Court Judges there is an entire section dedicated to the conduct of capital trials. It notes, "[c]onsider having venire members complete a juror questionnaire, and consider providing attorneys with the responses prior to jury selection."[106] Likewise, as the authors note in *Resource Guide for Managing Capital Cases,* "[n]early all federal judges who have had a death-penalty trial to date have used a written juror questionnaire to help inform the voir dire process and identify jurors who will be unable to serve."[107] On its website, the Federal Judicial Center maintains an inventory of sample questionnaires and orders for use in capital cases.[108]

Both systems rely, to some degree, on standard voir dire questions from the judge to begin the selection process. In the military, U.S. Dep't of Army, Pamphlet 27-9, The Military Judges' Benchbook, commonly known as the Military Judges' Benchbook, contains an entire section dedicated to the conduct of capital voir dire.[109] While most of the questions are the same as those for non-capital voir dire, there are two questions—one "abstract" and one "case-categorization"—that specifically address the potential members' attitudes about the death penalty and appropriate punishments.[110] In the federal system, the Benchbook likewise contains sample scripts for the conduct of voir dire in criminal trials.[111] The section dedicated to capital cases contains two

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recommendation of the Judicial Conference of the United States." FEDERAL JUDICIAL CENTER, http://www.fjc.gov (last visited May 26, 2017).

[106] FEDERAL JUDICIAL CENTER, BENCHBOOK 115 (2013), https://www.fjc.gov/sites/default/files/materials/2017/Benchbook-US-District-Judges-6TH-FJC-MAR-2013_0.pdf

[107] Johnson & Hooper, *supra* note 101.

[108] FEDERAL JUDICIAL CENTER, *supra* note 105.

[109] U.S. DEP'T OF ARMY, DA PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 8-3-1 (10 Sept. 2014) [hereinafter DA PAM 27-9].

[110] *Id. at 1156.*

> *32. Members, as I have told you earlier, if the accused is convicted of (premeditated murder) (_____) by a unanimous vote, one of the possible punishments is death. Is there any member, due to his/her religious, moral, or ethical beliefs, who would be unable to give meaningful consideration to the imposition of the death penalty?*
>
> *33. Is there any member who, based on your personal, moral, or ethical values, believes that the death penalty must be adjudged in any case involving (premeditated murder) (_____)?*

Id.

[111] BENCHBOOK, *supra* note 106, at 115-17.

additional questions for the judge to ask potential jurors.[112] Both are "abstract questions." Furthermore, the Federal Judicial Center's website contains sample scripts for judges in capital cases, which appear to incorporate questions from both parts of the Benchbook.[113]

While the Discussion to RCM 912(d) expresses a preference for military judges to allow counsel to conduct voir dire in all cases, in the federal system, Federal Rule of Criminal Procedure 24 states that "[t]he court may examine prospective jurors or may permit the attorneys for the parties to do so."[114] However, if the court conducts the examination it "must" permit both sides to "ask further questions that the court considers proper; or . . . submit further questions that the court may ask if it considers them proper."[115] As such, attorney-led voir dire is rare in the federal system.[116] In capital cases, attorney participation in voir dire is, however, common. As of August 11, 2014, attorney questioning of potential jurors was allowed in 186 (or 82%) of the 227 trials where jury selection begun,[117] according to an affidavit prepared by the Director of the Federal Death Penalty Resource Counsel Project.[118]

Both military and federal courts provide for challenges for cause in capital trials. In the federal system, such challenges are often based on the standard set forth in *Wainright*, specifically, "whether the juror's views would 'prevent or substantially impair the performance of his duties as a

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[112] "(a) Would you never find, under any circumstances, in favor of the death penalty under the law as I will explain it? (b) If the defendant is found guilty of conduct that is a capital offense, beyond a reasonable doubt, would you always find in favor of the death penalty?" *Id.* at 119-20.

[113] FEDERAL JUDICIAL CENTER, *supra* note 105.

[114] FED. R. CRIM. P. 24. *See* Rosales-Lopez v United States, 451 U.S. at 189.

[115] FED. R. CRIM. P. 24.

[116] *See* Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol'y Rev. 149, 159 (2010) (citing GREGORY E. MIZE ET. AL., THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 27 (2007), http://www.ncsc-jurystudies.org/~/media/Microsites/Files/CJS/SOS/SOS CompendiumFinal.ashx; Lauren A. Rousseau, *Privacy and Jury Selection: Does the Constitution Protect Prospective Jurors from Personally Intrusive Voir Dire Questions?*, 3 Rutgers J.L. & Pub. Pol'y 287, nn. 50, 53 (2006)).

[117] Mem. of Law at Ex. 2, United States v. Tsarnaev, No. 13-10200-GAO (No. 682).

[118] "The Federal Death Penalty Resource Counsel Project (FDPRCP) is a program of the Defender Services Office of the Administrative Office of the United States Courts (AOUSC) designed to assist the federal courts, federal defenders, and appointed counsel in connection with matters relating to the defense function in federal capital cases at the trial level." FEDERAL DEATH PENALTY RESOURCE COUNSEL PROJECT, http://www.capdefnet.org/FDPRC/aboutus.aspx (last visited May 15, 2016).

juror in accordance with his instructions and his oath.'"[119] The Jury Selection Act also contains provisions governing removing otherwise eligible jurors from the pool.[120] Rule for Courts-Martial 912(f) governs challenges for cause during all courts-martial.[121] In addition to the multiple bases for challenge laid out by the rule, RCM 912(f)(1)(N) has been interpreted to cover both actual and implied bias.[122]

The final and most notable difference between the two systems is the availability and use of peremptory challenges. Rule for Courts-Martial 912(g) governs peremptory challenges in all military cases.[123] Both sides have one challenge. In the federal system, each side has twenty peremptory challenges in a capital case.[124]

2. The Methodology of Capital Voir Dire

Voir dire has long been the subject of study and academic discussion.[125] This is especially true of capital voir dire, where the stakes could not be higher. While there are clear distinctions to be made related to death penalty practice between civilian and military practitioners, voir dire training and methodology is an area in which there are more commonalities than differences. Even though this paper is focused on the constitutionality of hypothetical questions during capital voir dire, it is impossible to fully appreciate the applicability of such arguments without

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[119] Wainwright v. Witt, 469 U.S. 412, 424 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)).

[120] 28 U.S.C. § 1866(c).

[121] MCM, *supra* note 88, R.C.M. 912(f).

[122] *See* United State v. Nash, 71 M.J. 83 (C.A.A.F. 2012); United States v. Briggs, 64 M.J. 285, 286 (C.A.A.F. 2007).

[123] MCM, *supra* note 88, R.C.M. 912(g).

[124] FED. R. CRIM. P. 24(b)(1). It is worth noting that while the military has the "liberal grant mandate," available only to defense counsel, the federal courts have nothing comparable. See United States v. Clay, 64 M.J. 274, 276-77 (C.A.A.F. 2007); United States v. James, 61 M.J. 132, 139 (2005).

[125] The Capital Jury Project is among the most notable sources of research for those writing scholarly articles on capital voir dire. In 1995, William J. Bowers, the principal research scientist for the study, wrote a law review article introducing it and describing its methodology. William J. Bowers, *SYMPOSIUM: THE CAPITAL JURY PROJECT: The Capital Jury Project: Rational, Design, and Preview of Early Findings*, 70 Ind. L.J. 1043 (1995). *See also* UNIVERSITY AT ALBANY, STATE UNIVERSITY OF NEW YORK, SCHOOL OF CRIMINAL JUSTICE, http://www.albany.edu/scj/13194.php (last visited May 16, 2017) (containing a partial listing of publications based on research from the Capital Jury Project).

understanding the actual practice of capital voir dire once the parties enter the courtroom. For that reason, this section presents a working overview of the various methodologies, in order to both inform the reader generally but also to help shed some light on the voir dire in the case studies in Part III *infra*.

Capital voir dire practice among prosecutors tends to track the same lines as traditional voir dire. Other than, perhaps, expanded use of questionnaires and individual voir dire, the process is essentially similar to that for any other complex case.[126]

As compared to prosecutors, the capital defense bar has invested substantial time and effort into developing specialized methods of voir dire for capital cases. A reasonable explanation for this might be two-fold. First, in cases where the facts are likely to be the most aggravated, capital defense counsel need to maximize any procedural advantage in order to preserve their clients' lives. Second, the specter of ineffective assistance of counsel claims is ever present in capital cases. Therefore, adhering to the most widely accepted and well-used capital voir dire methods is among the best defenses against such claims on appeal.

With that distinction in mind, let us turn to a discussion of those specifically enumerated methods, all of which are associated with the capital defense bar. The most commonly cited method in civilian practice is the Colorado Method. Because of the peculiarities of military panel

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[126] In support of this conclusion, one need only consult the training calendars of the three most well-known training organizations for prosecutors. The National District Attorney Association's website does not list any death penalty training for prosecutors through December 2016. NATIONAL DISTRICT ATTORNEY'S ASSOCIATION, http://www.ndaa.org/upcoming_courses.html (last visited May 16, 2017). Under the heading Capital Litigation Project, the NDAA details two three-day trainings it offered in July and August of 2009 on death qualification of capital juries and penalty phase practice, pursuant to a federal grant. NATIONAL DISTRICT ATTORNEY'S ASSOCIATION, http://www.ndaa.org/capital_litigation_home.html (last visited May 16, 2017). Although that training has apparently not been offered since, prosecutors may access the training by requesting an account from the New York Prosecutors Training Institute and downloading it. *Id.* By contrast, the Association of Government Attorneys in Capital Litigation does offer voir dire training as part of its 2016 conference agenda. However, over a four-day span, voir dire training is scheduled for only one hour. ASSOCIATION OF GOVERNMENT ATTORNEYS IN CAPITAL LITIGATION, http://agacl.com/conference-agenda/ (last visited May 16, 2017). Similarly, the United States Department of Justice's Offices of the United States Attorneys offers a three day seminar once a year on capital cases. UNITED STATES DEPARTMENT OF JUSTICE, http://www.justice.gov/usao/training/course-offerings/schedule-2016 (last visited May 16, 2017).

practice, the military also has the Ace of Hearts Strategy. Finally, while not specific to capital voir dire, this paper will also discuss the Trial Lawyers College (TLC) method.

Developed by David Wymore, a former Deputy Chief with the Colorado Public Defender, the Colorado Method "seeks to reduce the force of social conformity and get the life votes out of the deliberation room."[127] Practically, the method has two parts:

> The first part is designed to get jurors to accurately express their views on capital punishment and mitigation in order for the defense to rationally exercise their peremptory challenges for cause.[128] The second part is designed to address the Asch findings on group dynamics.[129] This part focuses on teaching the juror the rules for deliberation; that he is making an individual moral decision, that he needs to respect the decision of others; and that he is entitled to have his individual decision respected by the group. The goal is not to teach the juror to change everyone else's mind—the goal is to

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[127] Lieutenant Colonel Eric Carpenter, *An Overview of the Capital Jury Project for Military Justice Practitioners: Jury Dynamics, Juror Confusion, and Juror Responsibility*, 2011 Army Law. 6, 22 (2011).

[128] As the author of the article points out, this portion of the method plays a "small role" in the military justice system. *Id.* n.217.

> Under the Colorado method, defense counsel exercise their peremptory challenges based only on the juror's death views. The method uses a ranking system based on juror responses. . . . In the federal system, the defense gets twenty peremptory challenges in a capital case. However, in the military, the accused in a capital case only gets one.

Id. (citations omitted). For more information on the ranking system, *see* Matthew Rubenstein, *Overview of the Colorado Method of Capital Voir Dire*, THE CHAMPION, Nov. 2010, at 18-19.

[129] In his article, Lieutenant Colonel (LTC) Carpenter provides a brief summary of Solomon Asch's experiments in the 1950s, sponsored by the United States Navy. Carpenter, *supra* note 127, at 22. Asch's research "revealed the dynamic of social conformity, which is essentially the fear of disagreeing with the majority in a public setting." *Id.* at 7 (citation omitted). Citing research from the Capital Jury Project, LTC Carpenter provides a lengthy explanation of how this research is applicable to capital jury deliberations. "Capital jurors, dealing in norms and values, faced with the requirement to produce a unanimous answer, are affected by group pressure—even when someone's life is on the line." *Id.* at 8.

> teach the juror how not to fold and to teach the other jurors to respect everyone else's opinions.[130]

As the Colorado Method is both proprietary and an important part of trial strategy for capital defense counsel, public information discussing the method is limited.[131] Matthew Rubinstein of the Capital Resource Counsel published an article in *The Champion*[132] in 2010 on the basics of the Colorado Method. His article appears to be the most in-depth, publicly available discussion of the methodology. As he explained it:

> Colorado Method capital voir dire follows several simple principles: (1) jurors are selected based on their life and death views only; (2) pro-death jurors (jurors who will vote for a death sentence) are removed utilizing cause challenges, and attempts are made to retain potential life-giving jurors; (3) pro-death jurors are questioned about their ability to respect the decisions of the other jurors, and potential life-giving jurors are questioned about their ability to bring a life result out of the jury room; and (4) peremptory challenges are prioritized based on the prospective jurors' views on punishment.[133]

Where the Colorado Method is highly selective when it comes to potential jurors, the Ace of Hearts Strategy[134] is at the other end of the spectrum. In this strategy, counsel's goal is to preserve as many panel members as possible, to increase the likelihood that someone will cast the "life-giving" vote during sentencing. The most famous discussion of this strategy comes from Judge Morgan's concurring opinion in *United States*

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[130] *Id.* at 22-23.

[131] For example, the National College of Capital Voir Dire, co-founded by Mr. Wymore, provides training once a year on the Colorado Method. DAVID WYMORE, http://davidwymore.com/about/about.htm (last visited Jul. 1. 2016). The on-line application includes a certification that the applicant is "a capital defense counsel . . . not involved in any prosecution or law enforcement activities, and . . . will not distribute these materials without obtaining express permission from David Wymore." NATIONAL COLLEGE OF CAPITAL VOIR DIRE, http://www.nccvd.org/application (last visited May 16, 2016).

[132] The Champion is a publication of the National Association of Criminal Defense Lawyers (NACDL). NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, http:// http://www.nacdl.org/default.aspx (last visited May 16, 2017). It is available to members of the NACDL or via LexisNexis and Westlaw.

[133] Rubenstein, *supra* note 128, at 18.

[134] United States v. Akbar, 74 M.J. 364, 384-85 (C.A.A.F Aug. 19, 2015); *see also* Dwight H. Sullivan, *Playing the Numbers: Court-Martial Panel Size and the Military Death Penalty*, 158 Mil. L. Rev. 1, 34-36 (1998).

v. Simoy. In that case, appellant alleged that his counsel were *per se* ineffective for failing to retain a mitigation specialist for the sentencing portion of his trial.[135] While the majority addressed this specific allegation, Judge Morgan, in his concurring opinion, took issue with defense counsels' decision to successfully challenge for cause three members and then use a peremptory challenge on another, thereby accounting for four out of five dismissed panel members and resulting in a panel of eight as opposed to twelve or possibly thirteen members.[136] "To use a simple metaphor—if appellant's only chance to escape the death penalty comes from his being dealt the ace of hearts from a deck of 52 playing cards, would he prefer to be dealt 13 cards, or 8?"[137] In a more recent opinion, the Court of Appeals for the Armed Forces summarized the strategy like this:

> An ace of hearts strategy is predicated on the fact that in order for a panel to impose a death sentence, the members must vote unanimously to impose that sentence. Therefore, the strategy posits that the accused will benefit from having the largest possible number of panel members because that will increase the chances that at least one member of the panel (the so-called "ace of hearts") will vote for a sentence other than the death penalty.[138]

In sum, the Ace of Hearts Strategy is simply a "numbers game."

By contrast to both the Colorado Method and the Ace of Hearts strategy, the TLC method is predicated on building a relationship between the lawyer and the juror. Although this method is not specific to capital voir dire, it is used by capital defense practitioners and is taught for use in such cases.[139]

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[135] United States v. Simoy, 46 M.J. 592, 604 (A.F. Ct. Crim. App. 1996).
[136] *Id.* at 624-26.
[137] *Id.* at 625.
[138] *Akbar*, 74 M.J. at 785 (citing MCM, *supra* note 88, R.C.M. 1006(d)(4)).
[139] On its home page, the Trial Lawyers College notes, "We do not offer training for those lawyers who represent the government, corporations or large business interests." GERRY SPENCE TRIAL LAWYERS COLLEGE, http://www.triallawyerscollege.org/Default.aspx (last visited May 16, 2017). The Trial Lawyers College maintains a website that lists its upcoming courses for 2016. According to one of the faculty team members, Haytham Faraj, "DD-2016 In Defense of the Damned: Criminal Defense Seminar," includes

The purpose of this method is to create a tribe amongst the jurors.[140] To do so, the lawyer begins by revealing something about himself. In a capital case, it may be that the lawyer himself used to believe in the death penalty, but no longer does. This is designed to facilitate an open dialogue between the lawyer and the jurors.[141] From there, the method has six additional steps to assemble the "tribe": (1) look at each other, eye to eye; (2) tell the truth to each other; (3) listen to each other; (4) accept each other; (5) empathize with each other, and; (6) remain loyal to each other.[142] According to this method, the lawyer should not have to exercise any challenges for cause or use any peremptory challenges unless a prospective juror says that he or she cannot accept being on the jury.[143] The idea is to avoid the normal dynamic between lawyers and prospective jurors during voir dire.

> [T]he tenor and intent of the questioning undertaken by most lawyers is almost always couched in a method that, despite the smiling and friendly lawyer, are seen by the prospective juror as an attempt of the lawyer to find something negative about the prospective juror. Can the lawyer find something about me that will give him a reason to kick me off this jury? . . . Even those who seek

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instruction on the TLC method of voir dire in capital cases. *Id.*; telephone interview with Haytham Faraj, Faculty Team, The Trial Lawyers College (Jan. 8, 2016).

[140] Gerry Spence, Voir Dire: What We Teach and How We Teach (unpublished information paper) (on file with author).

[141] Telephone interview with Haytham Faraj, *supra* note 140.

[142] Spence, *supra* note 140.

[143] In an article arguing for office policies in favor of waiving peremptory challenges in criminal trials, the author describes the philosophy underlying the TLC method. "[A]ccepting the jurors without challenge may actually help the prosecutor build credibility and rapport with the final petit jury." Maureen A. Howard, *Taking The High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges*, 3 Geo. J. Legal Ethics 369, 418 (2010). The author goes on to quote Gerry Spence:

> "[A] person without an opinion on most things is an idiot . . . I begin with the proposition that everyone has an opinion, but everyone is basically fair. The questioning takes on the flavor of friends talking, accepting the other's opinions and feelings with respect. . . . I've finished many a voir dire examination not wanting to strike a single person from the original jury panel.

Id. at 419 (quoting Gerry Spence, *Win Your Case: How to Present, Persuade, and Prevail--Every Place, Every Time* 112-13 (2005)).

> to get off a jury do not want to be rejected. . . . Rejection is pain.[144]

Where the Colorado Method aims to uncover inner biases, the TLC method assumes that we all have them, lawyers and prospective jurors included, and seeks to forge a relationship between the defense counsel and the jurors such that, so long as the defense counsel maintains his credibility, the jurors will follow him through the case as members of the same "tribe," despite their individual biases.[145]

In discussing capital voir dire and constitutional requirements, this paper will reference to the Colorado Method to further the analysis. Although "case-specific" hypothetical questioning and the Colorado Method are not necessarily synonymous, the Colorado Method, as described by its founder, Mr. Wymore, seeks to determine whether prospective jurors and panel members are impaired with regard to mitigation evidence,[146] which is one version of the "case-specific" hypothetical question.

C. Sentencing Procedures[147]

As compared to voir dire, the sentencing procedures in the military and federal court are far simpler. By the time either court has reached sentencing, even in a capital case, the panel or jury has been set since opening statement, and there are no additional procedures necessary to qualify that same panel or jury to hear the aggravation and mitigation (and extenuation in the military) evidence before determining an appropriate

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[144] Spence, *supra* note 140.

[145] Telephone interview with Haytham Faraj, *supra* note 139.

[146] Telephone interview with David Wymore, Co-founder, National College of Capital Voir Dire (Jan. 7, 2016).

[147] As a preliminary manner, there is bound to be some potential confusion in this section and subsequent sections based on terminology. Procedures, when discussing capital cases, can refer not only to those statutory procedures designed to ensure compliance with applicable Supreme Court rulings on constitutional imposition of the death penalty, but also to rote courtroom procedures that govern the order of march for counsel and the presentation of evidence. Unfortunately, these two terms are used throughout the applicable literature making use of an alternate term unfeasible, lest there be dissonance between the text and the references. Therefore, whenever possible, this paper will use the term "courtroom procedure(s)" to refer to procedures which govern the order of march for counsel and the presentation of evidence.

sentence.[148] While the Supreme Court's decisions in *Furman v. Georgia*[149] and *Gregg v. Georgia*[150] created a generally accepted standard for a constitutionally valid death penalty scheme, there are still differences between the military and federal systems that merit discussion.

Rule for Courts-Martial 1004 governs the imposition of the death penalty in military cases.[151] As a preliminary matter, an accused does not have the option of judge-alone sentencing in a military capital case.[152] The Court of Appeals for the Armed Forces described the four current procedural requirements for imposing death under RCM 1004 in *Akbar*:

> Panel members are required to make four unanimous

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[148] One interesting proposal to remedy the underlying problem is to allow defense counsel to conduct voir dire a second time with panel members or jurors, to ensure they remain "life-qualified." Under the Federal Death Penalty Act of 1994 [hereinafter FDPA], the court can empanel a separate jury to determine an appropriate sentence where "the jury that determined the defendant's guilt was discharged for good cause." 18 U.S.C. § 3593(b)(2)(C) (2015). In *United States v. Young*, the Sixth Circuit Court of Appeals vacated a district court's pretrial order finding "good cause" to empanel a second jury during any potential guilt phase. Finding that the district court lacked such authority prior to conviction, the court also considered the defendant's arguments that "good cause" existed where "concerns about the impact of death qualification on the racial composition of the jury, and social science evidence suggesting death-qualified jurors may be more prone to convict and may decide sentencing issues before the penalty phase." United States v. Young, 424 F.3d 499, 502 (6th Cir. 2005) (citation omitted). *See also* United States v. Green, 407 F.3d 434 (1st Cir. 2005) (finding that the FDPA did not permit a pretrial order for a non-unitary jury).

[149] Furman v. Georgia, 408 U.S. 238 (1972). *See* Johnson v. Texas, 509 U.S. 350 (1993) (explaining that, despite a splintered opinion, a majority of the Court concluded that the system in place for determining a death sentence was "cruel and unusual" as defined by the Eighth Amendment).

[150] Gregg v. Georgia, 428 U.S. 153 (1976) (finding Georgia's revised death penalty statute did not violate the prohibition against the infliction of cruel and unusual punishment under the Eighth and Fourteenth Amendments). *See* Colonel Dwight Sullivan, *Killing Time: Two Decades of Military Capital Litigation*, 189 Mil. L. Rev. 1, 4 (2006) (noting that "[i]n the four years that followed *Furman*, thirty-five states and the federal government revised their capital punishment systems." . . . thereby ushering in the "'modern era of capital punishment'" in the United States).

[151] MCM, *supra* note 88, R.C.M. 1004. According to the Analysis of the Rules, RCM 1004 was drafted prior to the Court of Military Appeals' decision in United States v. Matthews, 16 M.J. 354 (C.M.A. 1983). *Id.* at A21–76. In *Matthews*, the Court of Military Appeals reversed the death sentence where there existed no requirement for the members to "specifically identify" the aggravating factor they relied upon in determining that death was the appropriate penalty. *Matthews* , 16 M.J. at 379.

[152] UCMJ art. 18 (2012); UCMJ art. 16(1)(B) (2012). *See* Major Tyler J. Harder, *All Quiet on the Jurisdictional Front . . . Except for the Tremors from the Service Courts*, 2002 Army Law. 3, 3-4 (2002).

> findings before imposing the death penalty: (1) the accused was guilty of an offense that authorized the imposition of the death penalty, R.C.M. 1004(a)(1)-(2); (2) one aggravating factor existed beyond a reasonable doubt, R.C.M. 1004(b)(7); (3) "the extenuating or mitigating circumstances [were] substantially outweighed by any aggravating circumstances," R.C.M. 1004(b)(4)(C); and (4) the accused should be sentenced to death, R.C.M. 1006(d)(4)(A).[153]

Rule for Courts-Martial 1004 also controls the presentation of aggravation and mitigation and extenuation evidence.[154] For trial counsel, evidence of aggravating factors may be presented in accordance with RCM 1001(b)(4).[155] For defense counsel, the language of the rule is extremely permissive: "The accused shall be given broad latitude to present evidence in extenuation and mitigation."[156]

While the procedural requirements of RCM 1004 differ greatly from the sentencing requirements in a non-capital case, the presentencing courtroom procedures are exactly the same. Department of the Army Pamphlet 27-9 "sets forth pattern instructions and suggested procedures applicable to trials by general and special court-martial."[157] Although primarily intended for use by Military Judges, practitioners also use DA PAM. 27-9 as a practice guide to prepare for courts-martial. Chapter 8 specifically governs capital trials.[158] There are no substantive differences between the "Presentencing Procedure" for capital versus non-capital cases.[159] There are also no substantive differences between the "Sentencing Proceedings" for capital versus non-capital cases.[160]

In the federal system, the Federal Death Penalty Act of 1994

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[153] United States v. Akbar, 74 M.J. 364, 401 n.21 (C.A.A.F. 2015). Following the Court of Military Appeals' Decision in *Matthews* and the signing of Executive Order 12,460, there have been no direct, facial challenges to the constitutionality of the military death penalty system on appeal.

[154] MCM, *supra* note 88, R.C.M. 1004.

[155] *Id.*

[156] In RCM 1001(c), the defense "may" present matters in mitigation and extenuation. MCM, supra note 87 at R.C.M. 1001(c).

[157] DA PAM. 27-9, *supra* note 109, at vi.

[158] *Id.* Ch. 8.

[159] *Id.* para. 2-15-16 to 8-3-14.

[160] *Id.* para. 2-15-17 to 8-3-16.

[hereinafter FDPA][161] governs the imposition of the death penalty in eligible federal cases.[162] Under that law, a defendant may elect sentencing by a judge alone, subject to approval from the government attorney.[163] The Federal Judicial Center's *Resource Guide for Managing Capital Cases* contains a description of the statutory procedures for imposing death:

> [T]to impose the death penalty, the jury must find that the defendant acted with one of four mental states set forth in section 3591(a)(2) and that at least one statutory aggravating factor in section 3592(c) exists. Furthermore, the jury is required to return special findings with respect to the aggravating factors. . . . [T]he Federal Death Penalty Act provides that a finding of a statutory aggravating factor must be unanimous, whereas a finding of a mitigating factor may be made by a single jury member. Similarly, the Act directs the jury to "consider

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[161] 18 U.S.C. §§ 3591-3598 (1994).

> The [FDPA] was enacted as Title VI of the Violent Crime Control and Law Enforcement Act of 1994 and became effective on September 13, 1994. In passing this legislation, Congress established constitutional procedures for imposition of the death penalty for 60 offenses under 13 existing and 28 newly-created Federal capital statutes, which fall into three broad categories: (1) homicide offenses; (2) espionage and treason; and (3) non-homicidal narcotics offenses. Drug-related killings under 21 U.S.C. 848(e) and political assassinations under 18 U.S.C. 1751 (presidential and staff) and 18 U.S.C. 351 (congressional and cabinet, etc.) are not expressly included in the Act's otherwise exhaustive listing of death penalty offenses. However, Section 3591(a)(2) of the Act expressly extends to "any other offense for which a sentence of death is provided . . . ."

U.S. ATTORNEYS' MANUAL, CRIMINAL RESOURCE MANUAL § 69, http://www.justice.gov/usam/criminal-resource-manual-69-federal-death-penalty-act-1994 (citations omitted).

[162] The Anti-Drug Abuse Act of 1988 authorizes the death penalty for certain drug offenses. 21 U.S.C. § 848 (2015). However, President Bush repealed the Act's procedures for imposing the death penalty, effective March 6, 2006, when he signed the USA PATRIOT Improvement and Reauthorization Act of 2005. Pub. L. No. 109-177, 120 Stat. 231 (2006).

[163] 18 U.S.C. § 3593(b)(3) (2015). *See also* U.S. ATTORNEYS' MANUAL § 9-10.170, http://www.justice.gov/usam/usam-9-10000-capital-crimes#9-10.170 (noting that the government attorney must obtain approval from the Assistant Attorney General for the Criminal Division before agreeing to a request by the defendant pursuant to this section).

> whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify the death sentence."[164]

With regard to the courtroom procedures, the Federal Rules of Evidence do not apply during the sentencing phase. The FDPA contains its own standards for the admission of evidence.[165] Notably, no presentence report is prepared[166] and information relevant to aggravating factors "is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials[167] except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury."[168] The government must prove the existence of any aggravating factor beyond a reasonable doubt.[169] The defense is held only to a preponderance of the information standard for the existence of any mitigating factor.[170]

Despite the differences, both the military and the federal systems share one commonality, at least on paper. There is no requirement, statutory or otherwise, for a break between the guilt phase and the sentencing phase.

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[164] Johnson & Hooper, *supra* note 101 (citations omitted). In *United States v. Quinones*, the Second Circuit entertained a facial challenge to the constitutionality of the FDPA. The court rejected this argument, reversed the district court, and wrote: "to the extent the defendants' arguments rely upon the Eighth Amendment, their argument is foreclosed by the Supreme Court's decision in *Gregg v. Georgia*." 313 F.3d 49, 52 (2d Cir. 2002) (citing 428 U.S. 153 (1976)), *cert. denied*, 540 U.S. 1051 (2003)). In doing so, the Second Circuit overruled the district court. *See* United States v. Quinones, 205 F. Supp. 2d 256 (S.D.N.Y. 2002).

[165] 18 U.S.C. § 3593(c) (2015).

[166] Pursuant to Rule 32 of the Federal Rules of Criminal Procedure, a presentence report is normally required prior to sentencing. However, the FDPA is specifically listed as an exception to this requirement. Fed. R. Crim. P. 32.

[167] The inapplicability of the Federal Rules of Evidence to sentencing procedures under the FDPA was the subject of litigation in *United States v. Fell*, wherein the Second Circuit Court of Appeals found no constitutional error with the statute's specialized procedures for the admission of information relevant to aggravation and mitigation. 360 F.3d 135, 144-46 (2d Cir. 2004).

[168] 18 U.S.C. § 3593(c) (2015).

[169] *Id.*

[170] *Id.* As compared to the military, the federal statute does not specifically discuss extenuation evidence. However section 3592(a), which delineates mitigation evidence, contains items that would appear to fit within the definition of "extenuation" as it is defined in RCM 1001(c)(1)(A), for example "Duress" or "Minor Participation." *See* MCM, *supra* note 88, R.C.M. 1001(c)(1)(A).

However, in practice, there is often a break,[171] sometimes of weeks, between the guilt phase and the sentencing phase in federal court. This, and the importance of such, will be discussed in greater detail in the analysis portion of this paper.

With this background in mind, and in consideration of the differences between federal and military courts, two case studies help to illustrate how voir dire can shape the outcome of capital cases. The next portion of this paper will examine two cases, one military and one federal civilian; *United States v. Hennis*[172] and *United States v. Tsarnaev,*[173] with an emphasis on the voir dire process and sentencing timeline.

III. Case Studies

A. *United States v. Hennis*

On July 4, 1986, a North Carolina state court convicted Master Sergeant (MSG) Timothy Hennis, who was on active duty in the Army at the time, of one count rape and three counts of premeditated murder.[174] The jury sentenced him to death.[175] On October 6, 1988, the North Carolina Supreme Court reversed his conviction and ordered a new trial.[176] At his retrial, another North Carolina state jury acquitted him on April 19, 1989.[177] Master Sergeant Hennis returned to active duty in the Army and retired on July 31, 2004.[178] Following new analysis of DNA evidence linking MSG Hennis to the murders, the Army recalled him to active duty and charged him with three specifications of premeditated murder.[179]

On April 8, 2010, a general court-martial empowered to adjudge a capital sentence found MSG Hennis guilty of the charge and all three

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171 United States v. Glover, 43 F. Supp. 2d 1217, 1234 (D. Kan. 1999).
172 *Supra* note 7.
173 *Supra* note 14.
174 *Hennis v. Hemlick, 666 F.3d 270, 271 (4th Cir. 2012).*
175 *Id.*
176 State v. Hennis, 373 S.E.2d 523, 528 (N.C. 1988).
177 *Hennis*, 666 F.3d at 271.
178 *Id.*
179 *Id.* The Army did not charge MSG Hennis with rape as it was barred by the statute of limitations. The military judge rejected MSG Hennis' claim that the military prosecution violated the Double Jeopardy Clause of the Constitution. RULING - Defense Motion to Dismiss for Double Jeopardy, *Hennis*, No. 20100304 (No. 236).

specifications.[180] Master Sergeant Hennis' only defense was that he did not commit the murders.[181] The panel sentenced him to death seven days later, on April 15, 2010.[182]

The convening authority first selected twelve primary officers, six primary enlisted members, twenty alternate officers, and twenty alternate enlisted members for general and special courts-martial on December 30, 2009.[183] The convening authority also selected an additional thirty officer alternates and thirty enlisted alternates.[184] On February 22, 2010, the staff judge advocate[185] recommended that the convening authority select an additional twenty officer alternates and ten enlisted alternates to replace those who had been excused since December 30, 2009.[186] According to its website, Fort Bragg is currently home to approximately 63,000 active duty soldiers.[187] As one of the largest military installations in the world, it is reasonable to assume this number remains fairly consistent, year to year. As such, the potential panel members selected for *United States v. Hennis* represented less than 0.2% of the available members.[188] Even absent any comparison to the federal system, this is admittedly an extremely small cross section for the defense to then choose from during voir dire.

Defense counsel filed his proposed voir dire with the court on January 12, 2010.[189] Included on that list was one question, with multiple subparts, to elicit panel member views on the death penalty generally and also under specific circumstances.[190] Although question 120, subparts d. through g. are hypothetical questions, it lacks the salient details of the case, notably the ages of the child victims and the lack of mitigating and extenuating

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[180] *Supra* note 7.
[181] *Hennis*, 666 F.3d at 271.
[182] *Id.*
[183] Packet of Panel Selection Docs., *Hennis*, No. 20100304 (No. 305).
[184] *Id.*
[185] "Staff judge advocate" is defined as "a judge advocate so designated in Army, Air Force, or Marine Corps, and means the principal legal advisor of a command in the Navy and Coast Guard who is a judge advocate." MCM, *supra* note 88, R.CM. 103(17).
[186] *Supra* note 183.
[187] FORT BRAGG, http://www.bragg.army.mil/directorates/DES/FireEmergencyServices/Pages/AboutUs.aspx (last visited July 1, 2016).
[188] Article 25 lays out the categories of individuals who are ineligible to serve, *i.e.*, an accuser or witness. Even so, such exceptions should not be expected to comprise enough individuals to alter the overall percentage, even in a case like *Hennis*. *Supra* note 86.
[189] Defense General Voir Dire Questions, *Hennis*, No. 20100304 (No. 296) (Appendix A).
[190] *Id.* at 11-12.

circumstances. In that regard, question 120 would fall into the third category described by *Johnson*, "case-categorization," opposed to the fourth category, "case-specific."[191] The military judge also provided potential panel members with a thirteen page questionnaire, containing mutually agreed upon questions from the prosecution and the defense.[192] The questionnaire contains one "abstract" question that tests prospective panel members' willingness to consider mitigation evidence in the form of a person's background when deciding whether to impose the death penalty, however, it lacks the most salient details of the case and is therefore not "case-specific."[193]

Voir dire began on March 2, 2010, and continued through March 15, 2010. After four rounds of voir dire for a combined total of thirty-nine potential members, Hennis was tried by a panel of fourteen members: six officers and eight enlisted.

For each round of voir dire, the military judge brought in the entire set of panel members and asked them some close variation of the standard questions from DA PAM. 27-9, specifically questions thirty-one through thirty-six from section 8-3-1.[194] Although the list does not include "case-specific" questions like those envisioned by *Johnson* and the accompanying cases discussed in Section B *supra*, it does include "abstract" questions and "case-categorization" questions aimed at discovering whether prospective panel members would automatically impose the death penalty based on the nature of the charged offenses or fail to fairly consider all of the evidence before reaching a decision on the appropriate sentence. However, in response to these questions, the military judge only received responses indicating an inability to fairly consider all of the sentencing options or evidence in the case to arrive at a sentencing decision, from five members of the thirty-nine he questioned; four during round two and one during round three.[195]

Initially, the military judge allowed defense counsel to ask question

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[191] United States v. Johnson, 366 F. Supp. 2d.
[192] Panel Member Questionnaire, *Hennis*, No. 20100304 (No. 242) (Appendix B).
[193] *Id.* at 8. Notably, the initial proposed questionnaire from the military judge contained some "case-categorization" questions designed to test prospective panel members' biases with regard to appropriate sentence, however, the questions also lacked the most salient details of the case and were therefore not "case-specific." The final version did contain these questions. Proposed Panel Member Questionnaire, *Hennis*, No. 20100304 (No. 228).
[194] *See*, *e.g.*, Tr. of R. at 1735-37, *Hennis*, No. 20100304 (Appendix C).
[195] Tr. of R. at 2812-14, 3267-69, *Hennis*, No. 20100304.

120 and its subparts (or some close variation) without objection or amendment.[196] By comparison to the military judge, during each round of group voir dire, defense counsel consistently received different responses from prospective members when he asked whether they agreed with the statement that "if someone is convicted of premeditated murder they should be given the death penalty?" versus when he asked whether they agreed with the statement that "if someone murders children they should be given the death penalty?" In every instance, more prospective panel members responded affirmatively to the second question than to the first.[197] Furthermore, as compared to the military judge's hypothetical questions described above, defense counsel had four prospective panel members during round one, one additional prospective panel member during round two, three additional prospective panel members during round three, and one prospective panel member during round four respond in the affirmative to his second hypothetical question.[198] In short, where all or most members told the military judge they could fairly consider all of the sentencing options and evidence in the case to arrive at a sentencing decision, some of those same members subsequently told defense counsel that someone convicted of the premeditated murder of children should receive the death penalty.

In addition to question 120 from his proposed voir dire, defense counsel also used a "case-specific" hypothetical question. However, unlike the many federal cases in Section II.B *infra*, defense counsel in *Hennis* did not litigate his use of a "case-specific" hypothetical question, or any variation thereof, prior to commencing voir dire, resulting in substantial litigation with the government. Defense counsel used two variations of a "case-specific" hypothetical question: one using the specific facts of the case and another probing the member's ability to consider mitigation and extenuation evidence prior to sentencing.

Defense counsel posed his first "case-specific" question with Colonel (COL) T, the very first member called for individual voir dire during the first round of voir dire.

> Let me ask you a question and again, this is not about this case. This is a hypothetical case. If you would be selected as a member of a military panel who would have

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[196] *Id.* at 1698-1700, 2812-14, 3267-69, 3522-25.
[197] *Id.* at 1844, 2915, 3372-73, 3609.
[198] *Id.*

> responsibility to sentence an accused who has already been found guilty of three counts of premeditated murder, including the premeditated murder of a mother and two children ages 3 and 5. Okay.
>
> And in this hypothetical and on this panel, you understand that under the UCMJ, premeditated murder involves the unlawful killing of another person and that's with premeditation. That is, meaning that there was a specific intent to kill and an opportunity to consider the act before the result—before the act that resulted in their death. So meaning that the killer knew what they wanted to do and deliberately did it; had the opportunity, knew what they wanted to do, and deliberately killed somebody. That's premeditated murder.
>
> Now, let's say that in this case, there's no issue of self-defense. There's no issue of heat of passion, meaning that some event that caused an uncontrollable heat of passion. There was no provocation. These were innocent victims. They didn't do anything to provoke this person. There's no mistaken identity. There's no accident or defense of others. Okay, sir. So you've got a premeditated murder of a mother and two children with no issues of self-defense, heat of passion, provocation, mistaken identity, accident, or defense of others.
>
> I want you to assume that you are a member on that premeditated murder case, and you've heard all the evidence. And you've determined that none of these defenses, none of those issues of self-defense, heat of passion, provocation, mistaken identity, accident, defense of others, or the person wasn't drunk or under the influence of alcohol—none of those things are present. Under that case, what is your opinion of the death penalty as the only appropriate punishment for that guilty murderer?[199]

The member ultimately conceded that if he heard nothing more than what was offered by defense counsel in his hypothetical question, death would

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[199] *Id.* at 1897-99.

be the "only appropriate punishment" under the facts of the hypothetical.[200]

Colonel T offers the first chance to examine the efficacy of defense counsel's lengthy "case-specific" question as compared to the military judge's "abstract" and "case-categorization" questions and defense counsel's "case-categorization" questions during group voir dire. As noted, no prospective member during round one responded affirmatively to the military judge's questions indicating an inability to fairly consider all of the sentencing options or evidence in the case to arrive at a sentencing decision. Colonel T also did not respond affirmatively to defense counsel's question whether someone convicted of the premeditated murder of children should be given the death penalty.[201] However, following the "case-specific" question, COL T agreed with defense counsel that, after further thought, he was "inclined" to view the death penalty as the "only appropriate penalty" for the premeditated murder of children.[202] Of note, although the defense counsel challenged COL T on the basis of these statements, the military judge granted the challenge for cause on a different basis and did not address his statements about the appropriate penalty for the murder of children.[203]

By comparison, with LTC R, another potential panel member, defense counsel employed a more limited version of the "case-specific" question to explore LTC R's response during group voir dire that life imprisonment was not sufficient punishment for the premeditated murder of children.[204] Specifically, defense counsel stated "as I understand it . . . if you were to sit on a military panel and be confronted with the decision to sentence a guilty murderer for the premeditated murder of two children, ages 3 and 5, that you would not consider life imprison [sic] to be an appropriate punishment?"[205] Lieutenant Colonel R responded that although it would be a "fair statement" that he would be "predisposed to the death penalty," that did not mean he would not consider "other things."[206] However, after confirming that LTC R considered death the appropriate punishment in a case where a guilty individual showed no remorse because he maintained his innocence throughout sentencing, the military judge granted defense

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[200] *Id.* at 1902.
[201] *Id.* at 1844.
[202] Tr. of R. at 1908-09, *Hennis*, No. 20100304.
[203] *Id.* at 2029, 2051.
[204] *Id. at 2065.*
[205] *Id. at 2066.*
[206] *Id.*

counsel's challenge for cause.[207]

Defense counsel successfully challenged another panel member, Command Sergeant Major (CSM) G, on the basis of her predisposition toward death in a case that involved the premeditated murder of children. Command Sergeant Major G, like COL T, also did not initially answer affirmatively to either the military judge's hypothetical questions or defense counsel's hypothetical questions during group voir dire.[208] With her, defense counsel used a version of his "case-specific" question.[209]

Defense counsel did not always succeed in successfully challenging a prospective member for cause with his use of "case-specific" questions. During group voir dire, LTC B and Major (MAJ) W agreed with defense counsel that "life in prison is not really punishment for premeditated murder of children?"[210] In exploring that response with LTC B, defense counsel posed a limited "case-specific" question as he did with LTC R, ". . . as I understand you though it is . . . your belief . . . that . . . life imprisonment would not be an appropriate punishment for someone who had with premeditation killed innocent children, meant to do it, did do it, killed innocent children, that just simply wouldn't be an appropriate punishment?"[211] Based on LTC B's responses to the "case-specific" question, the military judge denied the defense counsel's challenge for cause.[212]

By contrast, with MAJ W, defense counsel used the same "case-specific" question as with COL T.[213] The prospective member remained firm in his position that the death penalty was simply one legal option.[214] The military judge denied defense counsel's challenge for cause of Major W.[215]

Increasingly, the military judge sought to confine the defense counsel's use of "case-specific" questions as voir dire progressed. Based on his rulings, it is clear the military judge concluded that defense counsel

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[207] *Id.* at 2068, 2307.
[208] *Id.* at 2457-58.
[209] Tr. of R. at 2391-92, *Hennis*, No. 20100304.
[210] *Id.* at 1844.
[211] *Id.* at 2132.
[212] *Id.* at 2307.
[213] *Id.* at 2195.
[214] *Id.* at 2196-97.
[215] *Id.* at 2309.

had strayed into "stake-out" territory based on the nature of the defense counsel's final query to the prospective members, *i.e.*, some variation of "What are your views with regard to the death penalty as the appropriate penalty for this guilty murderer?"[216] Before issuing his final detailed ruling on the proper scope of voir dire, the military judge gave the following guidance in the midst of round one:

> You may ask them generally what their views are on the death penalty. I'm not—I said—again, I'm not going to allow you to make—require a commitment from the members on what they view is appropriate when they haven't heard all the evidence.
>
> And the case law does not require me to allow you to draw a commitment from the members on a particular sentence when they have not heard all of the evidence. The case law does not require me to do that.[217]

In response to these limitations, defense counsel began to use "case-specific" questions to probe how prospective members would consider mitigation and extenuation evidence. In two instances during round one, defense counsel successfully used a fact-based "case-specific" question to facilitate a discussion with members about their willingness to consider certain mitigation evidence, despite the military's judge's limitations and the trial counsel objections. Defense counsel successfully challenged both prospective members on their inability to consider the accused's military record and background information, respectively.[218] With a third member, defense counsel successfully used a limited version of his fact-based "case-specific" question to challenge a member who indicated he would impose the death penalty if he did not hear evidence of any mental health issues on the part of the accused.[219]

Furthermore, despite these limitations, defense counsel continued to

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[216] For example, following a government objection to defense counsel's "case-specific" question involving the premeditated murder of a child, the military judge made the following ruling: "Counsel, you may ask the member if he is willing to consider all the evidence in the case before he makes a decision on what an appropriate sentence is. But to ask him to commit to a particular sentence without knowing what that evidence is, I'm not going to allow." Tr. of R. at 2429, *Hennis*, No. 20100304.

[217] *Id.* at 2437.

[218] *Id.* at 2634.

[219] *Id.* at 2786.

successfully use "case-specific" questions incorporating children as victims to test prospective panel member biases. For example, one prospective member, Sergeant Major (SGM) M, stated in response to the trial counsel's question about his view of the death penalty, that it was "just punishment in some cases, certainly murder with aggravating circumstances."[220] After defense counsel's follow-up questions on this point, with specific regard to child victims, the military judge granted the defense counsel's challenge for cause based upon the prospective member's "rather obvious emotional response to the young children."[221]

After individual voir dire of the first member during the second round, the military judge held an Article 39(a) session[222] wherein he specifically disallowed variations of defense counsel's "case-specific" question.[223] According to the military judge, this type of question was "misleading, inartful, and confusing."[224] Ultimately, the military judge found that defense counsel was attempting to "indoctrinate the members to potential issues and to pre-commit to a certain outcome before the evidence has been presented and they have received the court's instructions on the law."[225] He provided the defense counsel with the following approved "case-specific," "case-categorization, and "abstract" questions for use during voir dire:

> If the evidence shows the accused committed the premeditated murders of a mother and two of her daughters, would you automatically vote to impose the death penalty?
>
> . . . if you find the accused guilty of premeditated murders of a mother and two of her daughters, would you automatically vote to impose the death penalty?
>
> Can you fairly consider a life sentence if the evidence shows the accused committed the premeditated murders

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[220] *Id.* at 2569.

[221] *Id.* at 2635.

[222] Article 39(a) allows the military judge to "call the court into session without the presence of members" for various purposes including, "hearing and ruling upon any matter which may be ruled upon by the military judge under this chapter, whether or not the matter is appropriate for later consideration or decision by the members of the court." UCMJ, art. 39(a)(2) (2012).

[223] Tr. of R. at 3005-15, *Hennis*, No. 20100304.

[224] *Id.* at 3012.

[225] *Id.* at 3013.

> of a mother and two of her daughters?
>
> Would you automatically reject a life sentence if the evidence shows that the accused committed the premeditated murders of a mother and two of her daughters?
>
> If you find the accused guilty, would you automatically impose a death sentence no matter what the facts of this case were?
>
> Have you given much thought to the death penalty before being notified as a court member?
>
> Can you fairly consider all of the evidence before reaching your determination of a sentence?
>
> Can you fairly consider all of the sentencing alternatives, if the accused were convicted of premeditated murder, to include life and death?
>
> What types of extenuation and mitigation evidence would you want to see from the defense?[226]
>
> Would you automatically reject a life sentence for a premeditated murder?
>
> Do you believe the death sentence or death penalty must be imposed for all premeditated murders?
>
> Would you automatically reject a life sentence for premeditated murder regardless of the facts and circumstances in a case?[227]

The military judge did not prohibit defense counsel from asking follow-up questions to the above questions in addition to follow-up questions about the members' questionnaires.[228]

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[226] This model question was subsequently amended by mutual agreement of the parties and the military judge to exclude "from the defense." *Id.* at 3023.
[227] *Id.* at 3007-11.
[228] *Id.* at 3012.

The remaining rounds of voir dire proceeded quickly, following the judge's ruling. Prior to the military judge's detailed ruling, defense counsel challenged fourteen of sixteen prospective members and succeeded eleven times. After the military judge's detailed ruling, defense counsel challenged eight of fifteen prospective members and succeeded seven times. Even so, three of defense counsel's successful challenges were based upon "case-categorization" questions.[229] Defense counsel successfully challenged two members who responded negatively to the military judge's hypothetical questions but affirmatively to defense counsel's hypothetical questions as to whether death was the appropriate penalty for someone convicted of the premeditated murder of children.[230] Finally, defense counsel successfully challenged another member by probing the prospective member's view of death as the appropriate penalty for someone who intentionally murders "two young children." Although the member had responded negatively to this question during group voir dire, during individual voir dire he stated, "I'll put it this way: I can't think of a circumstance where I would [think] that it should not be."[231]

The members delivered their unanimous guilty verdict at 10:54 AM on April 8, 2010.[232] The military judge instructed them to return at 9:00 AM the following day for sentencing.[233] Sentencing commenced at 9:25 AM on April 9, 2010.[234] The members delivered their sentence at 2:50 PM on April 15, six days later.[235] The relative speed with which the court proceeded through to the pronouncement of sentence stands in stark contrast to the following case, and will be discussed in further detail below.

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[229] For two of the four, the government did not oppose after the prospective members responded affirmatively to defense counsel's questions regarding life as an inappropriate penalty for someone who commits the premeditated murder of children during group voir dire. *Id.* at 2915, 3153. For the third, the military judge granted the opposed challenge based on the prospective member's responses to defense counsel's questions regarding life as an inappropriate penalty for someone who commits the premeditated murder of children during group voir dire. Tr. of R. at 2915, 3242, *Hennis*, No. 20100304. For the fourth member, the government did not oppose after the prospective member indicated he would expect the defense to respond to the government's evidence during the defense's case-in-chief. *Id.* at 2925-28.

[230] *Id.* at 3267-68, 3371-74.

[231] *Id.* at 3371-74, 3690-91, 3267-68, 3371-74.

[232] *Id.* at 6709.

[233] *Id.*

[234] *Id.* at 6782.

[235] Tr. of R. at 7312, *Hennis*, No. 20100304.

B. *United States v. Tsarnaev*

On April 15, 2013, two improvised explosive devices (IEDs) exploded on the Boston Marathon route while the race was still underway.[236] Each explosion killed at least one person and maimed, burned, and wounded many others.[237] On April 8, 2015, a jury convicted Dzhokhar Tsarnaev of all thirty counts of the indictment.[238] During her opening statement, Tsarnaev's defense attorney admitted that her client committed the murders.[239] She offered no legal defense for his action.[240] The jury sentenced him to death on May 15, 2015.[241]

Tsarnaev's initial appearance occurred on April 22, 2013.[242] On November 4, 2014, with trial pending, the federal judge assigned to the case, George A. O'Toole, Jr., ordered the parties to confer and provide a joint statute report to include proposed jury questionnaires.[243] During a pretrial status conference on November 24, 2014, Judge O'Toole requested the defense file their proposed jury questionnaire on December 1, 2014, and the government file their response a week later, on December 8, 2014, assuming the parties could not agree on a joint submission.[244] Furthermore, he suggested beginning with 1,200 potential jurors.[245] He later reduced that number to 1,000, with the expectation that ten percent would remain, leaving a comfortable margin for peremptory or other strikes.[246]

Tsarnaev's defense counsel moved the court to allow "case-specific" hypothetical questions. As Tsarnaev's counsel explained in his motion:

> In this case, the defendant is charged with multiple counts of use of a weapon of mass destruction resulting in death, bombing of a place of public use resulting in death,

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236 Indictment, United States v. Tsarnaev, No. 13-10200-GAO (No. 58).
237 *Id.*
238 Verdict, *Tsarnaev*, No. 13-10200-GAO (No. 1261).
239 Tr. at R. at 4-5, *Tsarnaev*, No. 13-10200-GAO (No. 1117).
240 *Id.* at 5-6.
241 Penalty Phase Verdict, *Tsarnaev*, No. 13-10200-GAO (No. 1434).
242 *Tsarnaev*, No. 13-10200-GAO (No. 7).
243 Order, *Tsarnaev*, No. 13-10200-GAO (No. 631).
244 Tr. of R. at 30, *Tsarnaev*, No. 13-10200-GAO (No. 671).
245 *Id.* at 31.
246 Tr. of R. at 6-7, *Tsarnaev*, No. 13-10200-GAO (No. 915).

> malicious destruction of property resulting in personal injury and death, and firearms violations resulting in death. It is these offenses, not simply "murder," that the government has elected to charge. Upon conviction for these crimes, therefore, he is entitled not only to twelve jurors who could consider imposing life imprisonment rather than the death penalty for some kinds of murder, but for these kinds. And that is the relevant question that *Morgan v. Illinois* entitles him to put to each prospective juror.[247]

In that same motion, echoing the "case-specific" question in *Hennis*[248] and the model Colorado Method "strip question,"[249] Tsarnaev's attorneys laid bare the problem of properly "life-qualifying" jurors, absent the ability to ask "case-specific" questions:

> Abstract or general questions risk eliciting answers that obscure disqualifying bias rather than expose it. For example, an affirmative answer to the question, "Could you weigh all of the aggravating and mitigating evidence and return either a death sentence or a sentence of life imprisonment, depending on the evidence presented?" could mean easily that the juror could vote against the

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[247] Mem. of Law at 9, *Tsarnaev*, No. 13-10200-GAO (No. 682) (citing *Morgan*, 504 U.S. at 719; *Johnson*, 366 F. Supp. 2d at 847-48).

[248] *Supra* note 199.

[249]

> Defense attorneys use leading questions to strip away extraneous defenses or other irrelevant facts in order to gather meaningful, relevant answers and information from a prospective juror regarding her views of the death penalty and life imprisonment. The lawyer puts the prospective juror in the place of having been personally convinced that a hypothetical capital defendant is guilty of capital murder. The "strip question" normally incorporate relevant case-specific facts in a manner that avoids "staking-out" and "precommitment." Defense counsel says to the prospective juror, "I would like you to imagine a hypothetical case. Not this case. In this hypothetical case, you heard the evidence and were convinced the defendant was guilty of premeditated, intentional murder. Meant to do it and did it. It wasn't an accident, self-defense, defense of another, heat of passion, or insanity. He meant to do it, premeditated it, and then did it. For that defendant, do you believe that the death penalty is the only appropriate penalty?"
>
> Rubenstein, *supra* note 128, at 20-21.

> death penalty so long as:
>
> 1. the evidence did not conclusively establish guilt;
> 2. the killing was accidental or committed in sudden heat and passion;
> 3. the killing was not intentional;
> 4. the defendant was insane;
> 5. the defendant acted in self-defense or was otherwise provoked;
> 6. the victim was engaged in criminal conduct at the time of his or her death;
> 7. only a single victim was killed;
> 8. the victim was not a child; or
> 9. the crime did not involve terrorism.
>
> This list could be extended indefinitely. The point is simply that a "yes" response to such a question is virtually meaningless unless the juror first understands that the question pre-supposes the defendant's guilt of both the charged offenses and the statutory aggravating factors that the government has actually alleged in the case to be tried. Otherwise a seemingly qualifying response is likely to mean only that the juror might not favor the death penalty in cases where it is legally unavailable in any event, or in categories of cases far removed from the one about to be tried.[250]

In its response, the government objected to Tsarnaev's request to conduct "case-specific" questioning.[251] The government alleged this would result in "staking-out" the jury.

> Tsarnaev essentially seeks permission to read out for jurors one by one the crimes and aggravating factors charged in the indictment and notice of intent, and then ask them whether, assuming the defendant is guilty of those crimes and the aggravating factors exist, they could consider imposing a life sentence rather than a death sentence. The problem with this approach is that it asks jurors to commit (or "precommit") to a penalty decision

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[250] *Supra* note 247, at 11-12.
[251] Govt.'s Resp. to Def.'s Mem. of Law at 7, *Tsarnaev*, No. 13-10200-GAO (No. 737).

> before they have heard any mitigation evidence or been told that the law requires them to weigh aggravating and mitigating factors and consider whether the aggravating factors "sufficiently outweigh" all the mitigating factor[s] . . . to justify a sentence of death."[252]

In their reply to the government's response, Tsarnaev's lawyers noted that not every "case-specific" question is a "stake-out question" (citing *Johnson*) and cited to *Ellington* for the proposition that "only focused questioning will suffice to reveal such a commonly-held disqualifying bias." [253] Unfortunately, to the extent Judge O'Toole issued a final ruling on the matter, it remains sealed.[254]

The final juror questionnaire in this case reflected a number of questions that dealt, generically, with jurors attitudes about the death penalty.[255] These are best categorized as "abstract" questions. Although the questionnaire contained a limited recitation of the facts of the case, it did not contain specifics of the crimes with which Tsarnaev was charged or his role in causing the deaths of a child and a police officer.[256] None of these facts were used to form the basis for any questions in *Johnson's* categories two through four. Rather, the facts were provided in order for potential jurors to determine whether they or anyone close to them had a personal connection to any of the victims or the places mentioned.[257]

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[252] *Id.* at 8 (citing 18 U.S.C. § 3593 (2004)).

[253] Reply to Resp. at 4, *Tsarnaev*, No. 13-10200-GAO (No. 758) (citing *Johnson*, 366 F. Supp. 2d at 822; *Ellington*, 735 S.E.2d at 756). In order to ensure a properly qualified jury, Tsarnaev proposed, as a preliminary matter, that the court include "three screening questions" on its questionnaire "to identify those jurors who are especially likely to believe that the death penalty should be automatic for terrorism-murders, or for murderers of children or police officers." *Id.* at 5. Unfortunately, the exhibit which contains those sample questions remains sealed.

[254] During a final pretrial status conference on December 23, 2014, the court noted that it would be scheduling an in-camera session with both sides to discuss the mechanics of jury selection and voir dire. Tr. of R. at 18, *Tsarnaev*, No. 13-10200-GAO (No. 800). A thorough review of the docket does not reveal any additional unsealed court orders or published transcripts relevant to the litigation over the proper scope of voir dire.

[255] Juror Questionnaire at 23-26, *Tsarnaev*, No. 13-10200-GAO (No. 1178) (Appendix D).

[256] *Id.* at 21. According to one news report, when one of Tsarnaev's defense attorneys attempted to question a potential juror about whether she might be particularly sensitive to a case involving a child's death, the judge disallowed the question following the prosecution's objection. Masha Gessen, *For Prospective Jurors in the Boston Bombing Trial, a Detailed Questionaire* [sic], The Washington Post (Jan. 29, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/01/29/for-prospective-jurors-in-the-boston-bombing-trial-a-detailed-questionaire/.

[257] *Supra* note 255, at 21-22.

While all of the underlying jury selection procedures in *United States v. Tsarnaev* remain under seal,[258] additional court filings and news report paint a limited picture of the voir dire in the case.[259] According to one news report, the eighteen jurors were selected from a "pool of 75 jurors who were chosen from a pond of 256 jurors who were chosen for individual questioning from an ocean of 1,373 jurors randomly picked and summonsed to court by Judge George O'Toole."[260] In particular, one online report indicated that, despite requests from Tsarnaev's attorneys to the contrary, the judge conducted all the voir dire in the case, at least at the outset.[261] Subsequent news reports indicated perhaps a more active role by the attorneys on both sides.[262] In all, jury selection in *United States v. Tsarnaev* lasted for twenty-four days. In accordance with Federal Rules of Criminal Procedure 23 and 24, eighteen jurors were sat; twelve primary

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[258] The court is currently in the process of unsealing documents in the case. On January 27, 2016, more than 600 documents were unsealed, however, none of these related to jury selection. David Boeri and Zeninjor Enwemeka, *Court Begins Unsealing Documents In Tsarnaev Case*, WBUR (Jan. 27, 2016), http://www.wbur.org/2016/01/27/tsarnaev-court-documents-unsealed. Recently, the judge ordered the public release of the names of the 12 jurors on the case. Zeninjor Enwemeka, *Judge Releases List of Tsarnaev Jurors*, WBUR (Feb. 12, 2016), http://www.wbur.org/2016/02/12/tsarnaev-jury-list. As of June 19, 2016, the jury selection documents remained under seal.

[259] Even so, as one legal commentator wrote:

> It may well be that whatever the selection process, this jury was that fair subset—those without the pro death biases reflected in the social science. While we have some idea of the *Tsarnaev* trial voir dire from the media coverage, there is much we do not know. The transcripts—like most of the critical pleadings in the case—were sealed. So we are left to wonder and to speculate: How probing was the voir dire? To what degree were careful distinctions made even among those who could be death qualified, to select out those who could be fair about death? Which jurors were accepted? Which were rejected?

Nancy Gertner, *Death Qualified: The Tsarnaev Jury, His Sentence and the Questions that Remain*, WBUR (May 28, 2015), http://cognoscenti.wbur.org/2015/05/28/death-penalty-nancy-gertner.

[260] David Boeri & Zoë Sobel, *Judge's Quest To Find A 'Fair And Impartial' Tsarnaev Jury In Boston Finally Comes To A Close*, WBUR (March 4, 2015, 6:15 AM), http://www.wbur.org/2015/03/03/tsarnaev-jury-boston-judge-otoole.

[261] Emily Rooney, *A Week At The Tsarnaev Trial: Jury Selection—A Close Up*, WGBH NEWS (Jan. 16, 2015), https://news.wgbh.org/post/week-tsarnaev-trial-jury-selection-close. *See* Mem. of Law at 17-20, Tsarnaev, No. 13-10200-GAO (No. 682).

[262] Gessen, *supra* note 256.

and six alternate.[263]

Following the verdict, sentencing began in the case on April 21, 2015, approximately two weeks later. As the judge explained to the jurors, following the verdict, "I anticipated we would take a short recess between the guilt phase and the penalty phase of the trial. And that is not uncommon in capital cases."[264]

IV. Conclusion

In *United States v. Gray*,[265] the Court of Appeals for the Armed Forces adopted the standard set forth in *Wainright v. Witt* for determining when prospective jurors must be excluded for cause based on their views of capital punishment. "The standard is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'"[266] As to how to determine those views, *Morgan* is the operative case.[267] However, the complexity of *Hennis*[268] and *Tsarnaev*[269] mirror the complexity that has developed in the federal case law interpreting *Morgan*.[270]

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[263] *Tsarnaev*, No. 13-10200-GAO (No. 1112).
[264] Tr. of R. at 3, *Tsarnaev*, No. 13-10200-GAO (No. 1287).
[265] 51 M.J. 1, 31-32 (C.A.A.F. 1999).
[266] Wainright v. Witt, 469 U.S. at 424 (quoting *Adams*, 448 U.S. at 45).
[267] 504 U.S. at 719. Although the specific issue in *Morgan* was "whether, during voir dire, for a capital offense, a state trial court may, consistent with the Due Process Clause of the Fourteenth Amendment, refuse inquiry into whether a potential juror would automatically impose the death penalty upon conviction of the defendant," the decision is equally applicable to courts-martial by way of the Fifth Amendment's Due Process Clause. Malinski v. New York, 324 U.S. 401, 415 (1945) (Frankfurter, J., concurring). *See* United States v. Santiago-Davila, 26 M.J. 380, 389 (C.M.A. 1988) (cited by United States v. Loving, 41 M.J. 213, 304 (C.A.A.F. 1994)).
[268] *Supra* note 7.
[269] *Supra* note 14.
[270] Counsel in *Fell*, *Wilson*, *Richmond*, *Trevino*, *Tipton*, *McCullah*, *Lucas*, *Montes* and to a more limited extent, *Robinson*, were concerned with the role of mitigation and extenuation evidence. United States v. Fell, 372 F. Supp. 2d at 767; *Wilson*, 493 F. Supp. 2d at 402-03; Trevino v. Johnson, 168 F.3d 173; United States v.Tipton, 90 F.3d 879; United States v. McCullah, 76 F.3d at 1113; Lucas v. State 555 S.E.2d at 446-47; United States v. Montes, 2012 U.S. Dist. LEXIS 49916, at *6-7; State v. Robinson, 2015 Kan. LEXIS 929, at *219-20. Counsel in *Basciano*, *Harlow*, *McVeigh*, *Oken*, *Ball*, *Hogwood*, *Schmitt*, *Garcia*, *Ellington*, *Robinson*, and *Smith* and the approved questions in *Johnson* were more concerned with the impact of case-specific facts, although *Basciano* did include one open-ended question about what jurors would find "important" when making the decision between life in prison or the death penalty. United States v. Basciano, 2011 U.S.

In *Hennis*, defense counsel asked "case-specific" hypothetical questions that touched both specific facts and mitigation and extenuation evidence. In *Tsarnaev*, defense counsel's proposed "case-specific" questions were targeted at the former. However they are phrased, both types are ultimately aimed at the same key inquiry: can prospective jurors or panel members meet the requirements of *Wainright*? It is hard to imagine how it is possible to extract the type of knowing commitment from a potential juror or panel member absent such information. It seems a matter of common sense that most prospective jurors and panel members will suspect that if the death penalty is an option, then they are likely dealing with the most heinous of alleged crimes. This will be confirmed when they receive a copy of the flyer in a military case or are read the indictment in a federal case.[271] However, as the flyer in *Hennis* makes clear, the details will remain scant, even if murder is alleged.[272] To inquire of a prospective juror or panel member, using an "abstract question," whether he believes that the nature of the charges alone is sufficient to render automatic imposition of the death penalty hardly seems to scratch the surface of the typical capital case.[273]

Essentially, it is as if a court is asking a prospective juror or panel member to sign a contract, without knowing the most important term, the "critical issue" as it were. As the court in *Ellington* explained:

> We believe that Ellington was entitled to ask whether the prospective jurors in this case would automatically vote for a death sentence in any case in which two murder victims were young children, regardless of any other facts

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Dist. LEXIS 11077, at *3-5; Harlow v. Murphy, 2008 U.S. Dist. LEXIS 124288, at *226; United States v. McVeigh, 153 F.3d at 1205; *Oken*, 220 F.3d at 266 n.4; State v. Ball, 824 So. 2d at 1104; Hogwood v. State, 777 So. 2d at 177; State v. *Garcia*, 226 P.3d at 377-78; Ellington v. State, 735 S.E.2d at 751; Richmond v. Polk, 375 F.3d at 329; Commonwealth v. Smith, No. 681 CAP, 2015 Pa. LEXIS 3002, at *18; United States v. Johnson, 366 F. Supp. 2d at 849.

[271] BENCHBOOK *supra* note 106, at 89.

[272] Flyer, United States v. Hennis, No. 20100304 (No. 285) (Appendix E). Without an unsealed transcript of jury selection in *Tsarnaev*, it is unclear how much detail prospective jurors were provided from the indictment.

[273] Under current Supreme Court caselaw, to even qualify for the death penalty, there must be at least one statutorily-defined aggravating factor present. *See generally* Lindsay H. Tomenson and Hannah M. Stott-Bumsted, *Thirtieth Annual Review of Criminal Procedure: Introduction and Guide for Users: IV. Sentencing: Capital Punishment*, 89 Geo. L.J. 1738, 1742-50 (May 2001).

> or legal instructions. As to the jury's decision on the sentences in this case, our experience in criminal justice matters and simple common sense indicate that the fact that two of the victims were young children was the critical issue.[274]

In both *Hennis* and *Tsarnaev*, counsel identified the "critical issue" or "issues" in the case. In *Hennis*, the critical "issues" were the fact of two child victims and the accused's only defense—that he did not commit the crimes—a position he would not waiver from during presentencing, making for a challenging case in mitigation and extenuation. In *Tsarnaev*, it was the specter of terrorism and murders of a child and a police officer.

In *Hennis*, to the extent defense counsel was allowed to ask "case-specific" questions that incorporated these critical issues, he did so to great effect. This was true even during group voir dire using a limited "case-specific" question. As noted, defense counsel's proposed voir dire questions specifically asked prospective members about the appropriateness of the death penalty for someone who commits premeditated murder and someone who commits premeditated murder of children.[275] In all cases, more prospective panel members responded affirmatively to the second question than to the first.[276]

Furthermore, as compared to the military judge's hypothetical questions, defense counsel was able to probe members in a much deeper, and more effective way. The best evidence of this is defense counsel's voir dire of COL T, LTC R, and CSM G, as discussed above. Even where defense counsel did not succeed in challenging a prospective member, as with LTC B and MAJ W, by subjecting these latter two members to the specific facts of the case, defense counsel ultimately demonstrated their ability to comply with *Wainright*.[277] In that regard, expanded voir dire benefits both parties and the judge by laying bare the bases for legitimate challenges for cause in addition to increasing public trust in the fairness of the system.

In *Hennis*, defense counsel's primary issue was not in the substance or purpose of the "case-specific" questions, but rather the phrasing. Too often defense counsel strayed into "stake-out" territory, by requesting a

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[274] Ellington v. State, 735 S.E.2d at 755.
[275] *Supra* note 192, at 11-12.
[276] Tr. of R. at 1844, 2915, 3372-73, 3609, *Hennis*, No. 20100304.
[277] Wainright v. Witt, 469 U.S. at 424.

commitment from the members, whether that was if they thought death was the only appropriate penalty or how much weight they would give certain aggravating or mitigating factors during sentencing.[278] Although in the former instance defense counsel modeled the Colorado Method "strip question," it is difficult to see how the final inquiry does not run afoul of *Johnson*'s three-part inquiry. In that regard, the military judge was correct when he limited defense counsel's phrasing of the "case-specific" question.

The problem with the military judge's final formulation of questions was that, even though they could be fairly considered to be "case-specific" questions, they were missing the "critical issues." None of his approved questions included the ages of the two child victims, or specifically that they were children. Likewise, none of his approved questions included anything that touched upon the lack of defenses or true mitigation in this case. Hennis offered nothing that approached the classic types of mitigation or extenuation evidence, such as mental health issues, mental infirmity, provocation, or youth. His entire case rested on the fact that he did not commit the murder. By comparison, while Tsarnaev did have relative youth to offer as a mitigating factor—he was nineteen at the time of the murders[279]—he too was without the full complement of classic mitigating and extenuating circumstances.

Aside from the practical utility of such questioning, the constitutional requirement for hypothetical questions in *Johnson* categories two through four is rooted in the differences between military panel selection and sentencing as compared to federal jury selection and sentencing, as discussed below.

One of the most pervasive and persistent criticisms of the military system is the lack of transparency in selecting members.[280] Whereas in

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[278] On multiple occasions, the military judge, either *sua sponte*, or in response to a government objection, interjected on account of defense counsel's insertion of words including "important," "seriously," and "honestly," when asking how prospective members how they would evaluate certain migration and extenuation evidence in the case. *See*, *e.g.*, Tr. of R. at 2199, 2201, 2493-95, 2549-50, 2603, 2710-11, 3001-06, 3106-08, *Hennis*, No. 20100304.

[279] *See supra* note 236.

[280] *See*, *e.g.*, Hansen, *supra* note 85, at 912; Hill, *supra* note 85, at 121 (citing Colonel James A. Young, III, *Revising the Court Member Selection Process*, 163 Mil. L. Rev. 91, 107 (2000); Glazier, *supra* note 85, at 4; JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, REPORT ON THE METHODS OF SELECTION OF MEMBERS OF THE ARMED FORCES TO SERVE ON COURT-MARTIAL 18 (1999) ("To the extent that

the federal system, the procedures used to determine potential members is prescribed and subject to validation, confirmation, and litigation; in the military system it is much more difficult to determine whether the convening authority in fact selected members in accordance with Article 25, as the criteria are subjective.

In *Tsarnaev*, for example, counsel litigated multiple motions over the court's jury selection process.[281] As the motions make clear, not only did Tsarnaev's attorneys ultimately gain access to the records for purposes of litigation, but they also had experts to assist them. While their challenges might not have been successful,[282] not only was the procedure subject to litigation, but the grounds upon which potential jurors were selected were entirely objective. Whether the district court has complied with the Jury Service Act is much easier to divine than whether the convening authority has in fact exercised the judgment that is called for under Article 25, assuming such a subjective system is even appropriate. In *Hennis*, by comparison, the panel selection process was not subject to litigation or challenge, according to a review of the appellate exhibits in the case. The panel selection documents, discussed in Part III.A., *supra*, are all that is known about the selection of panel members in *Hennis*.

The constitutional argument for certain types of hypothetical questioning becomes even clearer when you combine the differences between the Jury Selection Act and Article 25 as to the notable disparity between available peremptory challenges in both systems. Whereas defense counsel in a federal case have twenty, defense counsel in a military case have one. Furthermore, as Judge Cox observed in his concurring opinion in *United States v. Carter*:

> The Government has the functional equivalent of an unlimited number of peremptory challenges. Article 25(d)(2) provides that "the convening authority shall

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there is a possibility of abuse in the current system, there will always be a perception that that convening authorities and their subordinates may abandon their responsibilities and improperly attempt to influence the outcome of a court-martial.").

[281] Mot. for Disclosure of Jury Rs., *Tsarnaev*, No. 13-10200-GAO (No. 305); Sealed Mot. for Disclosure of Jury Rs., *Tsarnaev*, No. 13-10200-GAO (No. 912); Order, *Tsarnaev*, No. 13-10200-GAO (No. 1005); Second Mot. to Dismiss Indictment and Stay Proceedings Pending Reconstituting Jury Wheel to Conform with Statutory and Constitutional Requirements, *Tsarnaev*, No. 13-10200-GAO (No. 1080); Govt.'s Opp'n to Def.'s. Second Mot. to Dismiss the Indictment and Stay Proceedings Pending Reconstitution of the Jury Wheel, *Tsarnaev*, No. 13-10200-GAO (No. 1110).

[282] Op. and Order, *Tsarnaev*, No. 13-10200-GAO (No. 1149).

> detail as members . . . such members of the armed forces as, in his opinion, are best qualified for the duty." The statutory authority to choose the members necessarily includes the corollary right not to choose.[283]

Even though military defense counsel have a broader right to conduct voir dire than do their federal counterparts, they are operating at such a procedural disadvantage to start that RCM 912 cannot possibly level the playing field.

The differences in sentencing procedures only strengthen the argument. The FDPA explicitly includes a procedure to allow for a binary panel; one for findings and one for sentence. Even if district court judges rarely grant this remedy, there is at least the possibility of such for federal defendants. The military has no such procedural mechanism. Furthermore, the judge in *Tsarnaev* echoed what appears to be common practice in federal death penalty cases—a break between the verdict and sentencing. Whatever the reason, this functions as a "cooling off" period for jurors between phases.

In *Hennis*, for example, where the accused maintained his innocence throughout the trial, the court was essentially asking panel members who disbelieved his defense to sit fairly and impartially through mitigation and extenuation evidence less than twenty-four hours after determining he brutally murdered a woman and her two young children.[284] What is more, the government presents their sentencing case first, so, they are in essence "piling on" from the guilt phase, cementing for the panel members whatever animus they might feel toward such an accused. Hypothetical questions, notably "case-specific" ones which incorporate "critical issues," during voir dire at least give military defense counsel the possibility of presenting prospective panel members with this potential scenario, to determine if they can be truly impartial, and follow the

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[283] United States v. Carter, 25 M.J. 471, 478 (C.M.A. 1988).

[284] In that regard, this case can be distinguished from *Akbar*, where, in the course of litigating the ineffective assistance of counsel claim on appeal, it became clear that Akbar's attorneys' strategy was to lay the groundwork for their mitigation case during the findings phase, by introducing evidence of his mental instability as it related to premeditation, rather than strictly contesting his factual responsibility for the charged conduct. 74 M.J. at 385-87.

mandate of *Wainwright*.[285] While the voir dire in *Hennis*[286] may provide the empirical evidence for the utility of hypothetical questioning, the constitutional argument is much deeper than simple utility. The constitutional argument is rooted in the requirement to ensure a fair trial for an accused facing the ultimate penalty.

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[285] An even cursory review of military capital cases indicate that the majority of appeals include some allegation of ineffective assistance of counsel. *See*, *e.g.*, United States v. Akbar, 74 M.J. at 371; Loving v. United States, 64 M.J. 132, 134 (C.A.A.F. 2006); United States v. Gray, 51 M.J. at 18; United States v. Murphy, 50 M.J. 4, 8 (C.A.A.F. 1998); United States v. Curtis, 44 M.J. 106, 118 (C.A.A.F. 1996); Loving v. United States, 41 M.J. at 241; United States v. Witt, 73 M.J. 738, 766 (A. F. Ct. Crim. App. 2014). Even if such claims are not effective, the lack of time between findings and sentencing only increases the likelihood that counsel will not be adequately prepared for sentencing. If for no other reason than to remove fuel from the fire, the military should consider imposing a break between phases in capital cases, subject to a military judge's discretion, in order to guard against not only this claim, but this reality.

[286] *Supra* note 7.

Appendix A

Defense General Voir Dire Questions, *United States v. Hennis*

UNITED STATES OF AMERICA

vs.

MSG Timothy B. HENNIS.
U.S. Army
HHC, Special Troop Battalion
XVIII Airborne Corps
Fort Bragg, NC 28310

PROPOSED DEFENSE GENERAL VOIR DIRE

12 January 2010

****

The defense proposes to conduct the following general voir dire of the court-martial panel. Subject to the Court's guidance, the defense reserves the right to alter the order of the voir dire, once approved.

The defense proposes to address the panel members' attitudes towards the imposition of the death penalty primarily during the time the Court has allotted for individual voir dire.

1. Do you believe that MSG Hennis is under tremendous pressure as he sits there?

2. Do you agree that, regardless of the verdict, these days in court will be some of the most difficult days in MSG Hennis's life?

3. Will you hold it against MSG Hennis if he looks nervous?

4. If he has a little sweat break out on his forehead?

5. If he makes some sort of facial expression during trial?

6. If he takes any notes?

7. If he whispers something to one of his counsel?

8. If I, Mr. Spinner or LTC Glass do anything or say anything that you find distasteful, would you hold it against MSG Hennis?

9. The presentation of evidence in a trial is governed by certain rules which are designed to assist the panel in reaching its decision and to ensure fairness to both sides. Does each member agree that the rules must be enforced in order to have a fair trial?

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10. Does each member understand that the way the rules are enforced in a trial is by either side making objections or the military judge ruling on those objections?

11. If the military judge agrees that an objection is valid, he will say sustained. If he disagrees, he will say overruled. Would any member hold it against counsel for either side if an objection counsel made was overruled?

12. One of these rules is that MSG Hennis is legally innocent unless the prosecutors prove every element of each offense beyond a reasonable doubt. A foundation of the military justice system is the presumption of innocence. Has everyone heard of that concept?

13. Have you ever had an occasion to think about what that means to you?

14. Please tell me what you think of the statement that you have no duty to decide if MSG Hennis is innocent?

15. Do you believe that MSG Hennis is presumed innocent even after all the evidence is presented and the attorneys stand up and make closing arguments?

16. Do you believe that MSG Hennis is innocent as you would proceed into the deliberation room after hearing all the evidence?

17. Do you believe that the presumption of innocence alone is enough to find MSG Hennis not guilty unless at least two thirds of the panel members individually are convinced beyond a reasonable doubt of his guilt?

18. Do you believe that if, after careful consideration of all the evidence, the government fails to meet its burden, you have a duty to find MSG Hennis not guilty?

19. After hearing all the evidence, do you believe you must find MSG Hennis not guilty if there is any other reasonable theory except that of guilt?

20. If at the end of the trial, you determined that two reasonable theories can be drawn from the evidence, one establishes guilt and the other something other than guilt, would you vote not guilty?

21. What do you think of the statement "MSG Hennis is not on trial, the government's case is on trial?"

a. Do you agree with that statement?

b. Do you believe that is a proper way to view a trial?

22. Do you believe that it is the defense counsel's job to provide you with any evidence to prove the innocence of MSG Hennis?

23. If the defense were to put on no evidence, what would you think?

24. Would that bother you?

25. Would you believe MSG Hennis is likely guilty because his attorneys did not put on any evidence?

26. The government has charged MSG Hennis with three specifications of premeditated murder: Do you think that the fact that MSG Hennis has been charged is evidence in the case?

27. Does the fact that MSG Hennis has been charged make it any more likely that he is guilty in your mind?

28. As you sit here today, do you have any reason to believe that MSG Hennis is guilty of the charged offenses?

29. Do you believe that the military justice system will be satisfied with a not guilty verdict?

30. Do you understand that the military judge will be satisfied with a not guilty verdict?

31. Do you understand that the United States Government will be satisfied with a not guilty verdict?

32. The government has the burden of proof in this case. This means the government must prove every element of the charged offenses to an evidentiary certainty which our system describes as proof beyond a reasonable doubt. Should the government fail to meet its burden of proving its case to an evidentiary certainty, what is the verdict you must reach?

33. Under the law, the burden never shifts to the defense to establish innocence or to disprove the facts necessary to establish each element of each offense. Do you feel that that is the right way to conduct a trial?

34. Do you think that it would be a better system if an accused should have to prove their innocence?

35. How many of you believe you have a duty to convict MSG Hennis as to the charged offenses in this case?

36. Does anyone believe that the panel must reach a unanimous decision?

37. Once you have individually made a decision regarding the sufficiency of the evidence of the government's case, do you expect that the other panel members will respect your decision?

38. Once each of the other panel members has individually made a decision as to the sufficiency of the evidence of the government's case, will you respect your fellow panel members' decisions?

39. Do you believe that each panel member must explain and justify their decisions and votes in this case to any other panel member?

40. Do you believe that it is the duty of any panel member to be an advocate for the government and convince the other panel members to vote for a finding of guilty?

41. What does the concept of one person one vote mean to you?

42. Would your compassion for the family members of the victims cause you difficulty in voting for a finding of not guilty?

43. If the victims family members are in court during the presentation of evidence will that have an effect on your view of the evidence?

44. If you think the evidence has shown that it possibly was MSG Hennis who committed the offense but you still have a reasonable doubt about this would you be able to find him not guilty?

45. If you are not sure someone else committed the offenses would you be able to find him not guilty?

46. If you are not sure anyone else will ever be brought to justice for the offenses would you be able to find him not guilty?

47. Does every member agree that the system only works if the process is fair?

48. Is a finding of not guilty a failure of the system?

49. Have you ever heard anyone express the view that a finding of not guilty was a failure of the system in any case?

50. Would you be troubled if you were to sit on a panel that found MSG Hennis not guilty when you personally thought the government had proved an offense beyond a reasonable doubt?

51. Are you comfortable with the idea that you are fulfilling your individual duty as a panel member by voting not guilty unless the government has proven each element of the offense beyond a reasonable doubt?

52. The family and friends of the victims in this case have suffered a tremendous and tragic loss. How will your sympathy for the families of the victims affect you when making a decision in this case?

53. Do you believe that evidence offered by the government is more reliable than the evidence offered by the defense?

54. If the defense attorneys decide to call witnesses and present evidence in this case, should that evidence be weighed in the same way evidence presented by the government is weighed?

55. The government counsel will present you with a theory of what happened on 9 May 1985. As to that theory what do you think of the proposition that:

a. The government's theory is just the trial counsel's personal theory of what happened?

b. The government's theory may be just one of several potential theories?

c. You are not bound by the government's theory?

d. You are not required to accept the government's theory just because the government counsel presented it?

e. You alone have the duty of evaluating the government's theory in light of the evidence presented?

f. You alone have the duty of deciding whether there are other fair and reasonable theories inconsistent with guilt?

56. If you find that the government's theory is one of two or more fair and reasonable theories, one of which is inconsistent with guilt, how will you vote?

57. If you feel the government's theory of MSG Hennis' guilt is more likely than a reasonable theory under which he is not guilty, how will you vote?

58. What does the phrase "agree to disagree" mean to you?

59. What do you think of the idea that reasonable people can come to different conclusions regarding the same facts?

60. In those situations where you have "agreed to disagree" were you able to accept and respect the person's conclusion that was different than yours?

61. In those situations, were you able to stop trying to change the mind of a person with whom you "agreed to disagree" with?

62. Would you be able to stand firm on your theory if, after fair deliberation, you still believe that it is a reasonable theory despite strong opinions of others on the panel?

63. For the next few questions, I want you to picture yourselves in the deliberation room. All the evidence and argument from counsel has been presented and you and the other panel members are discussing the evidence and whether the government has proved the elements of the offenses beyond a reasonable doubt. Imagine that you and the others have discussed the evidence, the different possible scenarios and respectfully listened to one another's opinions. After all that, you personally disagree with one or more of the panel members as to whether the government proved the offenses beyond a reasonable doubt.

a. Does it matter that some people are more articulate than others?

b. Does it matter that it may be hard for someone to articulate how they came to their opinion?

c. Does any member feel that one member's opinion is entitled to less respect just because he may not be able to articulate the basis of the opinion as well as another member may be able to do?

d. Does any panel member owe any other panel member an explanation of his opinion?

64. Would you be able to respect other opinions even if it should mean that MSG Hennis is found not guilty while you personally may think he is guilty?

65. The offenses charged here stem from the killing of a mother and her two young daughters. The evidence about the offenses is likely to be very emotional at times. Has any panel member ever viewed photographs from autopsies before?

66. Has any panel member ever seen photographs of victims' bodies at a crime scene?

67. The photographs introduced into this case as evidence will likely involve graphic images of murdered children. Has any panel member ever seen photographs of murdered children before?

68. If upon seeing the pictures you experience a strong emotional reaction that interferes with your ability to reamin impartial, will you inform the military judge?

69. Have you ever been in the situation where you have been confronted with a highly emotional event but had to make an objective decision?

70. The defense expects that one or more police officers, sheriff's deputies or other law enforcement officials may testify. Are police officers more credible than other witnesses?

71. Do you believe police officers are more accurate in their testimony than other witnesses?

72. May police officers have a personal interest in persuading others that they did good work?

73. Can a police officer's personal interest in the investigation be:

a. Pride?

b. Embarrassment?

c. Fear of professional repercussions?

74. In your opinion, is it likely that the more high profile a particular case the greater that personal interest of the police officer might be?

75. Do you think it would be difficult for a police officer to concede that the police investigation was not conducted properly?

76. In determining whether a police officer's testimony is credible, is it proper to consider:

a. Evidence that police officers experienced "tunnel vision" as to one theory out of many possible theory of how the offenses occurred?

b. Evidence that because police officers focused on one theory, other fair and reasonable theories were never investigated?

c. Evidence that due to the passage of time, it may now be impossible to investigate other theory?

77. In your opinion, would it be important to consider evidence, if presented, that the investigation was compromised by any of the following:

a. A desire to solve the case quickly?

b. Tunnel vision on the part of the investigators?

c. Coming to a conclusion too early and then looking for evidence to support that conclusion?

e. Selective forensic testing of evidence in search of proving the conclusion?

f. Ignoring evidence tending to contradict the early conclusions of the investigations?

78. At some time in your Army career, each of you have provided urine samples for testing. Is it important to you that the people collecting, handling and storing your urine sample follow proper procedures?

79. What kinds of procedures regarding the collecting, handling and storing of your urine sample might be important to you?

80. What is the risk if proper procedures are not followed?

81. We anticipate that forensic science evidence will be presented in this case. Has anyone been exposed to or received training in fingerprint analysis?

82. Has anyone been exposed to or received training in footprint analysis?

83. Has anyone been exposed to or received training in DNA analysis?

84. Has anyone been exposed to or received training in trace evidence analysis?

85. Has anyone been exposed to or received training in hair analysis?

86. What is your impression of forensic science evidence?

87. Has anyone ever seen a movie or watch a television program where a crime has been solved by "forensic evidence"?

88. What movies or programs?

89. Is there anything you have heard about forensic science which may lead you to believe that it automatically solves the crime?

90. Is there anything you have heard about forensic evidence which may lead you to believe it's not reliable?

91. Is there anything you have heard about forensic evidence which may lead you to believe it's always reliable?

92. In your opinion, is it important to know precisely what a forensic test is incapable of proving or disproving?

93. Can the bias of the investigators, if any, be shown from evidence the investigators chose to have tested and not tested?

94. The military judge will instruct you regarding circumstantial evidence. Do you each agree that you will exercise the utmost caution and vigilance before coming to conclusions regard what circumstantial evidence proves or disproves?

95. If the prosecution asks you to consider circumstantial evidence in support of its theory of guilt, will you also fully consider whether a fair and reasonable theory other than guilt is also supported by the circumstantial evidence?

96. Is someone potentially having financial problems more inclined to commit violent crimes?

97. Do you agree that a witness's testimony simply reflects an expression of belief or observation by the witness?

98. Do you believe that a person can make an honest mistake identifying another person?

99. Do you believe that a person's memory fades, improves or stays the same over time?

100. Do you believe that a person of one race is more or less likely to be able to accurately identify a stranger of another race?

101. Do you believe that after-acquired information like newspaper stories and photographs or information given by police officers could alter a witness's original memory?

102. Do you believe that a person can be influenced to identify a person as a suspect by such outside influences such as media report, rumors, and suggestions by others that a certain person is a suspect or by the fact that others have identified that person as a suspect?

103. Has any member ever had an experience or heard of a situation where a witness was absolutely certain of what he had perceived, but turned out to be absolutely wrong?

a. Does anyone have a similar experience?

b. Has anyone heard of something similar?

104. Do you think that a witness's confidence in an identification is related to the accuracy of that identification?

105. Do you think that a witness's accuracy should be determined by whether the person appears confident about his perception and memory of events?

106. In the case of a witness who was involved with an event, how do you think a witness's accuracy may be affected by the following:

a. The proximity of the witness to the event?

b. The physical condition of the witness?

c. The time of the event?

d. The amount of light at the time?

e. The weather condition at the time of the event?

g. The rarity of the event?

h. The witness' relationship with the victims?

i. The witness' animosity or dislike of the potential suspect?

j. The witness' efforts to piece things together in his own mind?

k. The extent to which the nature of the events may have been suggested to the witness?

l. The desire of a witness to be a part of the solution and "solve the crime"?

107. Do you think that people give unconscious cues about the "correct" answer to a question in their body language or tone?

108. Have you heard the term "blind testing" or "double blind testing" before?

109. What do you understand "blind testing" or "double blind testing" to mean?

110. Why is "blind testing" or "double blind testing" important?

111. Do you believe that, if the culprit is not in a photo display, the witness will pick (a) no one, or (b) the person who looks most like the culprit?

112. Do you believe that if a person's picture is in a photo array, the person must have done something wrong in the past?

113. Do you believe that it is important to tell the witness that the culprit might not be in the photo array?

114. Do you believe that a witness might be worried that if he or she does not pick someone from the photo array, the investigation will end?

115. Do you believe that a witness viewing an array believes that the police are as concerned with clearing the innocent as with finding the guilty?

116. Is the credibility of a witness automatically suspect if that witness is a co-worker of the accused?

117. Is the credibility of a witness automatically suspect if that witness describes themselves as a friend of the accused?

118. Is credibility of a witness automatically suspect if that witness is a family member of the accused?

119. If a witness makes a sworn statement close in time to an event and then later makes a conflicting statement, should that witness' credibility be questioned?

120. Please understand that because the government has referred this case capital, we are required to ask you a few questions regarding your understanding of the death penalty in the military. What do you think of the following statements?

a. It costs too much to keep someone in prison for premeditated murder, it is better to give him the death penalty.

b. Death penalty cases take too much time.

c. There would be less crime if the death penalty were used more.

d. If someone commits premeditated murder, "they should fry that guy."

e. If someone is convicted of premeditated murder, they should be given the death penalty.

f. If someone murders children, they should be given the death penalty.

g. Life in prison is not a really punishment for premeditated murder.

121. Has anyone received any information about this case other than from the military judge here today?

122. There has been a book published and a television movie made about the Eastburn murders and the previous court proceedings involving MSG Hennis titled "Innocent Victims."

123. Has any panel member ever read or heard about the book?

124. Has any panel member watched or heard about the movie?

125. Do each of you agree to disclose to the military judge any information you may receive about this case during trial which comes from outside the courtroom?

126. Have you ever read a book about a crime or a murder trial?

127. Have you read any books, watched any television programs or movies involving the death penalty?

128. Have you ever written a letter to the editor?

129. Do you use the internet in your off-duty time?

130. Do you regularly view, author, or participate in any blogs on the internet?

131. This case may last up to eight weeks. During that time, your duty here will be your only duty. With that in mind, is there any professional or personal obligation that will require your attention within the next eight weeks?

132. Is there any reason that you may not be able to devote your full time and attention to this duty?

133. Is any member aware of any matter which might raise a question concerning your participation in this trial as a court member?

134. I ask each of you to carefully examine your own conscience. Does anyone feel there is any reason you truly should not sit in judgment of this case?

135. Does any panel member believe that his or her service on the panel could in some way affect the appearance of fairness and impartiality of the panel or the court-martial process?

136. Given your experiences in life, your experiences in the Army, your personal believes and temperament, as well as the nature of the accusations in this case, if you were sitting in MSG Hennis' seat, would you be uncomfortable having someone like you serve on the panel?

KRIS R. POPPE
LTC, JA
Trial Defense Counsel

Appendix B

Panel Member Questionnaire, *United States v. Hennis*

6 JANUARY 2010

SUSPENSE DATE: 25 JANUARY 2010

PANEL MEMBER QUESTIONNAIRE
UNITED STATES V. MSG TIMOTHY B. HENNIS

This questionnaire is designed to obtain information from you for the purpose of assisting the parties in selecting a fair and impartial court-martial panel in this case. Careful and complete responses may shorten the member selection process. This written questionnaire is just one step in the panel selection process.

Please answer every question carefully, truthfully and completely. Do not leave any questions blank. Your responses should reflect you own personal knowledge, beliefs, or opinions.

If you do not understand a question, please indicate so and the question will be explained to you. If a question is not relevant to you, please write "N/A" to indicate that it is not applicable to you in the space provided. Feel free to fully explain any response to any question. If your answers or explanations to any question will not fit completely in the space provided, please attach a continuation sheet to the questionnaire with your answers numbered to correspond with the questions.

During another step in the panel selection process, the military judge and the attorneys will have an opportunity to follow up on these questions in court. At that time, you will be given an opportunity to explain or expand on any of your answers in open court.

Please do not discuss this questionnaire or your answers with anyone, including family members, friends, co-workers, or other prospective members. The answers to these questions will be used by the court and the attorneys solely for the selection of the panel members in this case and for no other reason. The information contained within the questionnaire will become part of the court record.

Please return the competed questionnaire **NLT 25 January 2010** to MAJ Robert Leone, Chief of Justice, Office of the Staff Judge Advocate, XVIII Airborne Corps, building 2-1133, corner of Armistead and Macomb. If you would prefer to scan the completed questionnaire, his email address is: robert.leone@us.army.mil; phone number is 910-396-4113/2405

Patrick J. Parrish
PATRICK J. PARRISH
Colonel, Judge Advocate
Military Judge

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CONFIDENTIAL
PAGE 1 OF 13

COURT-MARTIAL MEMBER QUESTIONNAIRE
(PLEASE PRINT CLEARLY & USE INK)

DATE PREPARED: _____

1. Full name: _____
(First) (Middle) (Last) (Maiden, if applicable)

2. Date of birth: _____ Age: _____ Sex: _____ Race: _____

Birthplace (City/Town & State): _____

3. Current duty station and office telephone number: _____

4. Grade/rank: _____ Date of grade/rank: _____

5. MOS: _____
Job title, description and duties: _____
Length of present assignment: _____
Name and title of supervisor: _____
Current rating scheme: _____
Rater
_____
Intermediate Rater / Senior Rater
_____
Senior Rater / Reviewer

6. Have you or any family member ever served as either a legal officer or legal clerk? ☐ YES ☐ NO If *YES*, please explain: _____
_____

7. Have you ever worked as a police officer, military police, in military law enforcement or investigations? ☐ YES ☐ NO If *YES*, please indicate:

DATES	RANK	DUTIES

8. Years of active duty: _____ Years of reserve duty: _____

9. ***(Officers only)*** Source of commission: _____

10. ***(Officers only)*** Have you had any enlisted service? ☐ YES ☐ NO If *YES*, please indicate:

DATES	YEARS	HIGHEST RANK

11. Have you ever been employed as a civilian? ☐ YES ☐ NO If *YES*, please indicate the following for each employment:

DATES	LENGTH OF EMPLOYMENT	NAME & NATURE OF BUSINESS	TITLE & DUTIES	REASON TO LEFT THE JOB

12. Have you attended technical or trade schools (including any military schools)? ☐ YES ☐ NO If *YES*, please indicate the following for each school you attended:

DATES	NAME OF SCHOOL	LOCATION (CITY/STATE)	MAJOR	MINOR	DEGREE EARNED

13. Have you attended college (***undergraduate***): ☐ YES ☐ NO If *YES*, please indicate the following for each undergraduate college you attended:

DATES	NAME OF SCHOOL	LOCATION (CITY/STATE)	MAJOR	MINOR	DEGREE EARNED

14. Have you attended post-graduate school? ☐ YES ☐ NO If *YES*, please indicate the following for each post-graduate school you attended:

DATES	NAME OF SCHOOL	LOCATION (CITY/STATE)	MAJOR	MINOR	DEGREE EARNED

15. Have you attended law school or taken any law courses (including any vocational, undergraduate or Army schools)? ☐ YES ☐ NO If *YES*, please indicate the following for each:

DATES	NAME OF SCHOOL	LOCATION (CITY/STATE)	LENGTH	TOPIC	DEGREE EARNED

16. Have you taken any courses, seminars, or training in the following areas ***(please check all that apply)***:

☐ BIOLOGY ☐ FAMILY THERAPY ☐ SOCIOLOGY
☐ CRIMINAL JUSTICE ☐ PHILOSOPHY ☐ COUNSELING
☐ EMERGENCY RESPONSE ☐ SOCIAL WORK ☐ EDUCATION
☐ PHARMACOLOGY ☐ CONSTITUTIONAL LAW ☐ MEDICINE
☐ RELIGION ☐ CRISIS INTERVENTION ☐ PSYCHIATRY
☐ CHEMISTRY ☐ LAW ENFORCEMENT ☐ GENETICS
☐ CRIMINOLOGY ☐ PSYCHOLOGY

17. Please indicate your current personal status:

☐ SINGLE (NEVER BEEN MARRIED)
☐ DIVORCED (HOW LONG?) _____
☐ WIDOWED (HOW LONG?) _____
☐ SEPARATED (HOW LONG?)_____
☐ DIVORCED/REMARRIED (HOW LONG?) _____
☐ WIDOWED/REMARRIED (HOW LONG?)_____

18. Current and/or former spouse's employer, job title, description and duties: _____

19. Has your (current and/or former) spouse ever served in any branch of the Armed Forces? ☐ YES ☐ NO If *YES*, please give a summary of your spouse's military career ***(please include all significant or unusual jobs and service in any other branch of the Armed Forces)***:

DATES	BRANCH	ENLIST/ COMMISSION/ REENLIST	HIGHEST RANK	DUTY STATION/ COMMAND	DUTIES & SPECIFIC ASSIGNMENT	DATE/TYPE OF DISCHARGE

20. Has your current and/or former spouse ever worked as a police officer in a military or civilian law enforcement capacity? ☐ YES ☐ NO If *YES*, please indicate:

DATES	RANK	DUTIES

21. Has your current and/or former spouse or any family member attended law school or taken any law courses (including any schools)? ☐ YES ☐ NO If *YES*, please indicate the following for each:

DATE	NAME OF SCHOOL	LOCATION (CITY/STATE)	LENGTH	TOPIC	DEGREE EARNED

22. Please provide the following information about each of your children, stepchildren, foster children or grandchildren:

RELATIONSHIP (SON, STEPSON, ETC.)	AGE	STATUS	LIVING IN YOUR HOME
		☐ LIVING ☐ DECEASED	☐ YES ☐ NO
		☐ LIVING ☐ DECEASED	☐ YES ☐ NO
		☐ LIVING ☐ DECEASED	☐ YES ☐ NO
		☐ LIVING ☐ DECEASED	☐ YES ☐ NO
		☐ LIVING ☐ DECEASED	☐ YES ☐ NO

23. Have your parents (including stepparents or foster parents) or siblings (including stepsiblings or foster siblings) ever served in any branch of the Armed Forces?

RELATIONSHIP	DATES	BRANCH	ENLIST/ COMMISSION/ REENLIST	HIGHEST RANK	DUTIES & SPECIFIC ASSIGNMENT

24. Have any of those listed above ever worked as a police officer in a military or civilian law enforcement capacity? ☐ YES ☐ NO If *YES*, please indicate:

RELATIONSHIP	DATES	RANK	DUTIES

25. Please list the civil clubs, societies, professional associations, or other organizations to which you now belong or to which you have belonged in the past: _____

_____

26. Have you ever served as an officer or held a position of leadership in any of these organizations? ☐ YES ☐ NO If *YES*, please explain: _____

_____

27. On ***social*** issues, are you:

☐ VERY CONSERVATIVE ☐ MODERATE ☐ VERY LIBERAL
☐ CONSERVATIVE ☐ LIBERAL

28. On ***financial*** issues, are you:

☐ VERY CONSERVATIVE ☐ MODERATE ☐ VERY LIBERAL
☐ CONSERVATIVE ☐ LIBERAL

29. What is your religious preference? _____

30. On ***religious*** issues, do you consider yourself to be:

☐ VERY CONSERVATIVE ☐ MODERATE ☐ VERY LIBERAL
☐ CONSERVATIVE ☐ LIBERAL

31. Which best describes how often you attend religious services:

☐ DAILY ☐ MONTHLY ☐ OCCASIONALLY
☐ WEEKLY ☐ HOLIDAYS ☐ DO NOT ATTEND

32. Other than services, what activities sponsored by your religious organization are you involved with and how are you involved? _____

_____

_____

33. Does your spouse practice or belong to a religion different from yours?

☐ YES ☐ NO If *YES,* to which religion does your spouse belong? _____

_____

34. Have you ever held any offices or positions of leadership in your church or congregation? ☐ YES ☐ NO If *YES,* which offices or positions and how long did you hold that office or position? _____

_____

35. Have you studied for the ministry, priesthood, rabbinical order, or any other clergy position? ☐ YES ☐ NO If *YES*, when, what position and what was the outcome of your studies? _____

36. On ***political*** issues, do you consider yourself to be:

☐ VERY CONSERVATIVE ☐ MODERATE ☐ VERY LIBERAL
☐ CONSERVATIVE ☐ LIBERAL

37. Please express the extent of your agreement with the following statement:

A person's background should be considered when it comes to deciding whether or not he should be sentenced to death for murder.

☐ STRONGLY AGREE ☐ MODERATELY AGREE ☐ SLIGHTLY AGREE

☐ STRONGLY DISAGREE ☐ MODERATELY DISAGREE ☐ SLIGHTLY DISAGREE

☐ NEITHER AGREE OR DISAGREE

38. Do you know the official position of your religion, philosophy or spiritual training regarding the death penalty? If ***yes***, what is that position? _____

_____

_____

_____

39. Have you or any family members or close friends ever worked in medicine, healthcare or a related field (nurse, pharmacist, doctor, radiologist, etc.)?

☐ YES ☐ NO If *YES,* please tell us who, when and what that person's job duties included: _____

_____

40. Have you or any family members or close friends ever worked in the mental health or related field (psychiatrist, psychologist, psychiatric nurse, social worker, counselor, etc.)? ☐ YES ☐ NO If *YES,* please tell us who, when and what that person's job duties included: _____

_____

41. Have you ever read books or articles dealing with psychiatry, psychology, social work or mental health issues? ☐ YES ☐ NO If *YES,* please tell us which books, if you remember the title _____

_____

_____

42. Have you ever taken any courses or seminars in the fields of psychiatry, psychology, social work or counseling? ☐ YES ☐ NO If *YES,* please tell us what courses and approximately when: _____

_____

_____

43. Have you ever known anyone who you believe suffered from severe emotional problems? ☐ YES ☐ NO If *YES*, please explain: _____

44. Have you or any family members or any close friends ever undergone counseling, treatment, or hospitalization for psychiatric, emotional, family, behavioral, or substance abuse problems? ☐ YES ☐ NO If *YES*, please tell us who and provide the general circumstances: _____

45. Have you or anyone close to you ever called the police or other law enforcement agency, been interviewed by police or filed a complaint or a police report? ☐ YES ☐ NO If *YES*, please explain: _____

46. Have you or any family member or close friend ever witnessed a crime (other than on television)? ☐ YES ☐ NO If *YES*, please explain: _____

47. Were you or a close friend or relative satisfied with how you/they were treated as a victim/witness in that matter?_____

48. Have you or any family member or close friend ever been accused, arrested, convicted or acquitted of a criminal offense? ☐ YES ☐ NO If *YES*,, please explain: _____

49. Were you or a close friend or relative satisfied with how you/they were treated an accused in that matter?_____

50. With respect to any of the two previous questions, do you feel that you/they were justly accused, charged or convicted? ☐ YES ☐ NO Were you/they treated fairly? If *NO* as to either question, please explain: _____

51. Have you ever had any interaction with CID or any other investigative agency of any branch of the military? ☐ YES ☐ NO If *YES*, please explain: _____

_____

_____

52. Have you ever had any interaction with the Cumberland County Sheriff's Office, Cumberland County District Attorney's Office, or the North Carolina State Bureau of Investigation? ☐ YES ☐ NO If *YES*, please explain: _____

_____

_____

53. Do you know anyone who has been in jail or who has been to prison?

☐ YES ☐ NO If *YES,* please explain: _____

_____

54. Have you or any member of your family ever been associated or worked with any program involved with supporting victims of crime? ☐ YES ☐ NO If *YES,* please explain: _____

_____

55. Have you or any member of your family ever been associated or worked with any program involved with rehabilitation of persons convicted of a crime?

☐ YES ☐ NO If *YES,* please explain: _____

_____

_____

56. Is there a crime prevention group in your neighborhood? ☐ YES ☐ NO If *YES,* what is the name of the group, do you or any family members participate in it, and if so, how do you participate in it? _____

_____

57. Have you or anyone close to you ever been employed in any capacity by or volunteered to help any local, state, federal, private, or military law enforcement or other investigative agency, including:

_____Military Police, Army CID, Other Military Investigative Agencies
_____Police/Sheriff's Department, State Police, Highway Patrol, School Police
_____U.S. Marshal's Service, FBI, ATF, DEA
_____IRS, CIA, INS/ICE, DHS, U.S. Customs
_____Security/Detective
_____Other, please specify:_____

If *YES*, please explain: _____

_____

58. Have you or any family members or friends ever worked in a security or detective service? ☐ YES ☐ NO If *YES,* who, what type of service(s), what are that person's duties and are they currently with that organization? _____

_____

_____

_____

59. Have you or any family members or friends ever worked in a correctional facility or program, such as a prison, jail, state hospital, halfway house or detention center? ☐ YES ☐ NO If *YES,* who, what facility(ies), what is that person's duties and are they currently associated with the facility(ies)? _____

_____

_____

60. Have you ever served as summary court-martial officer? ☐ YES ☐ NO If *YES,* please provide information about when, the cases and results: _____

_____

61. Have you ever convened or appointed any of the following? ☐ YES ☐ NO
If *YES* to any, please explain:

SUMMARY COURT-MARTIAL	☐ YES ☐ NO	_____
SPECIAL COURT-MARTIAL	☐ YES ☐ NO	_____
ARTICLE 32 INVESTIGATION	☐ YES ☐ NO	_____
GENERAL COURT-MARTIAL	☐ YES ☐ NO	_____

62. Have you ever imposed nonjudicial punishment under U.C.M.J., Article 15?
☐ YES ☐ NO If *YES,* please estimate the number of Article 15 proceedings in which you have imposed punishment: _____

Please estimate the number of cases in which you have found the Soldier "Not Guilty" at the Article 15 hearing. _____

63. Have you ever watched any criminal trial (civilian or military) in person?
☐ YES ☐ NO If *YES,* please explain circumstances: _____

_____

64. Have you or any family members or friends ever worked in the justice system (military or civilian)? ☐ YES ☐ NO If *YES,* please tell us who, when, what were their duties and are they still working there? _____

_____

65. Have you or any family members or friends ever been a party to or a witness for any criminal trial (military or civilian)? ☐ YES ☐ NO If *YES*, who, when and what were the circumstances? _____

_____

_____

66. Have you served as a panel member in a court-martial? ☐ YES ☐ NO If *YES,* please explain the type of case:

DATE	TYPE/NATURE OF CASE

67. Have you ever served on a civilian jury? ☐ YES ☐ NO If *YES*, please indicate the court, the dates served, the nature of the case and the verdict.

_____

_____

68. Have you ever served on a civilian grand jury? ☐ YES ☐ NO If *YES*, please indicate the court, and dates served.

_____

_____

69. Have you ever served as an Article 32, U.C.M.J., Investigator Officer?
☐ YES ☐ NO If *YES*, please explain: _____

_____

70. Have you ever served as an AR 15-6, Investigating Officer or conducted any other type of investigation? ☐ YES ☐ NO If *YES*, please explain: _____

_____

71. Have you or anyone you know ever worked for a lawyer or law firm?
☐ YES ☐ NO If *YES,* who, which lawyer or law firm, what type of law does that lawyer/firm practice and what were your/their job responsibilities: _____
_____
_____

72. Do you know any lawyers, prosecutors or judges on a personal or professional basis? ☐ YES ☐ NO If *YES*, who do you know, what type of law does that person practice and what is the nature of your relationship? _____
_____
_____

73. Are you aware of any media coverage of this case? ☐ YES ☐ NO If *YES*, please list the media sources in which you have heard about this case.
_____
_____

74. How would you describe the amount of media coverage you have seen about this case:

☐ A GREAT DEAL ☐ MODERATE ☐ NONE
☐ QUITE A BIT ☐ LITTLE

75. Do you know Master Sergeant Timothy B. Hennis? ☐ YES ☐ NO If *YES,* please explain: _____
_____

76. Did you know Katherine, Kara, and Erin Eastburn? ☐ YES ☐ NO If *YES,* please explain:_____
_____

77. Are you personally acquainted with anyone at Fort Bragg in the trial counsel office, Office of the Staff Judge Advocate, or Trial Defense Service? If *YES*, please explain: _____

Appendix C

Transcript of Record, *United States v. Hennis*

With that in mind, does anyone know of anything of a personal or professional nature which would preclude you from giving your full attention to these proceedings?

[Pause.]

MJ: And that's a negative response by each member.

Now, it's a ground for challenge for cause if you believe that the commission of crime "X" must always result in punishment "Y." Having read the charge and its specifications, does anyone believe you would be compelled to vote for a particular punishment based solely on the nature of these offenses?

[Pause.]

MJ: That's a negative response.

And I will advise you -- if we get to sentencing, I will advise you of the full range of punishments that would be available.

Can each of you assure me that you will consider the full range of punishments if we get to sentencing? Can each of you do that?

[Pause.]

MJ: That's an affirmative response by each member.

Now, I told you earlier, Members, that if the accused is convicted of premeditated murder by unanimous vote, one of the possible punishments is death.

Is there any member due to his or her religious, moral, or ethical beliefs, who would be unable to give meaningful consideration to imposition of the death penalty?

[Pause.]

MJ: That's a negative response by each member.

Is there anyone who, based on your personal moral, or ethical values, believes that the death penalty must be adjudged in any case involving premeditated murder?

[Pause.]

MJ: And that's a negative response by each member.

Now, if sentencing proceedings are required, I will instruct you in detail before you begin your deliberations. You must keep an open mind and not make a choice nor foreclose from consideration any possible sentence until you are altogether in your closed-session deliberations.

Can each of you follow that instruction to keep an open mind?

[Pause.]

MJ: That's an affirmative response by each member.

Can each of you then be fair, and impartial, and open minded in your consideration of an appropriate sentence in this case if called to do so?

[Pause.]

MJ: That's an affirmative response by each member.

So each of you then can reach a decision on a sentence, if required to do so, on an individual basis and not based solely on the nature of the offenses involved? Can each member do that?

[Pause.]

MJ: That's an affirmative response by each member.

Is any member aware of any matter which you believe may raise a substantial question concerning your participation as a court member in this case?

[Pause.]

MJ: And that's a negative response by each member.

Trial Counsel, do you have any questions?

TC: Thank you, Your Honor.

Please bear with me a moment while I put the microphone on.

[Pause.]

Appendix D

Juror Questionnaire, *United States v. Tsarnaev*

For Official Use Only: _____
Juror Number

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO. 13-10200-GAO

UNITED STATES OF AMERICA

v.

DZHOKHAR A. TSARNAEV,
Defendant.

_____
Juror Name

For Official Use Only: _____
Juror Number

United States v. Dzhokhar Tsarnaev
Cr. No. 13-10200-GAO

Juror Questionnaire

The information that you provide in this questionnaire will be used by the Court and the parties to select a qualified jury in this case; that is, a jury that can render a verdict fairly and impartially based upon the evidence offered at trial in accordance with the law as instructed by the Judge. Both parties are entitled to a jury that is fully fair and impartial. This questionnaire and the jury selection process that we are about to begin is not meant to be intrusive; rather, it serves the important function of ensuring that a fair and impartial jury is selected to hear and decide this case.

It is very important that you answer these questions as completely and accurately as you can. Please write legibly and answer the questions as candidly as possible. There are no right or wrong answers to these questions. But honesty and candor are of the utmost importance. You have taken an oath promising to give truthful answers. The integrity of the process depends upon your truthfulness.

Please bear the following instructions in mind:

- Do not consult, confer, or talk with any other person in completing this questionnaire.
- If you are unable to answer a question because you do not understand the question, please write "Do not understand" in the space after the question. Do not ask anyone, including court personnel, for clarification or assistance.
- If you are unable to answer a question because you do not know the answer, please write "Do not know" in response to the question.
- If you believe that your response to a particular question is of a sensitive or private nature and would like to request that your response not be made public, please write the number of that question in your response to Question #100. Alternatively, if you would prefer not to write an answer to a particular question because of the sensitive or private nature of your response, please write "Private" after the question. The Court may still need to speak with you about the topic, but will endeavor to do so bearing your concerns in mind.
- Please do not write on the back of any page. Use the blank space at the end of the questionnaire (front side only) where there is insufficient room on the form for your answer to any question. When using this space, please include the number of the question(s) you are answering.
- Please write legibly.

You will be permitted to leave for the day when you have completed the questionnaire. Do not discuss any of the questions or your answers on this questionnaire with anyone, including

For Official Use Only: _____
Juror Number

members of your family, co-workers, or other potential jurors. If anyone approaches you and attempts to discuss any aspect of this questionnaire, the jury selection process, or any aspect of this case, you may not answer their questions or engage in any discussion.

Do not discuss anything about this case with anyone and do not read, listen to, or watch anything relating to this case until you have been excused as a potential juror, or if you are selected as a juror, until the trial is over. You may not discuss this case or allow yourself to be exposed to any discussions of this case in any manner.

When you have completed the questionnaire, please sign it, affirming the truth of your answers and confirming that you had no assistance in completing it. As explained by the Court, you will receive further instructions about whether you need to return for the next phase of jury selection by calling the juror information line and entering your nine-digit participant number.

The Court thanks you for your attention and willingness to serve as a juror, an important duty of citizenship in our democracy.

For Official Use Only: _____
Juror Number

1. Date of birth: _____

2. Gender: ☐ Male ☐ Female

3. Race: (This information will not affect your selection for jury service.)
☐ Black/African American ☐ Asian ☐ American Indian/Native Alaskan
☐ White ☐ Native Hawaiian/Pacific Islander ☐ Other: _____

4. In what city or town do you live? _____

5. How long have you lived there? _____

If you have lived at that location fewer than 5 years, please list the cities or towns in which you have lived since 2010:

_____

_____

6. In what city, state, and country were you born and raised?

Born: _____ Raised: _____

If you were born in another country, when did you move to the United States, and when did you obtain U.S. citizenship?

Moved: _____ Citizenship: _____

7. Have you ever lived in another country? ☐ Yes ☐ No

What Country? For How Long?

_____ _____

_____ _____

8. Do you have any problem understanding English that would make it difficult or impossible for you to serve as a juror in this case? ☐ Yes ☐ No
If "yes," please explain:

_____

For Official Use Only: _____
Juror Number

9. If you believe you have a medical, physical, psychological, or emotional problem, issue, or condition that would affect your ability to serve as a juror, including difficulty hearing, seeing, reading, or concentrating, please explain:

_____

_____

_____

If you believe you could serve as a juror if such condition were accommodated in some way, please state the accommodation:

_____

10. If you are selected to serve on this jury, the trial is scheduled to start immediately after jury selection is completed and to continue for three or four months. The jury will sit on Monday through Thursday from 9:00 a.m. to 4:00 p.m. with a mid-morning break and a lunch break. The jury will also sit on Friday during a week in which the Monday is a legal holiday, such as President's Day. Once the jury begins its deliberations, the jury will sit at least every weekday from 9:00 a.m. until the end of the day (usually 4:30 p.m.).

The Court is well aware that this is a demanding schedule. However, in fairness to all involved in this important process, the Court will only excuse someone from jury duty for the most compelling reasons. That is, answering "yes" to this question will not necessarily result in the Court allowing you to be excused from service. With this in mind, does the schedule described above impose a special hardship on you such that it would be difficult or impossible for you to serve in this case?
If "yes," please explain:

_____

_____

_____

For Official Use Only: _____
Juror Number

11. If you take any medications that you think might affect your ability to serve as a juror, please describe them and their effects:

Medication	Side Effects
Example: Xanax	*Makes me sleepy*
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

12. What is your current relationship status?

☐ Married ☐ Single ☐ Separated
☐ Divorced ☐ Widowed ☐ Civil Union/Domestic Partner

13. Please identify your current spouse or domestic partner (if any) and all former spouses and domestic partners (if any) and provide their highest levels of education and occupations while you were together:

Relationship to You	Highest Education Level	Occupation
Example: Ex-wife	*BA in Physics*	*Engineer*
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

For Official Use Only: _____
Juror Number

14. Please describe your parents' and/or step-parents' current or, if retired, former occupations. Write "none" or "deceased" if that applies.

Father: _____

Step-father: _____

Mother: _____

Step-mother: _____

15. Please identify all your children and step-children (including any who are deceased):

	M/F	Age	Occupation (if any)	Place of Residence
#1	____	____	_____	_____
#2	____	____	_____	_____
#3	____	____	_____	_____
#4	____	____	_____	_____

16. Please identify all your siblings and step-siblings (including any who are deceased):

	M/F	Age	Occupation (if any)	Place of Residence
#1	____	____	_____	_____
#2	____	____	_____	_____
#3	____	____	_____	_____
#4	____	____	_____	_____
#5	____	____	_____	_____

For Official Use Only: _____
Juror Number

17. Have any of your siblings tried to influence your direction in life or your major life decisions (e.g., choice of job, spouse, religion, congregation)? ☐ Yes ☐ No
If "yes," please explain:

_____

_____

_____

18. Have you tried to influence any of your siblings' direction in life or major life decisions (e.g., choice of job, spouse, religion, congregation)? ☐ Yes ☐ No
If "yes," please explain:

_____

_____

_____

19. Do you feel that any of your siblings has had a major positive or negative influence on you? ☐ Yes ☐ No
If "yes," please explain:

_____

_____

_____

20. Do you believe most teenagers are easily influenced by older siblings? ☐ Yes ☐ No

21. If you or any close family member has (or ever had) a mental health or addiction problem that you know about, please describe it:

_____

_____

_____

For Official Use Only: _____
Juror Number

22. Please list all schools you attended after high school, what you studied, and any certificates or degrees that you received:

School	Location	Area of Study	Degree/Certificate

23. If you have studied law, medicine, psychiatry, psychology, counseling, sociology, social work, or religion, please describe your training:

_____

_____

24. If you have studied ballistics, explosives, arson, criminology, terrorism, computer science, crime scene investigation, or law enforcement, please describe your training:

_____

_____

25. Do you plan to attend school in the future? ☐ Yes ☐ No
If "yes," what do you intend to study?

_____

_____

For Official Use Only: _____
Juror Number

26. List any jobs you have held for the past 10 years, in reverse chronological order, noting periods of unemployment, retirement, disability, homemaking, study, or stay-at-home parenting. Check "Sup." if you supervised others. If you can't remember exact names, titles, or time periods, please give your best estimate.

Employer	Title/Position	Years	Sup.
_____	_____	____ to 2015	☐
_____	_____	____ to ____	☐
_____	_____	____ to ____	☐
_____	_____	____ to ____	☐
_____	_____	____ to ____	☐
_____	_____	____ to ____	☐
_____	_____	____ to ____	☐

27. If you are currently employed, please describe your job responsibilities:

_____

_____

28. If you have ever been a published or unpublished author, please describe the things you have written and when you wrote them:

_____

_____

29. If you blog or post messages or opinions on websites, please describe the websites, the types of things you blog or post, and how often you do it:

_____

_____

For Official Use Only: _____
Juror Number

30. If you use social media (Facebook, Instagram, Twitter, etc.), please list all the social media you use and how frequently you use each one:

_____

_____

31. If you, a family member, or close friend ever served in the military (including Reserves, National Guard, or ROTC), please describe the nature and length of that service:

_____

_____

_____

32. If one or more of the people you listed ever experienced combat (that you know about), please explain:

_____

_____

33. Have you, a family member, or close friend ever worked for, applied for a job at, or volunteered at a prosecutor's office, public defender's office, criminal defense attorney's office, or any other law office? ☐ Yes ☐ No
If "yes," please explain (including employer and dates of work):

Relationship	Office	Dates
Example: Wife	*State Prosecutor*	*2007-present*
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

For Official Use Only: _____
Juror Number

34. Have you, a family member, or close friend ever, to your knowledge, worked for, applied for a job at, or volunteered at a law enforcement agency (e.g., FBI, DEA, ATF, ICE, IRS, U.S. Marshals Service, police, sheriff, or correctional department)?
☐ Yes ☐ No
If "yes," please explain (including agency and dates of affiliation):

Relationship	Agency	Dates
Example: Son	*FBI Agent*	*2007-present*

35. Have you, a family member, or close friend ever, to your knowledge, worked for, applied for a job at, or volunteered at any federal, state, or local department of corrections, prison, jail, board of prisons, pardons or parole board or probation agency, youth authority, or correctional or detention facility? ☐ Yes ☐ No
If "yes," please explain:

Relationship	Agency	Dates
Example: Self	*Parole Officer*	*2007-present*

36. The jurors in this case will be instructed that the testimony of a law enforcement officer is to be treated the same as the testimony of any other witness. Jurors are to give neither greater nor lesser weight to the testimony based solely upon the witness's status as a law enforcement officer. Do you have any concerns about your ability to follow this instruction? ☐ Yes ☐ No
If "yes," please explain:

_____

For Official Use Only: _____
Juror Number

37. Have you ever done paid or volunteer work for the benefit of people accused of crimes or people who served time in prison? ☐ Yes ☐ No
If "yes," please explain:

_____

_____

_____

38. Have you ever attended a meeting, sponsored an effort, or supported any group that deals with victims' rights? ☐ Yes ☐ No
If "yes," please explain:

_____

_____

_____

39. Have you ever attended a meeting, sponsored an effort, or supported any group that deals with the reform of any laws? ☐ Yes ☐ No
If "yes," please explain:

_____

_____

_____

40. If you, a family member, or a close friend have ever (to the best of your knowledge) committed a crime and/or been arrested, accused of a crime, charged with a crime, or prosecuted for a crime, other than a minor traffic violation, please explain (include the person's relationship to you, the charge, the approximate date, the location, and the outcome):

Example: Close friend, Drug Possession, 1982, New Mexico, Pleaded guilty

_____

_____

_____

_____

For Official Use Only: _____
Juror Number

41. If you, a family member, or close friend, have ever (to the best of your knowledge) been the victim of a crime, please explain (including the person's relationship to you, when and where the crime occurred, and the outcome of any prosecution):

Example: Sister, Victim of assault, 1999, Chicago, Defendant convicted

_____

_____

_____

_____

42. If you (to the best of your recollection) have ever had to appear in court or in any court proceeding (e.g., court trial, court or administrative hearing, civil or criminal deposition, etc.) OTHER THAN as a defendant (e.g., as a witness), please explain:

_____

_____

43. If you, a family member, or a close friend (to the best of your knowledge) have ever been treated unfairly by a law enforcement officer or by the criminal justice system, please explain:

_____

_____

_____

44. If you have strongly positive or negative views about prosecutors, please explain:

_____

_____

45. If you have strongly positive or negative views about defense attorneys, please explain:

_____

_____

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46. If you have strongly positive or negative views about law enforcement officers, please explain:

_____

_____

47. Have you ever served on a jury before? If "yes," please describe (to the best of your recollection), for each case on which you served, whether it was state or federal, civil or criminal, what the charges or allegations were, when, where, whether the jury reached a verdict, and whether you were a foreperson:

_____

_____

_____

48. If you answered "yes" to #47, is there anything about the experience that would make you want to serve, or not serve, on a jury again? Please explain:

_____

_____

_____

49. Have you ever served on a grand jury? If "yes," when and where?

_____

50. In the past 10 years, what court cases have you followed with interest? What interested you about these cases?

_____

_____

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51. If, to the best of your knowledge, you, or anyone close to you has participated in a group that takes positions on political or social issues (e.g., civil rights, prisoners' rights, crime control, the environment, death penalty, digital freedom, tax reform), please describe the group and any relevant leadership position:

Relationship	Organization	Level of Participation
Example: Spouse	*The Sierra Club*	*Board of Directors*
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

52. Have you ever changed your mind about an important decision you had to make in your life? If "yes," please give a specific example or examples:

_____

_____

If you answered the previous question affirmatively, what do you think led you to change your mind? Answer as many as apply:

___ Additional information
___ Reconsideration of pros and cons
___ Opinions of others
___ Other: _____

53. What religion were you born into (if any)? _____

54. What religion do you currently practice (if any)? _____

55. How religious do you consider yourself? _____

56. How often do you attend your place of worship (if any)? _____

57. How familiar are you with the teachings of Islam (i.e., the Muslim religion)?

☐ Very familiar ☐ Somewhat familiar ☐ Not at all familiar

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58. Do you have any interactions with people who are Muslim or practice Islam?
☐ Yes ☐ No
If "yes," please explain:

_____

_____

_____

59. Do you have strongly held thoughts or opinions about Muslims or about Islam?
If "yes," what are they?

_____

_____

_____

60. Do you believe the United States government acts unfairly towards Muslims in this country or in other parts of the world? ☐ Yes ☐ No
If "yes," please explain:

_____

_____

_____

61. Do you believe the "war on terror" unfairly targets Muslims? ☐ Yes ☐ No

62. Do you believe the "war on terror" is overblown or exaggerated? ☐ Yes ☐ No

63. Do you have strong feelings about our laws or government policies concerning legal immigration? ☐ Yes ☐ No
If "yes," please explain:

_____

_____

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64. Do you believe that our government allows too many Muslims, or too many people from Muslim countries, to immigrate legally to the United States? ☐ Yes ☐ No
If "yes," please explain:

_____

_____

65. The defendant was born in Kyrgyzstan and is of Russian descent. Do you have any beliefs, attitudes, or opinions regarding Kyrgyzstan, Russia, Chechnya, or Dagestan, or the people who live there that would make it difficult for you to be a completely fair and impartial juror in this case?

_____

_____

66. If you know anyone who, to the best of your knowledge, is Chechen, Avar, Dagestani or of Chechen, Avar, or Dagestani descent, please describe who it is you know and how you know them:

_____

_____

67. Do you understand any of the following foreign languages:
☐ Russian ☐ Chechen ☐ Arabic

_____

68. What is your primary source of news (e.g., newspapers, internet, TV, radio, word-of-mouth, etc.)? Please list all that apply.

_____

69. What newspapers do you read and how often do you read them? Please include online editions of newspapers in your answer:

_____

_____

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70. What news or talk radio programs do you listen to on the radio or over the internet and how often do you listen?

_____

_____

71. What national or local news programs do you watch on TV or over the internet and how often do you watch?

_____

_____

72. To the best of your recollection, have you ever called into a talk show, written a letter to the editor, or posted a comment on a website to express your opinion about ANY issue? If "yes," what was the issue?

_____

_____

73. How would you describe the amount of media coverage you have seen about this case:

___ A lot (read many articles or watched television accounts)
___ A moderate amount (just basic coverage in the news)
___ A little (basically just heard about it)
___ None (have not heard of case before today)

74. What did you think or feel when you received your jury summons for this case?

_____

_____

75. To the best of your recollection, what kinds of things did you say to others, or did others say to you, regarding your possible jury service in this case?

_____

_____

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76. If you did any online research about this case, or about anything relating to it, after receiving your jury summons, please describe it:

_____

_____

77. As a result of what you have seen or read in the news media, or what you have learned or already know about the case from any source, have you formed an opinion:

(a) that Dzhokhar Tsarnaev is guilty? ☐ Yes ☐ No ☐ Unsure
(b) that Dzhokhar Tsarnaev is not guilty? ☐ Yes ☐ No ☐ Unsure
(c) that Dzhokhar Tsarnaev should receive the death penalty? ☐ Yes ☐ No ☐ Unsure
(d) that Dzhokhar Tsarnaev should not receive the death penalty?
☐ Yes ☐ No ☐ Unsure

If you answered "yes" to any of these questions, would you be able or unable to set aside your opinion and base your decision about guilt and punishment solely on the evidence that will be presented to you in court? ☐ Able ☐ Unable

78. If you answered "yes" to subparts (a), (b), (c), or (d) of #77, have you expressed or stated your opinion to anyone else? ☐ Yes ☐ No
If "yes," please explain:

_____

79. If you have commented on this case in a letter to the editor, in an online comment or post, or on a radio talk show, please describe:

_____

_____

_____

80. If you or, to the best of your knowledge, a family member, or close friend witnessed the Boston Marathon explosions or the response to them IN PERSON, please describe who was there and what he or she saw:

_____

_____

_____

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81. If you or, to the best of your knowledge, a family member, or close friend were personally affected by the Boston Marathon bombings or any of the crimes charged in this case (including being asked to "shelter in place" on April 19, 2013), please explain:

_____

_____

_____

82. If you or, to the best of your knowledge, anyone in your family or household has personally (1) taken part in any of the activities, events, or fundraisers that have been held in support of the victims of the Boston Marathon bombings; (2) contributed to the One Fund; or (3) bought or worn any merchandise, clothing, or accessories that have logos such as "Boston Strong" that relate to the Boston Marathon bombings, please explain:

_____

_____

_____

The following is a summary of the facts of this case. Please read it carefully and answer the questions that follow.

On Monday, April 15, 2013, two bombs exploded on Boylston Street in Boston near the Boston Marathon finish line. The explosions killed Krystle Marie Campbell (29), Lingzi Lu (23), and Martin Richard (8), and injured hundreds of others. Four days later, on Thursday, April 18, 2013, at approximately 10:30 p.m., MIT Police Officer Sean Collier (26) was shot to death in his police car near the corner of Main Street and Vassar Street in Cambridge. Approximately 90 minutes later, a man named Dun Meng called the police from a gas station on Memorial Drive in Cambridge; he said that two men had carjacked him in Boston, kidnapped and robbed him, and still had his car. Approximately 20 minutes after that, two men in Watertown had a confrontation with police near the intersection of Laurel Street and Dexter Avenue in which shots were fired and bombs were thrown. One of the men, Tamerlan Tsarnaev, was injured at the scene and died shortly thereafter. The other, Dzhokhar Tsarnaev, was captured some 15 hours later after he was found hiding in a boat in Watertown.

Dzhokhar Tsarnaev has been charged with various crimes arising out of these events. Mr. Tsarnaev was raised in Cambridge and attended Rindge and Latin High School. At the time he is alleged to have committed the crimes, he was a 19-year-old student at UMass-Dartmouth.

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83. To the best of your knowledge, do you or anyone close to you have any PERSONAL connection to any of the individuals or places mentioned in the case summary you just read? If "yes," please explain:

_____

_____

_____

84. Do you believe you know any of the following people, their colleagues, staff members, or family members? ☐ Yes ☐ No

(a) Presiding judge: The Honorable George A. O'Toole, Jr.;

(b) Defense lawyers: Judy Clarke, David I. Bruck, Miriam Conrad, Timothy Watkins, and William Fick;

(c) Prosecutors: William D. Weinreb, Aloke S. Chakravarty, Nadine Pellegrini, and Steven Mellin;

(d) Defendant: Dzhokhar Tsarnaev

If you answered "yes," please identify whom you know and how you know them:

_____

_____

85. Attached to this document as Attachment A is a list of people who may testify at this trial. Please review the names on the attached list. If you personally know any of the individuals on the list, or any of their immediate family members, identify them here by number and describe how you know them.

_____

_____

_____

86. Attached to this document as Attachment B is a list of people who do not live in the United States and who may testify at this trial. Please review the names on the attached list. If you personally know any of the individuals on the list, or any of their immediate family members, please circle them directly on Attachment B. Do not write their names on this part of the questionnaire.

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87. The evidence in this case may include graphic photographs and videos showing very severe injuries suffered by victims of the bombings. Do you think that seeing such graphic pictures would affect your ability to serve as a juror? _____

88. Mr. Tsarnaev is charged with 17 crimes that carry the possibility of a sentence of death. If the jury finds Mr. Tsarnaev guilty of one or more of those crimes, the same jury will then decide whether to sentence Mr. Tsarnaev to death or to a sentence of life imprisonment without the possibility of release.

    If you have any views on the death penalty in general, what are they?

    _____

    _____

    _____

89. Please circle one number that indicates your opinion about the death penalty. A "1" reflects a belief that the death penalty should never be imposed; a "10" reflects a belief that the death penalty should be imposed whenever the defendant has been convicted of intentional murder.

Strongly Oppose									**Strongly Favor**
1	2	3	4	5	6	7	8	9	10

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90. Which of the following best describes your feelings about the death penalty in a case involving someone who is proven guilty of murder?

(a) I am opposed to the death penalty and will never vote to impose it in any case no matter what the facts.

(b) I am opposed to the death penalty and would have a difficult time voting to impose it even if the facts supported it.

(c) I am opposed to the death penalty but I could vote to impose it if I believed that the facts and the law in a particular case called for it.

(d) I am not for or against the death penalty. I could vote to impose it, or I could vote to impose a sentence of life imprisonment without the possibility of release, whichever I believed was called for by the facts and the law in the case.

(e) I am in favor of the death penalty but I could vote for a sentence of life imprisonment without the possibility of release if I believed that sentence was called for by the facts and the law in the case.

(f) I am strongly in favor of the death penalty and I would have a difficult time voting for life imprisonment without the possibility of release regardless of the facts.

(g) I am strongly in favor of the death penalty and would vote for it in every case in which the person charged is eligible for a death sentence.

(h) None of the statements above correctly describes my feelings about the death penalty.

If you selected (h) as your answer, please explain:

_____

_____

91. If your views about the death penalty have changed over the past 10 years (e.g., now more in favor or less in favor), please explain how and why your views have changed:

_____

_____

_____

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92. If your views about the death penalty are informed by your religious, philosophical, or spiritual beliefs, please describe how they are so informed:

_____

_____

_____

93. Which of the following best describes your opinion? Please check only one.

Life imprisonment without the possibility of release is:

☐ Less severe than the death penalty
☐ About the same as the death penalty
☐ More severe than the death penalty
☐ No opinion

Please explain your answer:

_____

_____

_____

94. Do you believe that anyone close to you would be critical of you or disappointed in you if you voted for the death penalty in this case? If you voted for life imprisonment without the possibility of release? If your answer is "yes" or "I'm not sure" to either question, please explain:

_____

_____

_____

95. If you found Mr. Tsarnaev guilty and you decided that the death penalty was the appropriate punishment for Mr. Tsarnaev, could you conscientiously vote for the death penalty?

☐ Yes
☐ I am not sure
☐ No

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96. If you found Mr. Tsarnaev guilty and you decided that life imprisonment without the possibility of release was the appropriate punishment for Mr. Tsarnaev, could you conscientiously vote for life imprisonment without the possibility of release?

☐ Yes
☐ I am not sure
☐ No

97. Is there any other matter or any information not otherwise covered by this questionnaire—including anything else in your background, experience, employment, training, education, knowledge, or beliefs—that would affect your ability to be a fair and impartial juror?

_____

_____

_____

98. Is there anything else that you would like to tell us, or that you feel we should know about you?

_____

_____

_____

99. Did you have any problems reading or understanding this questionnaire?

_____

100. Did you have a response to any specific question above that you deem private or sensitive that you request not be made public at this time? If so, list the number of that question here:

_____

_____

_____

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101. Additional Space (Please indicate question number):

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Additional Space (continued): _____

I do hereby certify, under the pains and penalties of perjury, that I had no assistance in completing this questionnaire and the answers that I have given in this questionnaire are true and complete to the best of my knowledge and belief.

_____ _____
Signature Date

_____
Print Name

Appendix E

Flyer, *United States v. Hennis*

FLYER

CHARGE: VIOLATION OF UCMJ, ARTICLE 118.

SPECIFICATION 1: In that Master Sergeant Timothy B. Hennis, U.S. Army, did, at or near Fayetteville, North Carolina, on or about 9 May 1985, with premeditation, murder Mrs. Kathryn Eastburn by means of stabbing and cutting her with a sharp object.

SPECIFICATION 2: In that Master Sergeant Timothy B. Hennis, U.S. Army, did, at or near Fayetteville, North Carolina, on or about 9 May 1985, with premeditation, murder Ms. Kara Eastburn by means of stabbing and cutting her with a sharp object.

SPECIFICATION 3: In that Master Sergeant Timothy B. Hennis, U.S. Army, did, at or near Fayetteville, North Carolina, on or about 9 May 1985, with premeditation, murder Ms. Erin Eastburn by means of stabbing and cutting her with a sharp object.