THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S, Appellee	APPELLANT'S REPLY BRIEF ORAL ARGUMENT REQUESTED
v.	Docket No. ARMY 20150505
Specialist (E-4) JEFFERY T. PAGE, United States Army, Appellant	Tried at Fort Carson, Colorado, on 18 March, 18 May, and 15-18 June 2015, before a General Court-Martial, appointed by the Commanding General, Headquarters, Fort Carson, Colonel Douglas K. Watkins, Military Judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

COME NOW the undersigned civilian and military appellate defense counsel pursuant to this court's Rules of Practice and Procedure, and files this Reply Brief in response to the government's 4 May 2017, Brief on Behalf of Appellee (Gvt. Br.).

DISCUSSION

I. The Evidence is Factually and Legally Insufficient

In his opening brief, SPC Page explained that the prosecution's purely and exclusively circumstantial evidence on the most important issue at trial, his state of mind when he squeezed the trigger from the two-soldier guard shack at an entry-control point on a Jordanian Airbase, was legally and

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factually insufficient to sustain the unpremeditated murder conviction for want of intent to kill.

To defend the conviction and sentence, the government essentially restates the patchwork and conditional evidence the prosecution offered on the question of intent to kill. Absent, however, from the government's brief is any real weakening of the probative force and weight of the undisputed evidence of culpable negligence.

For example, the government did not and cannot dispute: a) that not one witness testified that SPC Page intended to kill SPC Perkins; b) there is significant evidence of culpable negligence which remains largely unchallenged; c) the physical evidence corroborates SPC Page's testimony during the providence inquiry, as does other witness testimony; d) leaving undisputed facts that the murder conviction was and remains factually and legally insufficient; and e) factually similar caselaw informs that involuntary manslaughter is the appropriate conviction.

A. <u>There is No Witness Testimony of Intent to Kill</u>

For example, the government fails to squarely address the undisputed fact that *not one soldier* testified that they thought SPC Page intended to kill SPC Perkins. Of the eleven (11) witnesses, nine (9) lay persons and two (2) experts the government offered in its case-in-chief, none testified that SPC Page had the intent to kill. That is, the entire record is void

of *any* testimony from *any* witness that SPC Page intended to kill SPC Perkins.

The total absence of any witness testimony supporting intent is wholly consistent with SPC Page's sworn answers to the military judge's questions during the providence inquiry. The total absence of testimony supporting intent is also consistent with those facts contained in the Stipulation of Fact entered into as part of the plea to involuntary manslaughter by culpable negligence.

B. Substantial Witness Testimony of Culpable Negligence

Although there is a noticeable absence of witness testimony to murder, the record contains abundant and compelling testimony to involuntary manslaughter. For example, three (3) Criminal Investigation Command (CID) agents testified that the entire investigation, to include blanket and repeated interviews and a forensic search authorized by warrant of SPC Page's laptop, revealed no evidence of an intent to kill. (R. at 853; 874; 890; Art. 32(b)).

Specifically, the lead investigator testified that every witness the CID interviewed universally believed there was no intent to kill:

> Q. And all the interviews that you carried out was there any evidence that Specialist Page had the motive to kill Specialist Perkins?

> A. There was nothing to indicate that he was in a state of mind to want Specialist Perkins dead.

(R. at 872, Art. 32(b)).

Similarly, the CID agent who conducted blanket interviews testified that no witness thought SPC Page intended to kill:

> Q. Since you've had a copy of the reports, there are no reports by any witness that, when you did the blanket interviews that Specialist Page had expressed any intent or desire to kill or harm Specialist Perkins. Correct?
>
> A. That is correct, sir. To my knowledge that's what was related to me.

(R. at 890, Art. 32(b)).

Likewise, the Air Force Office of Special Investigations (AFOSI) originally investigated this shooting. The AFOSI did not find murder, rather, negligence surrounding the shot.

What is more, the 1088-page verbatim Article 32(b) hearing transcript contains sworn testimony from twelve (12) witnesses that SPC Page had no intent to kill.

The following demonstrative chart lists each of these witnesses by name, offers a brief description of their exculpatory testimony, provides citation to the Article 32(b) verbatim transcript, and offers an explanation as to why this material, exonerating, and/or mitigating evidence did not make it before the military judge during the court-martial:

	WITNESS	ARTICLE 32 Verbatim Transcript	COURT - MARTIAL Transcript
1	SPC Catlin	No intent to kill (442)	Not called to testify
2	SA Nichols	No intent to kill (853)	Not called to testify
3	SA Wimberly	No intent to kill (874)	Not called to testify
4	SA Wood	No intent to kill (890)	Not called to testify
5	CPT Brenzika	No intent to kill (921)	Not called to testify
6	MAJ Thibodeau	No intent to kill (1047)	Not called to testify
7	1LT Wilson	No intent to kill (1062)	Not called to testify
8	PFC Macaskill	No intent to kill (310)	Not asked about intent
9	SSG Wyvill	No intent to kill (181)	Not asked about intent
10	SGT Nys	No intent to kill (539)	Not asked about intent
11	SPC Curley	No intent to kill (644)	Not asked about intent
12	SGT Adams	No intent to kill (364)	Not asked about intent
13	AFOSI	No intent to kill (1066)	Not offered by Defense
14	Laptop	No intent to kill (874)	Not offered by Defense

That these witnesses and evidence were not presented during the court-martial is the subject of SPC Page's Sixth Amendment ineffective assistance of counsel assignment of error as part of his *Grostefon* matters, discussed more fully below.[1]

The point here, however, is this evidence, from the soldiers who spent the five and one-half (5.5) month deployment working twelve (12) hour shifts in the Jordanian heat with SPC Page, his NCOs who supervised him, an AR 15-6 investigating officer, and the three (3) CID agents who investigated the shot,

[1] Specialist Page respectfully requests to supplement his personal matters pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982) by claiming ineffective assistance at trial. Specifically, he requests to highlight the twelve (12) witnesses who testified at the Article 32(b) pretrial investigation that did not believe SPC Page had the intent to kill but were not called by the defense counsel. As part of his *Grostefon* matters, he respectfully requests this court to admit the Article 32(b) verbatim transcript to the record of trial for this court's consideration on appeal, and his motion to attach the verbatim transcript is filed contemporaneously with this Reply Brief.

all swore that SPC page did not intend to kill. This is forceful, substantiated, and trustworthy evidence demonstrating factual and legal insufficiency.

In addition to the dozen witnesses who unanimously found no evidence of intent to kill, the physical evidence further exposes the prosecution's purely conditional evidence as too weak to support the finding of specific intent.

C. The Physical Evidence Corroborates the Testimony

In its brief on behalf of appellee, the government essentially restates the circumstantial evidence to defend the conviction and sentence. However, the record contains considerable physical evidence that corroborates the testimony that this shooting was a tragic manslaughter and not a murder.

For example, SPC Page testified during the providence inquiry that he chambered one (1) round about 1500 the day before the shooting (14 May) during a vehicle borne improvised explosive device (VBIED) alert, and that he forgot the round was in the chamber. Sergeant Duty, who secured SPC Page's weapon moments after the shot and confirmed thirty (30) rounds in the magazine and one (1) casing on the floor, swore that,

> the only way I could think [the shooting] is possible is maybe on a previous shift [SPC Page] had loaded the magazine and was unaware, charged his weapon and that he had a round in his weapon and didn't even know about it until the following shift later.

(R. at 675, Art. 32(b)). That thirty (30) rounds remained in SPC Page's magazine and the casing from the spent round was recovered reinforces SPC Page's testimony that he chambered a round the day before and placed a new thirty (30) round magazine into his rifle upon shift change-over at the guard shack the morning of the shot.

Directly after the shot, SGT Duty confirmed that one (1) of the guard shack magazines contained 29 rounds, corroborating SPC Page's testimony that he chambered a round the afternoon prior and SPC Mancha's testimony that a "push-test" revealed 29 rounds in one of the guard shack magazines during shift transfer with SPC Page, approximately three (3) hours prior to the shot. (R. at 442-43).

That all three hundred (300) rounds were accounted for moments after the shot backs SPC Page's testimony and supports SGT Duty's causation assessment, *supra*. The guard shack had ten (10), 30-round M4 magazines, for a total round-count of three hundred (300). Specialist Page had one (1) round in the chamber, which was fired and its casing recovered on the floor of the guard shack by SGT Duty. Specialist Page also had thirty (30) rounds in his magazine.

Three hours prior to the shot when SPC Page and PV2 Macaskill came on duty, SPC Mancha counted the magazines and one (1), pursuant to a "push-test," had but twenty-nine (29) rounds. All other magazines had thirty (30) rounds. Accordingly, that SPC Page had one (1) in the chamber, thirty (30) in his magazine, a

different guard-shack magazine had twenty-nine (29), and the balance of the magazines had thirty (30), accounts for all 300 rounds. That all rounds are accounted for validates SPC Page's testimony, as well as the testimony of the other 12 witnesses who found no intent to kill.

Another example of the physical evidence corroborating SPC Page's testimony: his rifle "double-fed" after the shot. The Army Field Manual for the M4 rifle is part of the record. It explains that the standard load for an M4 rifle is thirty (30) rounds. If a soldier attempts to load a thirty-one (31) round magazine, it will not ordinarily "seat" in the well properly.

However, if a round is already in the chamber, a soldier loads a thirty (30) round magazine, does not pull the charging handle but fires the round already chambered, the force of the extraction and ejection coupled with the additional pressure of too many rounds being cycled can produce a double-feed, which is also consistent with SPC Page's testimony that he chambered a round the day before.

That a round was already in the chamber tends to explain why PV2 Macaskill, standing a mere 6-8 inches away from SPC Page in the guard shack, neither saw nor heard SPC Page pull the charging handle - because a round was already chambered from the day prior.

Further, SPC Page's NCOs, SGT Nys and SGT Cullum, corroborate SPC Page's testimony because each chambered a round during the

afternoon of the VBIED incident (14 May), SGT Cullum stating to SPC Page, "watch and learn." (R. at 356-57).[2]

Furthermore, in the government's brief, there is scant discussion of the evidence surrounding SPC Page's mindset immediately before and directly after the shot, which reliably connotes culpable negligence and contrition. Before the shot, SPC Page talked with SPC Macaskill about leave, buying a truck, and women. (R. at 210-11, Art. 32(b)). Also before the shot, SPC Page talked with SSG Wyvill about re-enlistment and career advancement opportunities in the Army. (R. at 109, Art. 32(b)).

After the shot, SPC Page radioed for help, ran to SPC Perkins, assisted the medic, admitted he shot SPC Perkins, and was in "psychogenic shock." (R. at 343).

It stands to reason that a soldier bent on killing his squad mate is not thinking about career advancement, going on leave, buying a truck, and dating. Nor does he run to the aid of his victim, call for help, assist the medic, admit what he did, go into psychogenic shock, and apologize for the shot.

The government has not, and frankly cannot, diminish the direct and physical evidence against specific intent, which

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[2] Specialist Page requested during pretrial discovery the paper vehicle entry logs from the guard shack as well as the computer vehicle entry records kept at the BDOC. None were forthcoming, even though the records existed. Specialist Page sought these records to reinforce his testimony that the VBIED incident where he chambered a round was 14 May, the shift before and the day before the fatal shot.

surely led the CID agent who spearheaded the investigation to conclude that, "[t]here was nothing to indicate that [SPC Page] was in a state of mind to want Specialist Perkins dead." (R. at 872, Art. 32(b)).

D. Undisputed Facts Show Factual and Legal Insufficiency

Reviewing this assignment of error *de novo*, *United States v. Winckelmann*, 70 M.J. 403, 406 (C.A.A.F. 2011), the following facts remain undisputed. The weight of these facts is contrary to the finding of specific intent.

1) SPC Page, a high school graduate, was 22 years-old;

2) He had been in the Army for about two (2) years;

3) This was his first deployment;

4) The Patriot Missile Battery the unit was assigned to guard was a separate post within the larger, secured Jordanian air base;

5) SPC Page worked two (2), 12-hour *night* shifts followed by two (2), 12-hour *day* shifts - an alternating schedule;

6) The temperature in Jordan was consistently over 100 degrees Fahrenheit;

7) The 12-hour shifts on a "post-within-a-post" (the US Patriot Missile Battery within the larger and secured Jordanian Air Base) were monotonous;

8) Soldiers were found sleeping at their post;

9) Soldiers veered off the road while driving around the airfield;

10) Soldiers were found playing video games on their cell phones while at their post;

11) An expert in psychiatry testified that SPC Page's unit was suffering from "operational stress" due to "chronic sleep deprivation" which is correlated with an increase in accidents;

12) SPC Page had no previous history of discipline;

13) SPC Page had never previously zeroed his M4 rifle;

14) SPC Page never previously fired his weapon;

15) SPC Page's M4 rifle optic was broken;

16) There were no clearing-warning signs;

17) There were no clearing barrels;

18) Clearing barrels appeared the day after the shot;

19) NCOs did not visually inspect rifles in violation of the Brigade Commander's directive;

20) Soldiers returned their own rifle to the CONEX;

21) Soldiers often returned other soldiers' rifles to the CONEX, to include the Team Leader and/or Squad Leaders' rifles;

22) There were no "amnesty" boxes;

23) Weapons status was amber, meaning a 30-round magazine loaded but no round in the chamber;

24) The platoon leader never directed NCOs to conduct spot-checks to ensure soldiers had not chambered rounds;

25) Soldiers wore full "battle-rattle" in the triple digit heat;

26) Heat exhaustion and dehydration were significant concerns;

27) Nearly every soldier and NCO in the platoon, not just SPC Page, thought SPC Perkins a sub-standard soldier and an "oddity;"

28) SPC Macaskill was standing 6-8 inches from SPC Page in the guard shack when the shot rang out;

29) SPC Macaskill testified that before the shot, SPC Page appeared "normal," and that the two talked about "leave," "buying a truck," and "women;"

30) SPC Page did not know for certain whether SPC Perkins would be bringing lunch to the guard shack (SPC Curley was assigned to bring lunch to the guard shack, and SPC Perkins asked SPC Curley if he could go with);

31) SSG Wyvill, the squad leader, testified that he saw no unusual tension between SPC Page and SPC Perkins;

32) SSG Wyvill testified that minutes before the shooting, he and SPC Page were having a cigarette and talking about re-enlistment and career progression in the Army;

33) NCOs encouraged soldiers to "dry-fire;"

34) NCOs regularly conducted "dry-fires" with their soldiers;

35) The fatal shot occurred in broad daylight around lunchtime with several soldiers in the area;

36) After the shot, SGT Duty thought SPC Page was going to shoot himself;

37) After the shot, SPC Page's M4 rifle "double-fed;"

38) After the shot, SPC Page's rifle was visibly dirty and sandy;

39) After the shot, a separate M4 rifle magazine was recovered from the guard shack with 29 rounds in it;

40) SPC Macaskill, standing next to SPC Page when the shot rang out, did not observe SPC Page pull the charging-handle;

41) SPC Macaskill, standing next to SPC Page, never heard SPC Page utter words consistent with intent to kill before the shot rang out;

42) After the shot, SPC Page's hands were shaking;

43) After the shot, SPC Page ran to help SPC Perkins;

44) After the shot, SPC Page helped the medic attend to SPC Perkins;

45) After the shot, the unit medic testified that SPC Page was in shock;

46) While helping treat SPC Perkins, SPC Page freely admitted that he shot SPC Perkins while dry-firing and "being stupid;"

47) SGT Nys chambered a round on the afternoon of the VBIED threat;

48) SGT Cullum chambered a round on the afternoon of the VBIED threat;

49) The prosecution neither disclosed nor produced the paper logs of vehicle entry from the guard shack or the computer records of vehicle entry from the BDOC as evidence that the VBIED incident did not occur on 14 May, the day before the shooting; and

50) Not one witness testified that SPC Page intended to kill SPC Perkins.

For purposes of factual insufficiency, the evidence is too weak to support the finding of specific intent. The weight of the evidence is contrary to the finding of specific intent. At the same time, these undisputed facts establish the opposite of the military judge's finding. Put differently, the prosecution's evidence lacks the required probative force to support the unpremeditated murder conviction.

E. Caselaw Indicates This Case is a Manslaughter Only

Application of the caselaw to these undisputed facts shows that involuntary manslaughter is the correct conviction. For example, in *United States v. Markert*, 65 M.J. 677 (N-M. Ct. Crim. App. 2007), two Marines riding in the back of a vehicle on their way to guard duty on Okinawa drew their loaded pistols,

cocked the hammers back without the safeties on, pointed the weapons at each other, and the appellant shot his buddy in the head leading to his death. *Markert*, 65 M.J. at 678. The court accepted the accused's plea to involuntary manslaughter and sentenced him to three (3) years confinement. *Id.*

In this court-martial, there is evidence that soldiers regularly "dry-fired" not only with NCO encouragement, but also with NCO participation. There is also evidence that soldiers "flagged" and/or "glassed" each other, which involves scaring another soldier as part of horseplay by pointing one's weapon at their mate without the intent to kill. (R. at 458-59).

Prior to the 15 May shot, SPC Perkins "flagged" SPC Page (R. at 101, Art. 32(b)). Record testimony reveals that "flagging" or "glassing" is somewhat common in the Infantry and occurred within the platoon generally and the squad specifically as horseplay. *Id.* That SPC Page sought to "dry-fire" at SPC Perkins is consistent with the evidence that the unit regularly "dry-fired," "flagged," and "glassed" one another.

While treating SPC Perkins immediately after the shot, SGT Adams asked SPC Page what happened, and SPC Page replied, "I dry fired ... I was joking around and I misfired ... I don't know, it just went off." (R. at 459). Following the reasoning of the *Markert* court, this too is an involuntary manslaughter.

The facts in *United States v. Jacobs*, 9 M.J. 794 (N-M. Ct. Crim. App. 1980), also inform that involuntary manslaughter is appropriate here. In *Jacobs*, an unpremeditated murder conviction was set aside on appeal, the court finding instead an involuntary manslaughter.

There, the appellant removed a pistol from a gun case sitting on the dining room table at which he was seated, inserted a loaded magazine, let the slide go forward, and the pistol discharged a round into the victim's head, who was returning to the dining room from the kitchen, resulting in his death. *Jacobs*, 9 M.J. at 796.

After the shooting, the appellant made the statements, "I shot Chuck" and "I should have never touched the gun. I'm a stupid ass." *Id.* Other evidence was introduced tending to show that the victim and appellant's wife were "lovers" and that appellant had ample opportunity to know of this. *Id.*

The court in *Jacobs* reasoned, "that appellant by his acts of loading the pistol, having it in a ready to fire position, and having it pointing in the general direction of the victim while intending to scare the victim is sufficient to sustain a conviction under Article 119…" *Id.* at 797. The court approved only so much of the finding which extended to involuntary manslaughter and authorized a new sentencing hearing. *Id.* at 798.

Like the appellant in *Jacobs*, SPC Page put a round in the chamber of his rifle (although not moments before the shot as in *Jacobs*, but the day before the shot), had his rifle in the ready to fire position pointing it at SPC Perkins with the intent to "dry-fire" and/or "glass" or "flag" SPC Perkins, and a round unexpectedly went off. Specialist Page testified as did twelve (12) other witnesses that there was no intent to kill.

Also like the appellant in *Jacobs*, SPC Page admitted almost immediately that he shot SPC Perkins, that it was an accident, a misfire, that he was sorry, and that he forgot there was a round in the chamber.

Application of the *Jacobs* rationale and decision suggest that here too, the evidence supports manslaughter only and that a new sentencing hearing is rightly authorized.

United States v. Peterson, 17 U.S.C.M.A. 548 (1968), also counsels that manslaughter is the correct conviction in this court-martial. In *Peterson*, the appellate court upheld a guilty plea to involuntary manslaughter where the accused, engaged in horseplay, tossed a grenade toward a shower point in Vietnam, killing one (1) and wounding five (5).

The trial court adjudged a sentence which included five (5) years confinement, the convening authority approved two (2) years confinement by agreement, which the appellate court upheld. *Peterson*, 17 U.S.C.M.A. at 548.

Unlike the accused in *Peterson*, SPC Page did not harm anybody beyond SPC Perkins, let alone five (5) others. Like the accused in *Peterson*, SPC Page engaged in horseplay within the context of involuntary manslaughter by culpable negligence by his "dry-firing," or "glassing," or "flagging." When he tossed the grenade at his buddies in the shower, the appellant in *Peterson* had no intent to kill. Likewise, when he squeezed the trigger of his M4 rile, SPC Page had no intent to kill. The tossing of the grenade without the intent to kill is the functional equivalent of "dry-firing" or "flagging" or "glassing" without the intent to kill.

Accordingly, the *Peterson* rationale and decision provides additional authority to find SPC Page's conduct an involuntary manslaughter, authorize a new sentencing hearing, or approve only so much of the sentence to confinement which extends to three (3) years. *Accord United States v. Oxendine*, 55 M.J. 323 (C.A.A.F. 2001) (involuntary manslaughter where accused helped hang drunk Marine out of a third-story window during thrill-seeking game with other Marines; drunk Marine fell to his death).

The foregoing cases indicate that the government did not prove beyond a reasonable doubt that SPC Page intended to kill SPC Perkins, neither factually nor legally. *See* Articles 59(a) and 66, U.C.M.J.

F. Command Negligence a Substantial Factor

The government's brief fails to address the military judge's having discounted the significant evidence of command-negligence as a substantial factor in bringing about the fatal shot. In addition to the dozens of instances SPC Page cites in his opening and reply briefs of the command's actions bearing on this tragic shooting, one soldier sums this point up when he remarked, "[c]omplacency kills. You get complacent, you get relaxed, people get hurt, people don't do their jobs and something bad happens and things like that." (R. at 550, Art. 32(b)).

G. Sentencing Rehearing

In the event this court approves only so much of the finding that extends to involuntary manslaughter, SPC Page respectfully requests a sentencing rehearing.

The military judge considered a maximum sentence including life imprisonment but imposed a term of 26 years. The maximum term of confinement for involuntary manslaughter is ten years, demonstrating a dramatic change in the penalty landscape reducing the offense from an intentional killing to an act of culpable negligence. *See United States v. Harris*, 53 M.J. 86, 88 (C.A.A.F. 2000) (only "fair course of action" is a sentencing rehearing).

Alternatively, SPC Page respectfully requests that this court approve only so much of the sentence to confinement which extends to three (3) years, in accordance with the approved sentences in the factually similar cases noted *supra*.

Finally, SPC Page would like to reiterate his contrition and mindset by reference to the following comment to the military judge: "[a]nd, I'm very, very sorry for what happened, Your Honor. I never wanted to hurt Specialist Perkins, ever." (R. at 160).

Respectfully submitted,

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APPENDIX

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant SPC Jeffery Page through appellate defense counsel, personally requests the court to consider the matters previously submitted, those submitted to the convening authority pursuant to Rules for Courts-Martial 1106 and 1106, and the following assignment of error based on the Sixth Amendment right to the effective assistance of counsel at trial.

I.

Trial Defense Counsel's Assistance During this Court-Martial was Ineffective

LAW

"Claims of ineffective assistance of counsel are reviewed *de novo*." *United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011) (internal citations omitted). In evaluating allegations of ineffective assistance of counsel, this court applies the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

In *Strickland*, the Supreme Court found that the Sixth Amendment entitles criminal defendants to the "effective assistance of counsel"— that is, representation that does not fall "below an objective standard of reasonableness" in light of "prevailing professional norms." *Strickland*, 466 U.S. at 686.

Review of an attorney's representation is "highly

deferential" to the attorney's performance and employs "a strong presumption" that counsel's conduct falls within the wide range of professionally competent assistance. *Id.* at 688-89.

The Court of Appeals for the Armed Forces has applied this standard to courts-martial, noting that to prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate: 1) that his counsel's performance was deficient; and 2) that this deficiency resulted in prejudice. *United States v. Green*, 68 M.J. 360, 361-62 (C.A.A.F. 2010).

This court judges the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. *Strickland*, 466 U.S. at 690. In making that determination, this court considers the totality of the circumstances, bearing in mind "counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work . . . [and] recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.*

ARGUMENT

In this court-martial, there is a 1088-page verbatim transcript of the Article 32(b) pretrial investigation. Trial defense counsel was present for and participated in the lengthy hearing. Review of the transcript shows that no fewer than

twelve (12) witnesses testified at the Article 32(b) that SPC Page did not intend to kill SPC Perkins.

Nevertheless, trial defense counsel neither called these twelve (12) witnesses nor elicited their testimony *at trial* which stood to provide the military judge with substantial first-hand, direct evidence favorable to SPC Page and against the prosecution:

1) Staff Sergeant Wyvill, SPC Page's squad leader, testified that:

> Q. Based upon your knowledge of Specialist Page up that point based upon your deployment with him, being his NCOIC, spending all that time doing the videos--do you believe Specialist Page, based upon your knowledge of him, intended kill Specialist Perkins?
>
> A. I don't.

(R. at 196).

2) Private Macaskill, standing 6-8 inches away from SPC Page in the guard shack when the round went off stated under oath:

> Q. Did [SPC Page] say or do anything to you to give indication that he had any intent to harm anybody?
>
> A. No, sir.

(R. at 256). Private Macaskill continued:

> Q. Specialist Page did not act in any way that he intended to harm Specialist Page?
>
> A. Specialist Perkins.

Q. Perkins. I apologize, correct?

A. No, sir.

(R. at 310).

3) Specialist Catlin, the unit's junior medic at the scene of the shooting related that:

> Q. When you wrote, "He just kept saying he was sorry and kept asking was there anything he could do to help," same question, what was his demeanor when he said that?
>
> A. I felt like he was genuinely sorry, like he didn't intentionally do it, like he was like really trying to cope with it and trying to offer his help in the situation.

(R. at 443). Specialist Catlin continued:

> Q. Part of what is going into your conclusion is that at the time that you were looking at his demeanor, you didn't have any reason to believe that Specialist Page intentionally murdered Specialist Perkins correct?
>
> A. Correct.

(R. at 453-53).

4) Sergeant Nys, one of SPC Page's NCOs, related:

> Q. So Specialist Page up until May 15th was not giving you any indication that he had any intent to harm Specialist Perkins did he?
>
> A. No.
>
> Q. He didn't say anything to you that would indicate intent to harm Specialist Perkins, right?
>
> A. Correct.

> Q. He didn't act in any manner towards Specialist Perkins that would indicate he intended to harm Specialist Perkins?
>
> A. Correct.

(R. at 539). Sergeant Nys continued:

> Q. Anywhere on your written CID statements that you made within days of the event, did you state that Specialist Page ever had the intent to harm Specialist Perkins?
>
> A. I can't remember. I don't think so.
>
> Q. Why don't you to flip through those statements right there, I want to make sure, this is important.
>
> A. No.
>
> Q. Did you have an opportunity to review your statements?
>
> A. Yes.

(R. at 583-84).

5) Specialist Curley, standing next to SPC Perkins when the round went off, testified that,

> SPC Page looked pretty freaked out . . . kept saying 'misfire,'. . . and that the NCOs did not clear weapons on 15 May [the morning of the shot].

(R. at 624; 640; and 630-31).

6) Special Agent Nichols, a CID investigator, stated:

> Q. So going back to then--is it fair to say, based upon your role as a supervisor, you didn't see any evidence that Specialist Page had a motive to kill Specialist Perkins?

A. Based on the information we collected during the investigation, I don't believe we ever determined a clear cut, what would be considered, a clear-cut motive.

(R. at 853-54).

7) Special Agent Wimberly, a CID investigator testified:

Q. And all the interviews that you carried out was there any evidence that Specialist Page had the motive to kill Specialist Perkins?

A. There was nothing to indicate that he was in a state of mind to want Specialist Perkins dead.

(R. at 872).

8) Special Agent Wood, a CID investigator stated:

Q. Since you've had a copy of the reports, there are no reports by any witness that, when you did the blanket interviews that Specialist Page had express any intent or desire to kill or harm Specialist Perkins. Correct?

A. That is correct, sir.

(R. at 890).

9) Captain Brenzika, who preferred charges:

Q. We talked about Specialist Page's intent being important would evidence of a lack of intent to shot Specialist Perkins had been important to you?

A. Would a lack of intent?

Q. Lack of intent to kill Specialist Perkins have been important?

A. I think I understand what you are saying, but I wasn't given any documentation or sworn statement by Specialist Page to determine his intent.

(R. at 921).

10) Major Thibodeau, an AR 15-6 investigator stated,

> Q. Any evidence regarding anybody told you that Specialist Page had any intent to kill Specialist Perkins?
>
> A. No.

(R. at 1047).

11) Lieutenant Wilson:

> Q. I noticed in one of the emails that you sent out that you had identified the initial assessment by OSI remains that this was due to negligence not intentional. Do you recall that?
>
> A. hm-hmm [positive response]

(R. at 1062). Lieutenant Wilson continued:

> Q. What did you write?
>
> A. That the initial assessment by Air Force OSI remains that this is due to negligence and not intentional.

(R. at 1066).

These witnesses included the line-of-duty investigating officer, the company commander who preferred charges, and various NCOs and soldiers who knew both SPC Page and SPC Perkins during the five and one-half (5.5) months of the deployment to Jordan.

Three (3) CID agents, who conducted blanket interviews and led the entire criminal investigation, testified that there was

nothing in the investigation to show that SPC Page intended to kill SPC Perkins.

The AFOSI initially investigated the shot before the Army CID took over. The AFOSI concluded that the shot was a negligent discharge.

Put graphically below, it becomes clear that defense counsel was on notice of at least fourteen (14) sources of materially exculpatory evidence, but either failed to call the right witnesses and/or failed to ask them the right questions to elicit the exonerating testimony. Nor did counsel seek to introduce the AFOSI finding of negligence and/or the results of the CID forensic laptop test finding no intent to kill.

	WITNESS	ARTICLE 32 Verbatim Transcript	COURT - MARTIAL Transcript
1	SPC Catlin	No intent to kill (442)	Not called to testify
2	SA Nichols	No intent to kill (853)	Not called to testify
3	SA Wimberly	No intent to kill (874)	Not called to testify
4	SA Wood	No intent to kill (890)	Not called to testify
5	CPT Brenzika	No intent to kill (921)	Not called to testify
6	MAJ Thibodeau	No intent to kill (1047)	Not called to testify
7	1LT Wilson	No intent to kill (1062)	Not called to testify
8	PFC Macaskill	No intent to kill (310)	Not asked about intent
9	SSG Wyvill	No intent to kill (181)	Not asked about intent
10	SGT Nys	No intent to kill (539)	Not asked about intent
11	SPC Curley	No intent to kill (644)	Not asked about intent
12	SGT Adams	No intent to kill (364)	Not asked about intent
13	AFOSI	No intent to kill (1066)	Not offered
14	Laptop	No intent to kill (874)	Not offered

Had the military judge been presented with this compelling evidence against intent and in favor of culpable negligence, he

would have had at least twelve (12) additional bases upon which to find SPC Page not guilty of unpremeditated murder, a thirteenth (13th) basis in the form of the AFOSI report, and a fourteenth (14th) basis by introducing CID's forensic report revealing zero evidence of intent on SPC Page's laptop.

The main question during the contested portion of this court-martial was SPC Page's mindset: whether he intended to kill SPC Perkins or was instead culpably negligent. Reasonable defense counsel would have called these witnesses and asked the right questions. Counsel unreasonably failed to do either.

The same is true concerning sentencing: these witnesses were known to counsel, available, and could have provided extenuation and mitigation evidence explaining the circumstances surrounding the shot. Counsel neither called them for that purpose, nor elicited the lack of intent evidence during sentencing. *United States v. Boone*, 49 M.J. 187, 196 (C.A.A.F. 1998) (ineffective assistance of counsel can occur during sentencing when counsel fail to introduce evidence that would be of value to the accused in extenuation and mitigation).

The prejudice to SPC Page is the unpremeditated murder conviction as opposed to involuntary manslaughter, and a 26-year sentence to confinement as opposed to a confinement sentence capped at 10 years.

Although not a legally justifiable excuse for defense counsel's prejudicial trial failures, there does appear to be an explanation in the context of the prosecution's conduct of this court-martial, which can be fairly seen as overreaching.

It stands to reason that defense counsel may not have pursued the evidence discussed *supra* given the debilitating effects of the prosecution's dubious pretrial tactics. Examples include:

a) charging six (6) specifications under four (4) charges for a single act;

b) bringing an Additional Charge of premeditated murder with a potential sentence of life imprisonment without eligibility for parole;

c) refusing three (3) initial offers to plead guilty and accepting the fourth (4^{th}) on the condition that the prosecution was free to pursue more severe convictions;

d) brining eleven (11) witnesses to include two (2) experts, none providing direct evidence;

e) claiming that the War Horse Goals book was created after the shot despite significant testimony to the contrary;

f) seeking to introduce purported admissions made in violation of Article 31(b), U.C.M.J.; and

g) all while being 100% on notice of the twelve (12) witnesses who testified at the Article 32(b) that SPC Page had

no intent to kill, the AFOSI report concluded negligence, and the results of the forensic search of SPC Page's laptop revealed no evidence of an intent to kill.

These actions are a substantial departure from the prosecutorial fair-play, even in the face of the tragic death of an American soldier, called for by the Manual for Courts-Martial and the relevant caselaw.

WHEREFORE, SPC Page respectfully requests that this court approve only so much of the finding which extends to one conviction for involuntary manslaughter, order a new sentencing hearing, or approve only so much of the sentence to confinement which extends to three (3) years. *See, Markert*, 65 M.J. at 678.

CERTIFICATE OF SERVICE

UNITED STATES v. Page

Army Docket No. 20150505

Brief on Behalf of Appellant _____

Motion _____

Other ✓

I certify that a copy of the foregoing was delivered to the Court and the Government Appellate Division on 2 June 17.

MICHELLE L. WASHINGTON
Paralegal Specialist
Defense Appellate Division
(703) 693-0737

THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S, Appellee	APPELLANT'S MOTION TO ATTACH DEFENSE APPELLATE EXHIBIT "A"
v.	Docket No. ARMY 20150505
Specialist (E-4) JEFFERY T. PAGE, United States Army, Appellant	Tried at Fort Carson, Colorado, on 18 March, 18 May, and 15-18 June 2015, before a General Court-Martial, appointed by the Commanding General, Headquarters, Fort Carson, Colonel Douglas K. Watkins, Military Judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

COME NOW the undersigned appellate defense counsel, pursuant to Rule 23(b) of this court's Internal Rules of Practice and Procedure, and moves to attach Defenses Appellate Exhibit a on behalf of the appellant, Specialist Jeffery T. Page. In support, SPC Page states as follows:

1. There is a 1088-page verbatim transcript of the Article 32(b) pretrial hearing in this court-martial.

2. During that lengthy hearing, twelve (12) witnesses testified that SPC Page did not have any specific intent to kill SPC Perkins.

3. Testimony during the Article 32(b) hearing also focused on an Air Force Office of Special Investigations (AFOSI) report that the shot that killed SPC Perkins was the result of negligence rather than murder.

4. Other testimony at the Article 32(b) hearing described the lengthy efforts the Army Criminal Investigation Command (CID) undertook to secure a warrant to perform a forensic search of SPC Page's personal laptop for evidence of his fitting an "active shooter" profile in order to establish motive and/or intent. After the forensic search, no evidence of an intent to kill was discovered.

5. Three (3) CID agents who investigated the shooting testified at the Article 32(b) hearing that they found nothing in their "blanket" and "repeated" witness interviews to indicate that SPC Page intended to kill SPC Perkins.

6. A field grade Army Regulation (AR) 15-6 investigating officer testified that he found nothing to indicate that SPC Page intended to kill SPC Perkins.

7. A company commander who preferred charges testified that he too found nothing to indicate that SPC Page intended to kill SPC Perkins, but was advised to prefer the charges anyway.

8. Soldiers and non-commissioned officers (NCO) who served on the deployment to Jordan with SPC Page working twelve (12)

hour rotating shifts testified that they did not believe SPC Page intended to kill SPC Perkins.

9. The Article 32(b) transcript contains other significant exculpatory and/or mitigating evidence, including but not limited to:

a) SPC Page received his rifle upon arrival in Jordan;

b) SPC Page never fired his rifle before the fatal shot;

c) SPC Page never zeroed his rifle before the fatal shot;

d) SPC Page's rifle optic was broken at the time of the fatal shot;

e) NCOs encouraged soldiers to "dry-fire," and "glassing" and/or "flagging" occurs in the Infantry generally and in the unit specifically;

f) NCOs conducted "dry-fires" with their soldiers;

g) A psychiatrist testified that the unit was sleep deprived due to the 12-hour rotating shifts between day shift and night shift thereby increasing conditions for accidents;

h) NCOs did not visually inspect rifles to ensure they were cleared;

i) There were no clearing signs;

j) There were no clearing barrels; and

k) After the shooting, clearing signs and barrels appeared.

10. Trial defense counsel was present for the Article 32(b) hearing and participated in the hearing.

11. However, trial defense counsel did not call these witnesses and/or elicit testimony to exculpate SPC Page from murder and/or mitigate his sentence.

12. Specialist Page raises a Sixth Amendment claim of ineffective assistance of counsel based largely on trial defense counsel's failure to call these witnesses/elicit favorable testimony from them.

13. The Article 32(b) transcript is therefore relevant, necessary, and proper for this court to fully evaluate the merits of SPC Page's assignment of error.

14. Because the evidence is contained throughout the entirety of the Article 32(b) transcript, the complete hearing transcript is also relevant, necessary, and proper for this court to fully evaluate the merits of SPC Page's assignment of error.

15. The following graphical depiction summarizes identifies the twelve (12) witnesses by name, offers a description of their testimony at the Article 32(b) hearing, and describes that they were either not called nor asked questions to elicit exculpatory testimony. The graph also describes the AFOSI investigation and the CID forensic search of SPC Page's laptop:

	WITNESS	ARTICLE 32 Verbatim Transcript	COURT - MARTIAL Transcript
1	SPC Catlin	No intent to kill (442)	Not called to testify
2	SA Nichols	No intent to kill (853)	Not called to testify
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12	SGT Adams	No intent to kill (364)	Not asked about intent
13	AFOSI	No intent to kill (1066)	Not offered
14	Laptop	No intent to kill (874)	Not offered

16. Had the military judge been presented with this compelling evidence against intent and in favor of culpable negligence, he would have had at least twelve (12) additional bases upon which to find SPC Page not guilty of unpremeditated murder, a thirteenth (13th) basis in the form of the AFOSI report, and a fourteenth (14th) basis by introducing CID's forensic report revealing zero evidence of intent on SPC Page's laptop.

17. Specialist Page recognizes that to support a claim for ineffective assistance of counsel, facts must be included in a statement by someone with personal knowledge that is a sworn affidavit or a declaration made under penalty of perjury for this court to consider the statement on appeal. *United States v.*

Cade, 75 M.J. 923, 929 (Army Ct. Crim. App. 2016), *pet. denied*, 76 M.J. 133 (C.A.A.F. 2017).

18. Because the Article 32(b) verbatim transcript contains sworn witness testimony in support of SPC Page's claim for ineffective assistance of counsel, the entire transcript appears to satisfy the requirements for this court to review it upon appeal.

19. The Court of Appeals for the Armed Forces recently relied in large measure on evidence from an Article 32(b) investigation to reverse a conviction and authorize a rehearing. *United States v. Hendrix*, __ M.J. __ No. 16-0731/AR (1 June 2017).

WHEREFORE, appellate defense counsel respectfully request this court grant the instant motion.[1]

PANEL NO. 4

MOTION TO ATTACH DEF APPELLATE EXHIBT "A'

GRANTED: _____

DENIED: _____

DATE: _____

K. DePaul FOR

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K. DePaul

KATHERINE L. DEPAUL
Defense Appellate Counsel
CPT, JA

[1] The verbatim transcript is 1088 pages. The defense will provide the court and government appellate division separate electronic copies of the transcript.

CERTIFICATE OF SERVICE

UNITED STATES v. Page

Army Docket No. 20150505

Brief on Behalf of Appellant _____

Motion _____

Other ✓

I certify that a copy of the foregoing was delivered to the Court and the Government Appellate Division on 2 June 17.

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