

Comparative Systems Subcommittee
Written Statement of
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I am Neal Puckett, the Highly Qualified Expert in Complex and Sexual Assault Litigation for the Navy Defense Counsel Assistance Program. I am in my 30th year of the practice of military or federal criminal defense law. During my twenty years in the Marine Corps I served as an Intelligence Officer and Counterintelligence Officer, a military defense counsel, a prosecutor and an advisor to a GCM convening authority. I also served five years as a military judge. In addition to my bachelors and law degrees, I obtained an LL.M. in criminal law and a Master's degree in National Security and Strategic Studies. Later I supervised both prosecutors and defense counsel and defended a capital murder case. Upon my retirement I served 14 months as an assistant federal public defender in Pensacola, FL, defending felony cases in federal court. I launched a solo practice in military criminal defense in the spring of 1999, gradually building it into a four-attorney firm, and continued defending service members facing courts-martial until I was hired by the Navy and assumed my current position in December 2012. I was at the center of more complex, high profile war crimes cases than any attorney in the country. I represented former Florida Congressman and retired Army LTC Allen West, charged with detainee abuse in Iraq in 2003. In 2004, I represented BG Janis Karpinski, the Abu Ghraib prison commander, who was never criminally charged. Throughout the war years I made several trips to Iraq, Kuwait and Afghanistan in defense of our soldiers and Marines in harm's way. In 2010, I was lead counsel representing Navy SEAL Matthew McCabe, who along with two brother SEALs, was charged with detainee abuse in Iraq after leading a mission to capture the Butcher of Fallujah who tortured and incinerated 4 defense contractors in 2004. I was lead counsel in the case of SSgt Frank Wuterich, charged with nineteen counts of murder following the killing of 24 Iraqi civilians at Haditha, Iraq, in 2005 where an IED destroyed a HUMVEE killing one Marine and seriously wounding two others. That case went on for six years and included four trips to the Court of Appeals for the Armed Forces, including one petition for certiorari to the Supreme Court, and an appearance on CBS 60 Minutes, even before the trial began. The Haditha case

Written Statement of Neal A. Puckett, Esq., Navy DCAP Highly Qualified Expert

is widely acknowledged to have been the most complex case in the history of military justice and was cited along with Abu Ghraib as reasons why the government of Iraq refused to sign an acceptable Status of Forces Agreement which would have allowed U.S. combat troops to remain in Iraq past 2011. Before accepting this HQE position I presided over 542 cases as a military judge, and litigated a total of 646 as a prosecutor or defense counsel.

The views I express in this statement are my own and do not necessarily reflect the positions of the Judge Advocate General of the Navy or the Department of the Navy.

DCAP was created in 2010 to support and enhance the proficiency of the Navy Defense Bar, provide experienced reach-back and technical expertise for case collaboration, and to develop, consolidate and standardize resources for defense counsel. DCAP personnel (2 Judge Advocates and 1) consult with detailed defense counsel through every phase of the court-martial process, providing around the clock support for attorneys around the world. DCAP also creates, facilitates and/or provides, and tracks training for defense counsel. As DCAP Director, CDR Don King previously testified, Navy defense counsel are provided pipeline training that begins upon entrance to the Naval Justice School. The training is tracked, monitored, and constantly critiqued and modified to ensure effectiveness and to meet emergent needs. Training courses afforded to defense counsel include the following:

Basic Lawyer Course: The Basic Lawyer Course (BLC) is the foundational course all Navy Judge Advocates attend once commissioned. Over an eight week period, counsel are immersed in lectures, readings, and practical applications that focus on military law, including courts-martial.

Defense Counsel Orientation Course: This one week course is offered every six months and orients the new defense attorney to their new duties. Areas of instruction include: pretrial investigations, Article 32s, voir dire, trial advocacy, utilizing expert witnesses and areas of emerging law. Each defense counsel must attend this course within six months of reporting to the DSO.

Written Statement of Neal A. Puckett, Esq., Navy DCAP Highly Qualified Expert

Basic Trial Advocacy: Offered every six months, this one-week course affords defense counsel instruction and the opportunity to exercise trial advocacy skills. Practical exercises cover topics such as voir dire, opening statements, cross examination, interview techniques and closing arguments. Each defense counsel must attend this course within six months of reporting to the DSO.

Defending Sexual Assault Cases: This week-long course focuses on defending sexual assault cases. Among the faculty are renowned evidence professors, experienced civilian defense attorneys, and expert witnesses. The course allows for fulsome discussion of issues that pervade the typical sexual assault case and includes practical exercises focusing on the facts of an actual trial. Students are given extensive access to experienced practitioners and expert witnesses and frequently use this time to consult with other attorneys on themes and issues with their current cases. Defense counsel will attend this course within their first year of reporting for duty.

Intermediate Trial Advocacy: This one-week course is offered every other year and builds upon basic concepts taught in the Basic Trial Advocacy course.

Litigating Complex Cases: This three-week course is offered online twice per year. Through a combination of assigned readings, video lectures and discussion board participation, students learn what makes a case complex and how to address those complexities.

Senior Defense Counsel Course: This course is offered to litigators in supervisory positions, usually at their 6-8th year of active duty. The course focuses on leadership, mentorship, supervising litigators and case dockets and how to administer effective training. This one-week course is offered every other year.

Defense Counsel Ethics: This three-week, online course focuses on reinforcing the ethical responsibilities of the defense counsel. The course highlights dealing ethically with the client, the court and opposing counsel. Counsel explore the subject matter through a combination of required readings, video lectures and discussion.

Trial Practice Institute: This renowned two-week course is offered by the National Criminal Defense College and divides defense counsel from throughout the country into small groups according to

Written Statement of Neal A. Puckett, Esq., Navy DCAP Highly Qualified Expert

trial experience. Small group exercises are supplemented by faculty lectures and demonstrations in every facet of the criminal trial, including client interviews, jury selection, direct and cross examination, impeachment and closing arguments. Using professional actors to play the roles of witnesses, each participant performs daily assignments under the supervision of a member of the nationally recognized faculty. Five Navy defense counsel attended last year.

National Association of Criminal Defense Lawyers: This organization sponsors several relevant legal seminars aimed at the criminal defense attorney. One such seminar is the week long “Zealous Advocacy in Sexual Assault and Child Victims Cases.” Last year the Navy sent three defense counsel to this course.

Mobile Training Teams: DCAP offers an extensive training curriculum for its Mobile Training Teams (MTTs). DCAP schedules visits to each DSO and large Detachments twice each year to provide a three-day course of instruction. The training varies and usually addresses issues local counsel are experiencing, nearly always sexual-assault related. Each trip includes practical exercises that assist DCAP in its mission of monitoring the “relative experience levels of trial defense counsel.”

In providing this training, DCAP logged over 90,000 miles of travel in visiting 17 locations worldwide in FY 2013, providing 45 days of instruction and more than 220 hours of training, but still fell short of reaching all of our counsel with this vital trial advocacy training due to insufficient funding for their travel to our training locations or scheduling conflicts.

As a Marine Corps judge advocate, I was privileged to have benefited from ample training budgets which allowed us to attend many military and civilian continuing legal education seminars. I can recall spending two weeks at the University of Houston Law School attending the career prosecutors’ course offered by the National College of District Attorneys. Other week-long seminars I attended included prosecuting drug cases, trial strategy and techniques and prosecution of violent crime. As a defense counsel I attended courses in defending drug cases, the latest trends in use of forensic evidence and defending sexual assault cases, which were offered by the National Association of Criminal Defense Lawyers or similar organizations. I also attended several courses at the Army JAG School in

Written Statement of Neal A. Puckett, Esq., Navy DCAP Highly Qualified Expert

Charlottesville and NJS in Newport, RI. All of these occurred within a couple of years. As a military judge I attended the military judges' course in Charlottesville, and attended a criminal evidence course at the National Judicial College in Reno, NV, as well as two inter-service military judges' conferences. During my last tour, I attended a four-day capital litigation defense course at the NJS in preparation for my capital defense case.

Today our counsel must get by on much smaller travel and training budgets for reasons we all understand. That means it is up to those of us in the training business to make the opportunities we still have the very best they can be. I believe that the training provided to our defense counsel at various stages in their tenure as litigators is robust, effective and sufficient to meet their continuing legal education needs, so long as we are able to continue to fund the trips. I also believe that best practices in litigation training must include on-site, hands-on, eyes-on training of counsel, in the manner we provide during our MTT visits. Teaching counsel litigation concepts and then having them practice those concepts under the watchful eye of an experienced litigator (and their peers), optimally, with an actual current case, is mission-essential in the development of effective courtroom advocates. This training CANNOT be provided by recording and posting videos on a website and expecting a counsel to sit at his or her desk in front of a computer monitor and acquire skills. It will just never work that way. There simply has to be an acknowledgement that advances in technological capabilities cannot replace fundamental principles of human performance training; which means live-action practice and critique. You wouldn't learn to fire a weapon from a computer monitor. What we teach is how to use the weapons of litigation. My nickname is "Weapons Expert."

Although a small number of defense counsel have litigation experience prior to joining the Navy, most officers rotating out of their initial assignments as Judge Advocates into a DSO have yet to litigate a criminal trial. DSO supervisors factor this lack of experience into detailing (case assignment) decisions, providing careful supervision and even a more seasoned litigator to sit second chair when appropriate. Each DSO has officers qualified in the Military Justice Litigation Career Track program who provide support as well. But there is no substitute for experience. I can tell you from my 30 years of experience

Written Statement of Neal A. Puckett, Esq., Navy DCAP Highly Qualified Expert

in military law that there is no such thing as a lawyer who is competent to handle solo his or her first trial, if it is a sexual assault case, regardless of how many one has observed, or how many administrative discharge boards one has conducted.

Our new officers make up for their lack of experience with an astonishing work ethic and desire to accomplish their mission. They are perfectly positioned to receive effective training and to benefit from gradually acquiring their own trial experience. But while public defenders may try as many as five jury trials a week, military counsel acquire experience at a much slower pace, due to military duties, much smaller case loads and relative small numbers of contested jury trials.

Inexperience of our Navy defense counsel is mitigated somewhat by constant evaluation and feedback. Supervisors must be ever-present both in and out of court and military judges should routinely be providing individual and group feedback on performance. These methods allow DCAP and supervisors to monitor the strengths and weaknesses of counsel and to adjust the training plans and detailing decisions accordingly. Counsel and supervisors utilize a SharePoint website to post lessons learned and after-action reports that permit counsel around the world to learn from the experiences of others.

Defense Counsel assigned to a DSO will likely receive their first case very shortly after reporting. Detailing decisions are ultimately the responsibility of the Commanding Officer, and, even if delegated, are always made by an experienced officer within the DSO in the rank of O-4 or above. On average, DSO counsel will litigate 10-12 contested cases in 18 months.

In my opinion, no counsel should be detailed by him- or herself to a client facing a sexual assault charge unless that counsel has litigated at least ten contested trials as part of a defense team, more than half of which should be sexual assault cases. As noted above, that level of experience is usually attained in the Navy only after serving 18 months as a defense counsel. In general, I believe that so long as our defense clients are provided with at least one experienced counsel for every sexual assault case, they are being effectively and competently represented. But we have seen several cases where an inexperienced

Written Statement of Neal A. Puckett, Esq., Navy DCAP Highly Qualified Expert

counsel has been assigned alone to a sexual assault case, and those cases have raised appellate issues of ineffective assistance of counsel, potentially resulting in reversing the conviction.

As DCAP Director CDR Don King pointed out in previous testimony, that today's Navy defense counsel are among the most talented and capable attorneys in their peer group. They successfully navigated an extremely competitive selection process to join the Navy's JAG Corps, are superbly trained at Naval Justice School and spend two years learning the Navy legal profession before arriving at a DSO. Attorneys at the DSO are dedicated, well-trained professionals with a variety of experience levels, including litigation experts who have been involved in courts-martial for several years. They are also provided ample assistance and resources around the clock. My job is to be one of those resources, so that lessons I have learned, occasionally the hard way, can be shared with our young gladiators to avoid making mistakes that can result in a wrongful conviction.

But as in the other services, Navy defense counsel get good training and experience and become competent, only to then move on to other assignments, often outside the courtroom. Thus there is a continual need for training for the new batch of defense counsel we get every year, along with refresher training for those still in or returning to the job of defense counsel. Last year we had to wait until a couple of days before each of our planned MTT visits to find out whether the travel would be approved, due to funding constraints and resulting elevation of approval authority, and many of the visits were delayed until the end of the fiscal year. Admittedly that was caused by sequestration, but with shrinking budgets, I am concerned that there will be a call for eliminating our current best practices concept of on-site, hands-on, eyes-on training of our defense counsel in the various critical skill sets they need to effectively represent their clients.

So our primary challenge for the future is continuing to find the resources to fund the critical training required to maintain proficiency in all of the skills required to defend those Sailors and Marine accused in our most complex and challenging cases: those alleging sexual assault.

