

Military Death Row

By Gregory Maus

I. Introduction

The military Death Penalty in the U.S. has evolved over the course of U.S. History. Similar to its civilian counterparts, there has been a reduction in the death eligible crimes that are considered. The military death penalty is unique in its current state because it serves a rather limited function compared to its historical use; especially during “wartime.” As of today, only 6 people are on the military death row although there are many killings that could warrant death eligibility under the Uniform Code of Military Justice (UCMJ). The military death penalty has been rarely pursued in its current form since reinstated in 1984, and even if a death sentence is given no one has been executed since 1961.¹ These usual facts raise the questions: When is the military death penalty applied? And to who? In order to better understand these questions, this paper will analyze the historical context of the military death penalty, the crimes of those on the military death row, and factors that determine death eligibility. First, the military death penalty standards from their historical context until now will be examined. Second, the 6 current death row inmates and their crimes will be discussed. Third, several cases that may appear death eligible will be analyzed as well as previous death row inmates that have their sentences commuted to life in prison. Finally, several potential factors that make a homicide death eligible under the military death penalty beyond those included in the UCMJ will be proposed and discussed. Based upon this analysis, it would seem the military death penalty is typically imposed upon military members that commit unlawful killings outside of traditional “combat zones” and the killings are to fellow servicemen or U.S. citizens.

¹ Chelsea J. Carter, *Military death row: More than 50 years and no executions*, CNN.com (August 6, 2013), <http://www.cnn.com/2013/07/28/justice/military-death-penalty/>.

II. Military Death Penalty Standards

Historical Context

Although the most recent execution took place in 1961, most military death penalty convictions and executions within the 20th century took place under the WWII articles of war.² Of the approximately 160 post 1930 death sentences and executions, approximately 106 of the executions were for murder or some sort of aggravated murder while about 53 were for rape, and there was 1 for desertion.³ Of these, only about 10 death sentences and executions were performed under the UCMJ between 1951 and 1961.⁴ The death eligible standards during this, however, did not differ greatly from the current death eligibility standards under the UCMJ.⁵

Uniform Code of Military Justice (UCMJ) Death Penalty Standards

The UCMJ essentially has two classes of death eligible offences: “wartime” crimes and “peacetime” crimes.⁶ The crimes of desertion, assaulting/ willfully disobeying a superior commissioned officer, lurking/acting as a spy, and misbehavior of a sentinel are only punishable during “wartime.”⁷ Of the “peacetime” offenses, only murder (both premeditated and felony

² *Id*; *Executions in the Military*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/executions-military> (last visited Nov. 5, 2013).

³ U.S. Census Bureau, *Statistical Abstract of the United States: 2000*, at 233 (2000).

⁴ *Executions in the Military*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/executions-military> (last visited Nov. 5, 2013).

⁵ *See id*; 10 U.S.C. §§ 877-934.

⁶ *See* 10 U.S.C. §§ 877-934.

⁷ 10 U.S.C. §§ 885, 890, 906, 913.

murder) has a current death eligible counter-part.⁸ Although there are 9 other “peace-time” offenses, murder is the only crime which death sentences have been issued for the current death row inmates.⁹ Also, the members of the tribunal must find at least one “aggravating circumstance” for military death penalty murder cases similar to civilian courts.¹⁰

Although most of the aggravating circumstances are the same as the Model Penal Code standard adopted by most states, the Rules for Courts-Martial (R.C.M.) has some interesting additional “aggravating factors” that may apply for murder cases.¹¹ First, the R.C.M. adds an aggravating factor of knowingly created grave risk that caused substantial damage to the national security of the United States.¹² Second, if the violation was committed in time of war and in a territory where the U.S. or an ally an occupying power, or U.S. armed forces were in engaged in active hostilities.¹³ Third, if the accused knew the victim was an officer in the U.S. armed services or a high ranking government official conducting official business (such as the President).¹⁴ Not all of these aggravating factors, are given the same weight, and some seem to

⁸ 10 U.S.C. § 918

⁹ *Description of Cases for those Sentenced to Death in U.S. Military*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/description-cases-those-sentenced-death-us-military-0> (describing the various offences of current military death row inmates); see 10 U.S.C. §§ 894, 899-902, 904, 906a, 910, 920 (describing death eligible crimes); Catherine M. Grosso et. al., *The Role of Intimacy in the Prosecution and Sentencing of Capital Murder Cases in the U.S. Armed Forces, 1984-2005*, 40 N.M. L. Rev. 273, 282, fn. 65 (2010) (discussing how the Supreme Court did not address rape in military cases although death is no longer listed as a punishment for rape under 10 U.S.C. § 920 due to a 2007 amendment).

¹⁰ Manual for Courts-Martial United States, Rule for Courts-Martial (R.C.M.) 1004(b)(4)

¹¹ R.C.M. 1004 (c)

¹² R.C.M. 1004 (c)(2).

¹³ R.C.M. 1004 (c)(6).

¹⁴ R.C.M. 1004 (c)(7)(F)-(G).

weigh much more heavily than others as discussed latter in part VI. Nevertheless, the aggravating factors for the military death penalty seem to generally correspond to their civilian counterparts despite these three exceptions.

Although aggravating factors are required for the ultimate disposition of a death penalty case and a death sentence, this only occurs at the last stage of the entire process. The entire process consists of three stages and is governed by two decision-makers. The three stages are: (1) the Capital Court Martial, (2) the Capital Sentencing Hearing, (3) the Hearing Decision.¹⁵ These stages are fairly similar to the civilian DP counterparts. The “convening authority” and the “court-martial members” are the two “decision makers” for the process and some differences from a civilian system.¹⁶ The convening authority is one who may commence a death-eligible case and has total discretion whether or not to seek the death penalty.¹⁷ Typically the conveying authority is a general or admiral within the accused’s command.¹⁸ A decision to seek a death sentence is known as a “capital referral.”¹⁹ The “capital referral” is heavily influence by an “advice letter” written by the convening authority’s Staff Judge Advocate (i.e. his legal advisor or legal officer).²⁰ Although this is not completely dissimilar to a County Attorney deciding to seek the death penalty in a civilian court, the ultimate decision still is with the convening authority not the legal officer. If a capital referral is not withdrawn by the convening authority,

¹⁵ Catherine M. Grosso et al., *The Role of Intimacy in the Prosecution and Sentencing of Capital murder Cases in the U.S. Armed Forces*, 40 N.M. L. REV. 273, 286 (2010).

¹⁶ *Id.* at 285.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ R.C.M. 1004

²⁰ R.C.M. 1106; Catherine M. Grosso et al., *The Role of Intimacy in the Prosecution and Sentencing of Capital murder Cases in the U.S. Armed Forces*, 40 N.M. L. REV. 273, 285 (2010).

then it advance to the capital court-martial for the “first stage.” The capital court-martial determines the guilt/innocence of the accused. During this proceeding the court-martial members must be made up of at least 12 officers when deciding the accused’s guilt or innocence in capital cases.²¹ Upon an unanimous finding of guilt by the court-martial members, the case moves to a capital sentencing hearing for “stage two.”²² At “stage three” the court-martial members consider the aggravating factors and mitigating circumstances and make a life or death determination.²³ This final determination has only included a life sentence without parole option since November 18, 1997.²⁴

A unique feature of the military death sentence appeals process is it usually begins by a request for clemency to the convening authority.²⁵ The convening authority has complete authority to reduce both the crime of conviction and the punishment for that crime at any time.²⁶ Although the convening authority has only disallowed a death sentence twice since 1984, this is a unique feature within the military system, and there is no comparable authority within civilian courts.

²¹ Jeffery Fredrick, *Member (Jury) Selection in General Courts-Martial*, JURYLAW.COM (Sept. 9, 2013), <http://jurylaw.typepad.com/deliberations/2013/09/member-jury-selection-in-general-courts-martial.html>.

²² R.C.M. 1004(a)(2).

²³ R.C.M. 1004(b)(4).

²⁴ *The U.S. Military Death Penalty*, DEATH PENALTY INFORMATION CTR., <http://deathpenaltyinfo.org/us-military-death-penalty> (last visited Dec. 12, 2013).

²⁵ R.C.M. 1107

²⁶ *Id.*

III. The Current Death Row Inmates and Their Crimes

There are currently only 6 death row inmates on the military death row.²⁷ All of the inmates were sentenced after 1984 when the military death penalty was reinstated, and convicted under the UCMJ.²⁸ All of them were convicted of some form of murder under the UCMJ and not any other UCMJ death eligible crime.²⁹

Ronald Gray

Ronald Gray was a former army specialist at Fort Bragg in North Carolina.³⁰ He was convicted of murdering and raping a female army private and another female civilian between December 1986 and January 1987.³¹ He was also convicted of the attempted murder and rape of another army private in which he raped the victim at knifepoint then stabbed her multiple times before leaving.³²

This case contained numerous “aggravating factors” such as: multiple numbers, commission of a felony during a homicide, killing another commissioned officer.³³ Ronald Gray

²⁷ *Description of Cases for those Sentenced to Death in U.S. Military*, DEATH PENALTY INFORMATION CTR., <http://www.deathpenaltyinfo.org/description-cases-those-sentenced-death-us-military-0>.

²⁸ *See* 10 U.S.C. § 918.

²⁹ *See id.*

³⁰ *Description of Cases for those Sentenced to Death in U.S. Military*, *supra* note 27.

³¹ 37 M.J. 730 (1992); *Description of Cases for those Sentenced to Death in U.S. Military*, *supra* note 27.

³² David Baldus et al., *Racial Discrimination in the Administration of the Death Penalty: The Experience of the United States Armed Forces (1985-2005)*, J. OF CRIM. L. & CRIMINOLOGY 1227, 1325-26 (2012).

³³ *Id.*; *see* R.C.M. 1004(c).

was convicted in 1988, and has been on death row the longest.³⁴ There have been numerous appeals filed over the past two decades and appeals are still ongoing.³⁵

Ronald Gray's Case flared up a little in 2008 when President Bush approved his execution.³⁶ His execution was scheduled for December 10, 2008, but a stay was granted to allow time to file a habeas corpus petition.³⁷ This petition was denied by the Kansas Federal District Court in 2012, and there has not been any more recent action concerning his case.³⁸

Dwight Loving

Dwight Loving was a former army private at Fort Hood, Texas.³⁹ He was convicted of two premeditated murders, and robberies of two taxicab drivers in the same night.⁴⁰ Dwight Loving robbed then shot the cab drivers in the head.⁴¹ He also attempted to do the same to a third taxi driver that night, but was unsuccessful.⁴² One of the victims was an active soldier

³⁴ *Description of Cases for those Sentenced to Death in U.S. Military*, *supra* note 27.

³⁵ Ashley Broughton, *Judge Stays First Military Execution in 47 Years*, CNN.COM, <http://www.cnn.com/2008/CRIME/12/03/military.execution/> (last updated Dec. 3, 2008).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Ronald Adrin Gray: Military Death Sentences – Once Appeals are Exhausted, They Aren't Exhausted*, BEFOREITSNEWS.COM (Aug. 30, 2013), <http://beforeitsnews.com/opinion-conservative/2013/08/ronald-adrin-gray-military-death-sentences-once-appeals-are-exhausted-they-arent-exhausted-2706622.html>

³⁹ *Description of Cases for those Sentenced to Death in U.S. Military*, *supra* note 27

⁴⁰ *Id.*

⁴¹ *Dwight J. Loving*, MURDERPEDIA.COM, <http://murderpedia.org/male.L/l/loving-dwight.htm>.

⁴² *Id.*

stationed at Fort Hood and the other was a retired serviceman.⁴³ Dwight Loving willingly gave a videotaped confession of the crimes which has not been disputed and was sentenced in 1989.⁴⁴

There are also several aggravating circumstances for both murders. First, both murders were in the commission of a felony.⁴⁵ Second, there were multiple murders within the same night.⁴⁶ Third, the accused likely knew his victims were military service members, and one of the victims was a current army private.⁴⁷

Hasan Akbar

Hasan Akbar was a former army sergeant stationed at Camp Pennsylvania, Kuwait during the invasion of Iraq.⁴⁸ He was convicted of two counts of premeditated murder several counts of attempted murder.⁴⁹ Hasan Akbar threw four hand grenades into three tents in which other members of the 101st Airborne Division were sleeping.⁵⁰ He then fired his rifle at fellow soldiers in the ensuing chaos.⁵¹

Interestingly, he is the only current death row inmate whose crime took place outside of the United States. This crime, however, also shares many of the aggravating factors that

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *See* R.C.M. 1004(c).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Description of Cases for those Sentenced to Death in U.S. Military, supra* note 27.

⁴⁹ *Id.*

⁵⁰ *Akbar Sentenced to Death for Grenade Attack*, FOXNEWS.COM (April 23, 2005), <http://www.foxnews.com/story/2005/04/29/akbar-sentenced-to-death-for-grenade-attack/>.

⁵¹ *Id.*

typically arise in other cases of death row inmates.⁵² First, there are multiple victims which was the primary aggravating factor found in this case.⁵³ Second, the murders were of commissioned officers.⁵⁴ Lastly, there may have the potential that the offense was committed during “active hostilities” or a “time of war” under the R.C.M. 1004(c)(6) depending how the definition is applied since the crime was committed in the midst of the invasion of Iraq.⁵⁵

Timothy Hennis

Timothy Hennis differs from the other military death row inmates because he was originally convicted in state court.⁵⁶ He was a former master sergeant was originally convicted in 1986 of murdering three people in North Carolina.⁵⁷ The murders were of a woman and her two children.⁵⁸ The victims were all stabbed multiple times and throats slit afterwards along with the rape of the female victim.⁵⁹ This conviction, however, was overturned and he was granted a new trial in 1989. In the 1989 trial he was unanimously acquitted.⁶⁰ The crime scene evidence was preserved and later DNA testing revealed Timothy Hennis was guilty of the murders.⁶¹ Since Timothy Hennis had already left the service, he was recalled, and then charged with murders.⁶² In 2010, he was convicted again and sentenced to death.⁶³

⁵² *Id.*; see R.C.M. 1004(c).

⁵³ See R.C.M. 1004(c).

⁵⁴ See R.C.M. 1004(c).

⁵⁵ See R.C.M. 1004(c).

⁵⁶ Kristal Hawkins, *Double Jeopardy: Master Sergeant Timothy Hennis*, TRUTV.COM, http://www.trutv.com/library/crime/notorious_murders/family/hennis/overkill-three-brutal-murders.html.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

There were more of the same aggravating factors in this case as other military death penalty cases including multiple murders and the murder occurring while committing the felony of rape.⁶⁴ This case, however, had an additional factor of involving child victims under the age of 15.⁶⁵ Also, this case points out a double jeopardy loophole because a military proceeding is considered distinct from a state court proceeding and therefore the capital court-martial could go forward.

Nidal Hasan

Nidal Hasan is the most recent addition to the military death row. He was a major and army psychiatrist stationed at Fort Hood, Texas.⁶⁶ He killed 13 people on that base due to a belief it would aid Islamic insurgents in other countries.⁶⁷ He was sentenced on August 28, 2013.⁶⁸ He repeatedly refused counsel because he wished to represent himself, but the court had a standby counsel that attempted to intervene during the proceedings.⁶⁹

The case had a few aggravating factors. The most significant ones being the multiple murders as well as unlawfully and substantially endangering multiple persons while committing the offense.⁷⁰ Also, the killings involved enlisted soldiers.⁷¹ An interesting potential aggravating

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *See* R.C.M. 1004(c).

⁶⁵ Kristal Hawkins, *supra* note 56; R.C.M. 1004(c)(7)(K)

⁶⁶ *Description of Cases for those Sentenced to Death in U.S. Military, supra* note 27.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *See* R.C.M. 1004(c).

factor that was not addressed is whether Nidal Hasan “knowingly created a grave risk of substantial damage to the national security of the United States” under R.C.M. 1004(c)(2). Although this may impermissible stretch this particular aggravating factor, Nidal Hasan has consistently asserted that his intent was to aid insurgents in other countries in which the U.S. has a presence. He acts would likely meet the “knowingly” criteria but there is the question of what “grave risk of substantial damage” would actually entail.

Andrew Witt

Andrew Witt’s case has been the most active death penalty in the Appeals during the 2013 fall semester. He was convicted of two counts of premeditated murder, and one count of attempted murder.⁷² He stabbed a fellow Airman and the Airman’s wife to death at Robins Air Force Base, and also seriously injured another Staff Sergeant.⁷³ He originally sentenced to death in October of 2005.⁷⁴ Andrew Witt’s Crime had aggravating factors of committing multiple murders, and having a victim he knew was a fellow serviceman.⁷⁵

In August of 2013, however, an Air force Court of Criminal Appeals overturned Andrew Witt’s conviction on the grounds that his trial defense attorneys overlooked evidence that could

⁷¹ Billy Kemper, *Nidal Hasan Sentenced to Death for Fort Hood Shooting Rampage*, THE WASHINGTON POST (Aug. 28, 2013), http://articles.washingtonpost.com/2013-08-28/world/41525767_1_nidal-hasan-death-sentence-2009-shooting-rampage.

⁷² *Description of Cases for those Sentenced to Death in U.S. Military*, *supra* note 27.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See R.C.M. 1004(c); Nancy Montgomery, *Airman’s Death Sentence for Georgia Murder is Overturned*, STARS AND STRIPES (Aug. 13, 2013), <http://www.stripes.com/news/airman-s-death-sentence-for-georgia-murders-is-overturned-1.235146>.

have persuaded jurors to spare his life.⁷⁶ The Court was then motioned to reconsider this ruling, and on October 21, 2013 the Court granted the motion and vacated its former ruling.⁷⁷ The Appeals Court is now in this process of reconsideration and a ruling on whether Witt will continue to stay on death row is expected in December 2013.

IV. Former Death Row Inmates that Now Have Life Sentences

There are also 11 people who were formally on the military death row, but are no longer on it currently.⁷⁸ Most of their crimes are similar to the majority of the current death row inmates, and usually involved some variety felony murder, multiple victims, or an enlisted person victim as aggravating factors.

Kenneth Parker & Wade Walker

These former Marines initially received death sentences arising out of murders which involved both men.⁷⁹ There were two separate murders on two separate occasions which involved both men.⁸⁰ The first murder occurred after a night of drinking when Parker and Walker decided to kill a white person because of rumors of white Marines attempting to lynch an

⁷⁶ Nancy Montgomery, *supra* note 75.

⁷⁷ *Appeals Court Cancels Decision to Overturn Airman's Death Sentence*, AIR FORCE TIMES (Oct. 28, 2013), <http://www.airforcetimes.com/article/20131028/NEWS06/310280030/>.

⁷⁸ *Description of Cases for those Sentenced to Death in U.S. Military*, *supra* note 27.

⁷⁹ See Michael Doyle, *Death Sentence of Marine Kenneth G. Parker Overturned on Appeal*, MCCLATCHY DC (Aug. 23, 2012), <http://www.mcclatchydc.com/2012/08/23/163288/death-sentence-of-marine-kenneth.html>; Amy McCullough, *Marine's Death Sentence Overturned*, MARINE CORPS TIMES, <http://www.marinecorpstimes.com/article/20100222/NEWS/2220322/> (last updated Feb. 22, 2010).

⁸⁰ See Michael Doyle, *supra* note 79; Amy McCullough, *supra* note 79.

African-American on Martin Luther King's birthday.⁸¹ They found their victim who was also a Marine and killed him with a shotgun.⁸² A few nights later, both men were involved in the kidnapping, and killing of another man with the same shotgun whose wife was having an affair with Walker.⁸³ In the second murder, both Parker and Walker were convicted of felonies along with the murder.⁸⁴ The felonies in the second murder seem to be one of the aggravating factors for the murders.⁸⁵ Also, Walker & Parker knew both the victims were Marines which adds another aggravating factor.⁸⁶

Parker was tried for both murders in the same proceeding.⁸⁷ Parker's sentence was overturned because the Appellate Court was not convinced beyond a reasonable doubt that Parker was actually involved in the second murder.⁸⁸

Similarly, Walker's sentence for the two murders in a subsequent proceeding was eventually overturned based upon a lack of evidence that could definitively show his role in the murders.⁸⁹ Although both men were there, and the same gun was used, the uncertainty of who pulled the trigger in each case eventually caused the Appellate courts to give life sentences.

⁸¹ See Michael Doyle, *supra* note 79; Amy McCullough, *supra* note 79.

⁸² See Michael Doyle, *supra* note 79; Amy McCullough, *supra* note 79.

⁸³ See Michael Doyle, *supra* note 79; Amy McCullough, *supra* note 79.

⁸⁴ See Michael Doyle, *supra* note 79; Amy McCullough, *supra* note 79.

⁸⁵ R.C.M. 1004(c).

⁸⁶ See R.C.M. 1004(c).

⁸⁷ Michael Doyle, *supra* note 79.

⁸⁸ *Id.*

⁸⁹ Amy McCullough, *supra* note 79.

James Murphy

In 1987, James Murphy confessed to killing his wife who was a German National and their two children with a hammer while stationed in Germany.⁹⁰ Murphy had the aggravating factors of having multiple victims, but also met the criteria of having the aggravating factor of a victim under the age of 15.⁹¹ Since his original conviction was given before the 1997 LWOP statute in the UCMJ, his sentence was reduced to life.⁹² This is because a life sentence was the maximum non-capital sentence that could be imposed when Murphy was convicted.⁹³

William Kreutzer

Kreutzer was originally convicted of one premeditated murder and 17 counts of attempted murder, and received a death sentence.⁹⁴ Kreutzer was upset with some things going on with the squad, and decided he would shoot at his brigade to create a greater awareness of these perceived problems.⁹⁵ He open fired at several soldiers while at Towle Stadium in Fort Bragg.⁹⁶ He would have potential aggravating factors of having a service member victim, and putting people other than the victim in substantial danger.⁹⁷ Since Kreutzer's original death

⁹⁰ Dwight Sullivan, *Another Former Military Death Row Inmate Resentenced to Life*, NAT'L INST. OF MIL. JUST. (May 14, 2010), <http://www.caaflog.com/2010/05/14/another-former-military-death-row-inmate-resentenced-to-life/>.

⁹¹ *See id.*; R.C.M. 1004(c).

⁹² Dwight Sullivan, *supra* note 90.

⁹³ *Id.*

⁹⁴ XVIII Airborne Corps PAO, *Judge Sets Sentence for Bragg Shooting Spree*, ARMY.MIL (March 25, 2009), <http://www.army.mil/article/18701/judge-sets-sentence-for-bragg>.

⁹⁵ *William Kreutzer Fmr Military DR Pleads Guilty in Retrial, DP Not on Table*, PRO DEATH PENALTY (March 11, 2009), <http://off2dr.com/smf/index.php?topic=5867.0>.

⁹⁶ *Id.*; XVIII Airborne Corps PAO, *supra* note 94.

⁹⁷ *See* R.C.M. 1004(c).

sentence, it has been overturned in 2004 citing ineffective assistance of counsel.⁹⁸ He was then offered a plea deal in which the death penalty was taken off the table.⁹⁹

Jesse Quintanilla

Quintanilla was convicted of murdering a superior officer in 1996, and two other attempted murders in California.¹⁰⁰ He had the aggravating factor of knowingly killing an officer of the armed services.¹⁰¹ In 2006, however, a military appellate court set aside the death sentence due the improper dismissal of jury member by the trial judge.¹⁰² When the case was remanded, Quintanilla was given a life sentence based upon an agreement between the parties and the convening authority in exchange for waiving his right to further appeal the conviction.¹⁰³

Todd Dock

Todd Dock was convicted of a robbery murder of a cab driver in 1984 while in Germany.¹⁰⁴ The cab driver died of multiple stab wounds.¹⁰⁵ Dock's only aggravating factor was committing the murder while in the commission of a felony (robbery).¹⁰⁶ Only four years

⁹⁸ *William Kreutzer Fmr Military DR Pleads Guilty in Retrial, DP Not on Table*, *supra* note 95.

⁹⁹ *Id.*

¹⁰⁰ Jeanette Steele, *Marine's Death Sentence Reduced to Life in Prison*, UNION TRIBUNE SAN DIEGO (Sept. 23, 2010 6:13 P.M.), <http://www.utsandiego.com/news/2010/Sep/23/marines-death-sentence-reduced-life-prison/>.

¹⁰¹ *See* R.C.M. 1004(c).

¹⁰² Jeanette Steele, *supra* note 100.

¹⁰³ Tony Perry, *Marine convicted of killing officer has death sentence reduced to life in prison*, L.A. NOW (Sept. 21, 2010 2:59 P.M.).

¹⁰⁴ Baldus et al., *supra* note 32 at 1246-47.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

after his conviction, his sentence was commuted to a life sentence, and was helped in part by outside counsel hired by Dock's mother for a few hundred thousand dollars.¹⁰⁷

Melvin Turner

Melvin Turner was convicted of murdering his eleven month old daughter by slashing her throat with a razor blade while stationed in Okinawa, Japan in 1985.¹⁰⁸ The aggravating factor used in this case was the infliction of substantial harm upon the victim.¹⁰⁹ The prosecution focused on the fact she would have died painfully while at the hands of her father.¹¹⁰ This sentence eventually received clemency by the convening authority, and the death penalty was taken away.¹¹¹

Ronnie Curtis

Ronnie Curtis was convicted of two premeditated murders, burglary, and other crimes at Camp Lejeune in 1987.¹¹² Curtis stabbed his commanding officer and the officer's wife to death

¹⁰⁷ Richard A. Serrano, *A Grim Life on Military Death Row: As the Armed Forces Prepare to Resume Executions, Six Men Await Their Fate at Ft. Leavenworth*, LOS ANGELES TIMES (July 12, 1994), available at http://articles.latimes.com/1994-07-12/news/mn-14806_1_death-row/3; Deb Riechmann, *Group Called MOMS Seeks to Make Changes in Military Justice System*, LOS ANGELES TIMES (Aug. 14, 1988), available at http://articles.latimes.com/1988-08-14/news/mn-630_1_military-justice-system.

¹⁰⁸ *Marine Sentenced to Death*, SPARTANBURG HERALD J. April 3, 1985 at D5, available at <http://news.google.com/newspapers?nid=1876&dat=19850403&id=UTwsAAAAIBAJ&sjid=R84EAAA AIBA J&pg=6514,460643>.

¹⁰⁹ *Id.*; see R.C.M. 1004(c)(7)(I).

¹¹⁰ SPARTANBURG HERALD J., *supra* note 108.

¹¹¹ Baldus et al., *supra* note 32 at 1247-48.

¹¹² *Description of Cases for those Sentenced to Death in U.S. Military*, *supra* note 27.

while they were in their home.¹¹³ Curtis had the aggravating factors having multiple victims, a service member victim, and murdering while committing a felony.¹¹⁴ In 1997, Curtis's sentence was commuted to a life sentence due to ineffective assistance of counsel.¹¹⁵

Joseph Thomas

Joseph Thomas was convicted of murdering his pregnant wife in 1989 by beating her with a tire iron.¹¹⁶ He then placed her body in a car and drove it off a cliff and set it on fire. His motivation for the crime was found to be for insurance money.¹¹⁷ This allowed Thomas to have the aggravating factor of committing the murder for pecuniary gain.¹¹⁸ Thomas's death sentence was vacated on appeal, and upon remand the convening authority waived the death penalty.¹¹⁹

Curtis Gibbs

Gibbs was found guilty of premeditated murder when he killed a female drinking companion with a sword and nearly decapitated her in 1990.¹²⁰ After Gibb's conviction the convening authority reduced his sentence to life based upon a clemency petition.¹²¹

¹¹³ Diana D'Abruzzo, *Military Appeals Court Blocks Death Sentence: Private Who Killed Lejeune Couple Keeps Life Sentence*, JACKSONVILLE DAILY NEWS.COM (Feb. 9, 1999), available at <http://www.murdervictims.com/voices/Lotz.htm>.

¹¹⁴ R.C.N. 1004(c).

¹¹⁵ See Marisa Taylor, *Military Capital Cases Deserve Better Defense, Critics Say*, MCCLATCHY DC (Aug. 28, 2011).

¹¹⁶ George Frank, *Convicted Marine Tells His Version of Wife's Murder*, LOS ANGELES TIMES (May, 19 1989), <http://articles.latimes.com/keyword/joseph-l-thomas>.

¹¹⁷ Baldus et al., *supra* note 32 at 1246.

¹¹⁸ R.C.M. 1004(c)(7)(C).

¹¹⁹ Baldus et al., *supra* note 32 at 1331.

¹²⁰ *Id.* at 1331 n.254.

¹²¹ *Id.* at 1248 tbl. 2.

Jose Simoy

Jose Simoy was convicted of felony murder in 1992 and received a death sentence when he and four others robbed a bank while killing a police officer in the process.¹²² Simoy was not the person who killed the police officer.¹²³ However, he was the mastermind of the robbery, and the get-away car driver.¹²⁴ The aggravating factor here is the fact the victim was a police officer, and a service member.¹²⁵ Simoy sentence was eventually overturned.¹²⁶

V. Potential Death Eligible Cases, but No Death Penalty Pursued

Robert Bales Case – Kandahar Massacre

In March of 2012, Robert Bales murder 16 Afghan civilians including women in children while serving a fourth tour of duty in Afghanistan.¹²⁷ After leaving a remote outpost in southern Afghanistan, Robert Bales shot and stabbed several victims in their homes.¹²⁸ He then burned

¹²² *Airman Sentenced to Death in Guam – Defendant Found Guilty in Robbery-Killing of Sergeant from Renton*, SEATTLE TIMES (July 22, 1992),

<http://community.seattletimes.nwsources.com/archive/?date=19920722&slug=1503377>.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ R.C.M. 1004(c).

¹²⁶ *Description of Cases for those Sentenced to Death in U.S. Military*, *Supra* note 27.

¹²⁷ Kirk Johnson, *Army Seeking Death Penalty in Massacre of 16 Afghans*, N.Y. TIMES (Dec. 19, 2012), <http://www.nytimes.com/2012/12/20/us/robert-bales-faces-death-penalty-in-afghan-massacre.html>.

¹²⁸ *Id.*

the bodies in one of the victims' homes.¹²⁹ When he returned to his camp that night other soldiers noticed his clothes were spotted with blood.¹³⁰

Early in the proceedings and the pretrial hearings in the fall of 2012, Robert Bales pleaded not guilty based on factors such as post-traumatic stress, and head injury.¹³¹ At this point in the case, it appeared the prosecution would pursue the death penalty for Robert Bales given the many aggravating factors.¹³² In particular, under the R.C.M. 1004(c) the prosecution could have easily shown aggravating factors of multiple murders, and victims under the age of 15. In addition there were aggravating factors of the felony of arson, and committing the offense in a manner that unlawfully substantially endangered the life of people other than the victims.

Subsequently in the summer of 2013 Robert Bales pleaded guilty to the charges which allowed him to avoid the death penalty as part of the deal.¹³³ This deal probably saved the prosecution much of the difficulty involved for seeking the death penalty although this case may facially seem the “worst of the worse” when the death penalty would apply.

The prosecution, however, not only faced potential problems during the guilt/ innocence stage of the proceeding, but also sentencing phase. First, there may have been a lack of forensic evidence linking Robert Bales to all of the killings which could have impacted his ultimate conviction even though there were many eyewitnesses to the killings. Second, Robert Bales had many potential mitigating factors during sentencing that may have reduced his sentence down

¹²⁹ *Id.*

¹³⁰ Kirk Johnson, *Guilty Plea by Sergeant in Killing of Civilians*, N.Y. TIMES (June 5, 2013), <http://www.nytimes.com/2013/06/06/us/sergeant-robert-bales-testimony.html>.

¹³¹ Kirk Johnson, *supra* note 127.

¹³² *Id.*

¹³³ Kirk Johnson, *supra* note 130.

from death.¹³⁴ Facts such as his post-traumatic stress, and stress from being on his fourth deployment could weigh against the aggravating factors.¹³⁵ Also, his use of different prescription drugs and alcohol would raise some questions about his mental state when committing the murders.¹³⁶ The standard under the UCMJ and R.C.M. require at least one aggravating factor to substantially outweigh any mitigating factors, and there was the possibility the mitigating factors were not “substantially” outweighed.¹³⁷

Ultimately, Robert Bales was sentenced to life without parole due to his plea.¹³⁸ In all likelihood, this plea is what saved him the death penalty. His case had very clear and arguably substantial aggravating factors even though he had some good mitigating factors. The crime, however, did lack some key other factors that seem to be common amongst the other military death penalty cases which are discussed in part VI.

Lawrence Hutchins

Lawrence Hutchins was accused to have led an 8 man squad in April 2006 which kidnapped an Iraqi man from his home, brought him to a ditch where the squad shot and killed the man who turned out to be a retired Iraqi police officer.¹³⁹ Based primarily on the testimony

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Kirk Jonson, *supra* note 127.

¹³⁸ Jack Healy, *Soldier Sentence to Life Without Parole for Killing 16 Afghans*, N.Y. TIMES (Aug. 23, 2013), <http://www.nytimes.com/2013/08/24/us/soldier-gets-life-without-parole-in-deaths-of-afghan-civilians.html>.

¹³⁹ Julie Watson, *Lawrence Hutchins III Murder Conviction Overturned by Military's Highest Court*, HUFFINGTON POST (June 26, 2013), http://www.huffingtonpost.com/2013/06/26/lawrence-hutchins-iii_n_3506506.html.

of a naval petty officer, Lawrence Hutchins led the squad to the victim's home after becoming frustrated about being unable to apprehend a particular insurgent after 10 attempts.¹⁴⁰ Hutchins and the squad then took the victim from his home along with the victim's own gun and shovel.¹⁴¹ Hutchins took the victim to a ditch then radioed for permission to fire upon an insurgent while the testifying petty officer fired a gun in the air to simulate a firefight.¹⁴² Hutchins and the squad then shot and killed the victim from a distance, and planted the victim's gun and shovel on him so that he appeared to be an insurgent.¹⁴³

Unlike most other potential military death cases, this incident did not have the aggravating factor of multiple victims. It did, however, have the potential aggravating factor of being committed during a kidnapping. Nevertheless, the death penalty was never sought in this case.¹⁴⁴ Lawrence Hutchins received the strongest sentence in the case amongst the others involved and was convicted of a lesser murder charge. He was sentenced to 15 years in 2007 and was acquitted of the kidnapping.¹⁴⁵ His request for Clemency to the convening authority was denied, but his sentence was reduced to 11 years. Later in June of 2013, he was acquitted because his 5th Amendment rights were violated when he was held for 6 days without being allowed access to counsel, and has been released.¹⁴⁶

¹⁴⁰ Linda Deutsch, *Sailor 'Shocked' by Killing of Iraqi*, ASSOCIATED PRESS (Oct. 7, 2006), available at <http://web.archive.org/web/20061105154057/http://sfgate.com/cgi-bin/article.cgi?f=/n/a/2006/10/07/national/a012714D01.DTL>.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Julie Watson, *supra* note 139.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

Although the military death penalty was never pursued in this case, it highlights the discretion allowed for death penalty cases that would likely meet the *Tison v. Arizona* standard of being a major participant in a felony and acting recklessly towards human life.¹⁴⁷ Setting aside the fact Hutchins was acquitted of the kidnapping and ultimately of the entire case, the facts of the crime committed would likely meet civilian standards of a death eligible case had it been committed in one of the United States.

Haditha Killings

This case involving multiple homicides, illustrates how the “fog of war” often leads to lessened sentences and acquittals for soldiers that could have been charged with the military death penalty under the UCMJ. This incident occurred in 2005 when after a bomb explosion several Marines went into nearby homes where 24 unarmed civilians were killed including children contrary to the initial reports by the Marines.¹⁴⁸ Ultimately 8 Marines were charged in the incident, but there were no charges equated to premeditated murder.¹⁴⁹ Therefore, from the outset of this case, no death penalty charges would be brought despite the several potential aggravating factors.

As common with most military death penalty cases there were multiple murders. There was also the additional factor of killing children under the age of 15. These potential aggravating factors, however, usually will not apply when the killings are commenced during a time when there is potential hostile activity such as immediately following an IED explosion. In scenarios such as these, a death sentence is rarely even considered because of the inherent stress

¹⁴⁷ 481 U.S. 137 (1987).

¹⁴⁸ CNN Library, *Haditha Killings Fast Facts*, CNN.COM, <http://www.cnn.com/2013/10/30/world/meast/haditha-killings-fast-facts/> (last updated Oct. 30, 2013).

¹⁴⁹ *Id.*

of these types of situations even though the killings may seem particularly heinous.

Additionally, these types of murders that occur near a battlefield suffer from a lack of evidence and ability to locate witnesses, etc. This makes it difficult to gain enough proof to change an individual with the death penalty. Therefore, many murders that are in a “combat zone” are not given charges high enough to warrant a death penalty sentence even though the facts of a case could give rise to death penalty prosecutions.

Calvin Gibbs and the “Kill team”

Calvin Gibbs was part of group of soldiers that were convicted for murder involving the killing of multiple Afghan civilians.¹⁵⁰ Gibbs was found guilty of killing three civilians as part of a “kill team” in which he and other soldiers would find a civilian and fake a combat situation in order to kill the intended victim.¹⁵¹ To do so they would detonate grenades or plant weapons near the victims.¹⁵² Then after the murders, Calvin Gibbs and other would take body parts from the victims as “trophies.”¹⁵³ In particular, Gibbs was accused of snipping off fingers or taking teeth from the victims.¹⁵⁴

Unlike scenarios in “the fog of war,” these incidents were removed from standard combat because the combat was faked. However, they still occurred in an active war zone while Calvin Gibbs was deployed. Also, the killings were premeditated and had the common aggravating

¹⁵⁰ William Yardley, *Soldier is Convicted of Killing Afghan Civilians for Sport*, N.Y. TIMES (Nov. 10, 2011), <http://www.nytimes.com/2011/11/11/us/calvin-gibbs-convicted-of-killing-civilians-in-afghanistan.html>.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

factor of having multiple victims.¹⁵⁵ Also, the keeping of body parts can usually cause civilian juries to invoke the death penalty based on depravity although it is not an official aggravating factor under the R.C.M. 1004(c). Calvin Gibbs was ultimately given a life sentence with the chance of parole after 10 years.¹⁵⁶

VI. Discussion of Death Eligible Homicides in the Military

There are several factors that seem to arise which are independent of any other aggravating factor based upon the similarities between death eligible cases that result in a death sentence versus potential death eligible cases which no death penalty is attained. One factor that seems particularly relevant is the location of the murders compared to a military base or camp. Another factor related to location, is the proximity of the murder to an active “warzone” or where active military operation are taking place. Along with these location factors, the “status” of the accused’s victim seems pertinent as to whether the accused will receive a death sentence. This includes the victim’s citizenship, and whether the accused knew the victim’s military/ non-military status. Whether the victim was a fellow serviceperson, U.S. civilian, or non-U.S. civilian seem relevant as to when the military death penalty is pursued.

Location Factors

Location seems to be a key factor for when the military death penalty is sought or not. Although probably not intentional, there seems to be a definite correlation between where a murder happens and death penalty sentencing. All of the current military death row inmates committed their murders either on a military base or near the general area of a base. Also, with

¹⁵⁵ R.C.M. 1004(c).

¹⁵⁶ William Yardley, *supra* note 150.

the exception of Hasan Akbar, all of the current death penalty inmates committed their crimes in the United States. It seems that when the military base is near the location of the crime and the base is in the United States, the capital crime is treated often treated in a manner similar to equivalent capital cases in civilian state courts. For example, Dwight Loving who killed two taxi drivers after robbing them is likely to have been given the same sentence in a civilian court because his crime fits a typical felony-murder death eligible case that may arise in those types of courts. However, a potential felony-murder case such as Lawrence Hutchins case involving kidnapping located well off the base did not even warrant capital prosecution.

Another important location factor which has characterized the military death row in its current form is whether the crime was committed in or near an active war zone. Of the current death row inmates, Hasan Akbar was the only one which was near an active warzone since he was at a military camp in Kuwait during the invasion of Iraq. The other 5 were nowhere near active combat zone operations at the time the committed their crimes. Hasan Akbar, however, was still on base when committed his crime whereas Robert Bales and Calvin Gibbs committed their criminal acts in areas which were warzones or at least very near them.

The significance of committing a death eligible offense, due to an individual's location to an active warzone is highlighted when comparing the cases of Robert Bales and Hasan Akbar. Both cases have several aggravating factors as well as other highly objectionable aspects. For example, Hasan Akbar killed multiple victims in the same attack and carried out the crime using multiple weapons while his victims were sleeping. Similarly, Robert Bales committed multiple murders which included child victims, and committed other morally objectionable actions such as burning the victims' bodies after their murder. Despite their comparable depravity, however, only Hasan Akbar was given a death sentence. Robert Bales sentence allowed to be reduced

although clearly death eligible. His action of leaving the base within or near a warzone undoubtedly played a role in this. First, there is the issue of having enough evidence of the crime when it happens in a combat zone instead of a military base. The lack of proper evidence issue seems fairly common when prosecuting potentially death eligible crimes against soldiers. Second, the “fog of war” itself makes it difficult to determine whether a soldier’s killing of another was actually unlawful, and even if it was, it is difficult to determine the crimes death eligibility. The Haditha killings illustrate the difficulty of determining whether a particular crime or murder is even death eligible. In this case, it took a long investigation to figure out that a crime was even committed given the chaotic nature of a warzone. Once it was discovered a crime was committed, the accused’s intent regarding premeditation and aggravating factors to warrant death eligibility are even more muffled given the intensity of the soldier’s circumstances from being in a warzone. Since a warzone is inherently chaotic, discovering the facts necessary to meet the requisite standards of premeditation and aggravating factors, besides figuring out the crime becomes exponentially more difficult.

Victim Status Factors

1. Citizenship

The victim’s citizenship seems make a difference in whether a death sentence is sought and upheld. Particularly, whether a victim is a U.S. citizen seems especially relevant. Although citizenship is not expressly considered, there seems to be an implied, subconscious consideration based upon who in fact gets the military death penalty, and who stays on death row. All of the current death row inmates’ victims were U.S. citizens. However, the death penalty was never sought for Robert Hutchins, Robert Bales, and Calvin Gibbs whose victims were not U.S. citizens. Also, only two people have been on the modern military death row that had victims that

were not U.S. citizens: James Murphy and Todd Dock. Both of these men are no longer on death row, and both had at least one aggravating factor which would allow for a death sentence. Todd Dock committed the murder while in the commission of a robbery, and Murphy had multiple victims. Murphy's murder was arguably highly depraved given the fact he confessed to murdering his wife and children with a hammer. Nevertheless, their sentences were eventually commuted to life sentences.

2. Member of the Military

Although typical aggravating factors such as having multiple victims, or committing a murder while committing a felony are frequently used for military death penalty cases, it seems having a fellow military service member victim increases your chances of receiving a death sentence. This is shown through the current make-up of the military death row, the people who were formally on death row, and those convicted of lesser sentences instead of the death penalty.

First, only one of the current military death row inmates, Timothy Hennis, did not have an armed service member victim. All of the other current inmates have one or more victims who were in the armed forces. In fact, Andrew Witt is the only current death row inmate who only had one victim in the armed services. The other four killed multiple armed service members. This means that 83% of the current military death row had a service member victim, and 66% had multiple service member victims. On these facts alone it seems that more people with armed service member victims will receive a death sentence, but only having 6 people on the military death row may skew the percentages. However, analyzing people who were formally on the military death row, better clarifies these statistics.

Secondly, having an armed service member victim, and the number of armed service member victims is significant when reviewing the people who were formally on military death

row, but now have life sentences. There is a slim majority (6:5) of former military death row inmates that did not have a service member victim. This brings the percentage of death row inmates having at least one service member victim to about 65%. Although this may be a significant majority, it may be still difficult to discern whether this number truly supports the proposition that having a service member victim increases one's chances of receiving a death sentence. This percentage gets stronger, however, when analyzing the rate death sentences get overturned which involve multiple service member victims.

Excluding the outliers of Kenneth Parker and Wade Walker, less than 6% of the military death row inmates with multiple service member victims have left death row. Although Kenneth Parker and Wade Walker had more than one armed service member victim, these cases are outliers due to the uncertainty of which man committed either of the two murders. Both cases had a systemic problem of how much either man was involved, so their cases are best classified as an outlier. Even in these two cases included, however, it means only 17.6% of the people who are or have been on death row eventually received a reduced sentence when there were multiple armed service member victims. This data further suggests murdering multiple service member victims is not only more likely to get someone a death sentence, but also maintain the death sentence. This is excepting of course any major evidence or due process violations which may also account for the Kenneth Parker and Wade Walker cases.

Thirdly, when there is not a service member victim, lesser sentences are often pursued. The Robert Bales case is a prime example of this scenario. The facts concerning the murders committed by Robert Bales are particularly stunning given the number of victims (16), having child victims, and the burning of the victims' homes and bodies during and after the murders. However, all of the victims were civilians. Although the death penalty could have easily been on

the table, it was eventually not pursued. This is starkly contrasted with another recent case involving Nidal Hasan who killed 13 armed service members. Compared to the Hasan's case, the Bales' case seems even more depraved. Bales' had three more victims compared to Hasan as well as child victims. Bales also took extra steps to burn the homes and bodies of his victims while Hasan did not take these extra actions. However, Hasan received the death penalty and Bales received LWOP because the death penalty was not even pursued. Comparing these cases suggests additional depravity in a murder case may be impliedly outweighed when armed service member victims are involved.

VII. Conclusion

The use of the military death penalty has changed greatly throughout the 20th century. The current system under the UCMJ is unique when compared parallel civilian systems in the U.S. Although the military death row is small, there are many unique factors which come into play. There are unique express aggravating factors unique to the military system as well as some implied factors involving the location of the accused, and qualities of their victims which influence death sentencing. It seems, however, the circumstances surrounding where a murder takes place and who the victim is greatly influences the end result for the military death penalty.