IIN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JEFFERY T. PAGE,

Petitioner,

v.

COMMANDANT, United States Disciplinary Barracks, 1301 North Warehouse Road
Fort Leavenworth, Kansas 66027,

Respondent.

Case No. 19-3020-JWL

PETITION FOR A WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2241

Petitioner, Jeffery T. Page (Page), by his attorneys JOSEPH HOLLANDER & CRAFT LLC and MAHER LEGAL SERVICES PC, respectfully requests the Court to award a writ of habeas corpus pursuant to 28 U.S.C. § 2241, vacate his conviction for unpremeditated murder in violation of 10 U.S.C. § 918, approve only so much of his conviction that extends to involuntary manslaughter pursuant to 10 U.S.C. § 919, and release him from incarceration by Federal officials based on the three and one half years he has spent in confinement.

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I. SUMMARY OF PAGES'S PETITION

On May 15, 2014, 22-year-old Page was sitting with another soldier, MacCaskill, in a two-person shack guarding an American Patriot Missile battery on a Royal Jordanian Air Base near the city of Amman. Page was in the middle of a 12-hour shift, weathering the intense desert heat over five months into a wearisome and extraordinarily monotonous deployment. During this particular shift, AP was walking to the guard shack carrying lunch trays to Page and MacCaskill. Page engaged in horseplay with his rifle and, as AP neared the guard shack, tragically shot his battle buddy, AP, in the head, killing him.

Page did not intend for this mundane shift in the middle of the hot desert to result in tragedy. Nor did he intend to kill AP. But he was wrong, and he admitted it—literally within seconds of the shot as he rendered medical aid to AP and during later attempts to enter into a plea agreement with the prosecution. With no previous history of violence or misconduct, Page ultimately pled guilty to involuntary manslaughter without an agreement. During his guilty plea allocution hearing, he testified under oath as to what had happened that day. The trial judge found him guilty of involuntary manslaughter, for which the maximum authorized sentence included ten years' incarceration. Caselaw applying the involuntary manslaughter statute in the context of horseplay with firearms suggests sentences within the 2 to 4-year range.

Notwithstanding Page's sworn testimony supporting each element of involuntary manslaughter, the judge's acceptance of that testimony to support a conviction, the sworn pretrial hearing testimony of 12 witnesses who attested that nothing in the months, weeks, or moments leading up to the shooting indicated Page intended to kill AP, and at least 51 undisputed points of evidence confirming involuntary manslaughter, the prosecution proceeded to put on a case seeking

a murder conviction. The judge convicted Page of unpremeditated murder and sentenced him to 26 years' confinement.

On direct appeal, Page urged the Army Court to set aside his unpremeditated murder conviction and sentence, approve only the involuntary manslaughter conviction to which he pled guilty, and reassess the sentence. He brought to the Army Court's attention that 12 witnesses testified under oath at a pretrial hearing that, in the months, weeks, days, and hours leading up to the shooting, they saw nothing to indicate Page intended to murder AP.[1]

Nine of these witnesses spent the five months preceding the shooting in close personal contact with Page and AP, to include the moments before the shooting and the moments after the shooting. Three of the witnesses included three professional criminal investigators – sworn Federal law enforcement officers, who, after having investigated the circumstances, found "nothing to indicate Page wanted AP dead."

Page also presented evidence that the Air Force, whose Office of Special Investigation (AFOSI) initially investigated the shot before the Army CID, concluded it was a negligent discharge and not a murder. Page also presented the CID forensic examination results from his personal laptop, which revealed nothing to support an intent to kill AP.

Trial counsel knew of these witnesses and evidence and had actually participated in the pretrial hearing for which a verbatim transcript was prepared. Yet, he called none of them to elicit exonerating or mitigating testimony during the contested portion of the trial where the main issue was Page's mindset, or *mens rea,* at the time the shot rang out. Nor did Page's counsel offer the

[1] The pretrial hearing is conducted pursuant to Article 32(b), UCMJ; 10 U.S.C. § 832(b), is a requirement before a case can be sent to a general court-martial, and is similar to a civilian grand jury hearing, but where defense counsel are allowed to be present, question witnesses, and submit limited evidence.

Air Force conclusion that the shot was negligence not murder, nor the results of the forensic laptop examination.

Page presented the Army Court with the following undisputed facts as part of his Sixth Amendment claim that he was deprived of effective assistance of counsel at trial and during sentencing. Page asserted that his counsel should have offered the following witnesses and their testimony, which stood to exonerate him of murder:

	WITNESS	Hearing Verbatim Transcript	Court–Martial Transcript
1	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	Brenzika	No intent to kill (921)	Not called to testify
6	Thibodeau	No intent to kill (1047)	Not called to testify
7	Wilson	No intent to kill (1062)	Not called to testify
8	Macaskill	No intent to kill (310)	Not asked about intent
9	Wyvill	No intent to kill (181)	Not asked about intent
10	Nys	No intent to kill (539)	Not asked about intent
11	Curley	No intent to kill (644)	Not asked about intent
12	Adams	No intent to kill (364)	Not asked about intent

Not only did counsel decline to call any of these witnesses or examine them for helpful testimony exonerating Page of unpremeditated murder during trial (which ultimately resulted in a more severe conviction and significantly longer sentence), but counsel also failed to call the witnesses during the sentencing hearing (at which he could have offered extenuating or mitigating evidence given that Page faced life in confinement).

The Army Court failed to address in substance Page's constitutional claim that counsel's failures to use this evidence was objectively unreasonable, deficient, and caused him actual prejudice as demonstrated by the Sixth Amendment and its binding case law.

Instead, the Army Court found counsel's performance reasonable and entitled to tactical deference. Specifically, it adopted nearly wholesale counsel's post-trial explanation that he did not

introduce the testimony because, according to his understanding, Military Rule of Evidence (Mil. R. Evid.) 602 and 701, each identical to Fed. R. Evid. 602 and 701, prohibit witnesses from testifying about a "lack of motive" or "specific intent" and their observations were "of limited evidentiary value at trial." (Army Decision at 3).

Not only did counsel deprive Page of effective assistance through his misunderstanding of the rules of evidence and underappreciation of the probative value of the witnesses' testimony, but the Army Court positively endorsed counsel's misunderstandings and underappreciation to further deprive Page of constitutional due process on appeal. Consequently, both the trial and appeal are constitutionally flawed and accordingly, were not afforded full and fair consideration.

Trial counsel's constitutional deficiency and the Army Court's failure to correct it on appeal are surely the types of "crude injustice[s]" in the military the Supreme Court has encouraged Article III habeas courts to correct.

> The constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers – as well as civilians – from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispending with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civilian courts.

Burns v. Wilson, 346 U.S. 137, 142 (1953).

In this Petition, Page raises two main grounds that rendered his conviction and sentence unconstitutional - ineffective assistance of counsel and deprivation of fundamental due process - each discussed more fully below. By way of introduction at this point, Page's two constitutional grounds essentially boil down to misapplication of the Constitution, Supreme Court precedent, and ignoring significant exonerating and mitigating evidence in eight main areas all of which produced an unconstitutional conviction and sentence.

First, the Army Court rejected out of hand, and did not fully or fairly consider exculpatory evidence that was available, necessary, and admissible under Mil. R. Evid. 602, which again, is identical to Fed. R. Evid. 602.

> A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony.

Nine of the witnesses served in Page's unit and had spent the previous five months with him in a confined space in a foreign county restricted to living on a small US Post within a larger Jordanian Base. They all worked, trained, exercised, ate, slept, talked, joked, and spent virtually every waking and sleeping moment together for this time period. Each of the witnesses knew both Page and AP. The three Federal law enforcement officers, "CID" agents from the U.S. Army Criminal Investigation Command, conducted canvass interviews, coordinated with the initial Air Force investigators, forensically examined Page's laptop computer, and analyzed the physical evidence drawing upon their specialized law enforcement training and experience, which supports a finding of their personal knowledge of the material evidence.

The verbatim transcript of the pretrial hearing, which was before the Army Court during its review, clearly shows that all 12 of these witnesses had actual personal knowledge of Page and AP, gained by their daily personal interactions and observations sufficient to satisfy Mil. R. Evid. 602's "personal knowledge" requirement. Indeed, Rule 602 itself states that witnesses can establish their personal knowledge by their own testimony, a point counsel apparently failed to consider.

The transcript and sworn statements assembled during investigation show the 12 witnesses would testify extensively regarding what that they had discovered had happened in the hours, days, and weeks preceding the shooting, as well as the moments after the shooting - absolutely nothing

to indicate Page intended to kill AP. As reflected in the verbatim transcript of the testimony of these witnesses, what they personally observed of Page's interactions with AP prior to the shooting and after the shooting, stood to provide the judge with facts to draw reasonable inferences that Page had no intent to kill and that AP's death was the result of a tragic accident rather than murder.

Second, the Army Court did not address Page's Mil. R. Evid. 701 claim that counsel's refusal to call the witnesses was objectively unreasonable under the Sixth Amendment. Rule 701 provides, also identical to its counterpart under the federal rules of evidence, states:

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue….

Mil. R. Evid. 701.

For largely the same reasons Mil. R. Evid. 602 is satisfied, so too is Mil. R. Evid. 701. The 12 witnesses who were not called or examined could have related their helpful and near contemporaneous personal observations, from which the judge could draw inferences of Page's state of mind. On top of that, they could have offered their helpful opinion as to Page's state of mind based on their perceptions of Page and AP, which stood to be meaningful to determining the legal difference between unpremeditated murder and involuntary manslaughter.

Indeed, lay opinion testimony has been regularly admitted as to an accused's state of mind in Federal court. For example, in *United States v. Goodman*, 633 F.3d 963, 968 (10th Cir. 2011), the appellate court stated:

> The Federal Rules of Evidence do not, therefore, categorically prohibit lay witnesses from offering opinion testimony regarding the defendant's mental state. As the Second Circuit put it, the admission of lay opinion testimony is "a sharp departure in theory, if not in practice, from the common law….Since neither Rule 701 nor Rule 704(a) limits the subject matter of lay opinion testimony, there is no theoretical prohibition against allowing lay

> witnesses to give their opinions as to the mental states of others." *United States v. Rea*, 958 F.2d 1206, 1214-15 (2d Cir. 1992) (citing Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* ¶ 701[02], pp. 701-19 to 701-21 (1991) *and* 2 S. Saltzburg & M. Martin, *Federal Rules of Evidence Manual* 1 (5th ed. 1990)); *see also United States v. Hauert*, 40 F.3d 197, 201 (7th Cir. 1994) ("[A] lay witness may, in appropriate circumstances, give an opinion on an 'ultimate issue.").

As the Tenth Circuit noted, neither Rule 701 nor Rule 704 (lay opinion and opinion about ultimate issue) limits the subject matter of lay opinion testimony. Thus, there is no prohibition to 12 witnesses providing their lay opinion as to whether they saw or observed anything to convince them that Page intended to kill AP. *See United States v. Leroy*, 944 F.2d 787, 789 (10th Cir. 1991) ("lay opinion of a witness as to a person's sanity is admissible if the witness is sufficiently acquainted with the person involved and has observed his conduct" and "has personal knowledge regarding the person's unusual, abnormal or bizarre conduct."); *United States v. Thompson*, 708 F.2d 1294 (8th Cir. 1983) (admitting opinion testimony that defendant was involved in criminal activity); *United States v. Lawson*, 653 F.2d 299 (7th Cir. 1981) (lay opinion testimony indicating that accused was sane at time of offenses relevant and admissible); *United States v. Benedict*, 27 M.J. 253, 259 (CMA 1988) (although opinion testimony allowed on ultimate issue of fact, it is not allowed on the issue of guilt or innocence). Against all this, counsel determined that Rule 701 prevented him from trying to admit the exonerating evidence the 12 witnesses possessed.

Third, the Army Court did not apply Mil. R. Evid. 704 in its rejection of Page's constitutional claim. Rule 704 reads: "[a]n opinion is not objectionable just because it embraces an ultimate issue." The Advisory Committee notes make clear that a lay person can provide opinion testimony that relates to the ultimate issue.

> The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact. In order to render this approach fully effective and to allay any doubt on the subject, the

> so-called "ultimate issue" rule is specifically abolished by the instant rule.

Notes of Advisory Committee on Rule Fed. R. Evid. 704.

That the Army Court did not apply Rule 704 to Page's Sixth Amendment claim is strong evidence that it was neither fully nor fairly considered by the military court.

Fourth, the one-sidedness of the Army Court's decision removes any doubt that Page's constitutional claims were neither fully nor fairly reviewed to meet constitutional muster. The Army Court spends considerable time discussing how circumstantial evidence can prove specific intent to kill, but spends no time whatsoever discussing how these witnesses, if called and questioned, could have provided personal observations of Page and AP, helpful lay opinions, and ultimate-issue opinion evidence showing lack of specific intent to kill.

Fifth, the Army Court ignored crucial evidence of Page's mindset directly before and directly after the shooting, *e.g*. Page's talking about dating, going on leave, and buying a truck moments before the shooting and radioing for medical help, admitting he shot AP, and providing medical assistance while going into psychogenic shock after the shooting. These points are altogether missing in the Army Court's assessment, which can be fairly seen as troubling. A 22 year-old person with no history of violence or misconduct who specifically intends to kill his squad mate is not likely talking about dating and buying a truck moments before he commits murder and running to their aid and assistance while in psychogenic shock.

Sixth, the Army Court failed to address the physical evidence corroborating a negligence mindset, *e.g*., that Page was looking through a broken rifle optic, that Page had never fired the rifle previously, that Page did not pull the charging handle to chamber a bullet prior to the fatal shot demonstrating a reasonable belief that the chamber was empty, that Page's rifle malfunctioned and

double fed connoting 30 rounds in the magazine and one already in the chamber forgotten from the day before, and that Page had never "zeroed" his rifle the entire time he was on deployment.[2]

Seventh, the Army Court did not apply the "explanation" portion of the involuntary manslaughter statute discussing "culpable negligence" to Page's mindset. It counsels that "pointing a pistol in jest at another and pulling the trigger, believing, but without taking reasonable precautions to ascertain, that it would not be dangerous," as a prototypical example of involuntary manslaughter. Article 119c(2)(a)(i), UCMJ. Seemingly on all fours with Page's actions and specifically brought to the Army Court's attention in his papers, the Army Court failed to apply this "explanation" of a prototypical involuntary manslaughter to Page's appellate claims.

Eighth, the Army Court declined to acknowledge, address, or apply the binding and persuasive case law Page presented showing involuntary manslaughter as the constitutionally-supported conviction, and appropriate sentences in the 2 to 4-year range for unintended killings the result of horseplay with firearms.

These eight errors and omissions left little to be placed against the Army Court's lengthy discussion of how circumstantial evidence can prove specific intent—making the strength of the prosecution's case appear stronger than it really was, while at the same time revealing a lob-sided appellate decision fairly seen as an advocate's brief rather than an objective, full, and fair analysis of the issues. Indeed, the Army Court's inequitable and seemingly partisan characterization of the evidence may have encouraged the superior court, the CAAF, to decline Page's request for review.

[2] "Zeroing" a rifle is a required step to increase the chances that bullets fired will actually hit the intended targets. Zeroing, or sighting in, is simply aligning the sights (scope) on a rifle so the bullet hits where the rifleman aims at a certain distance. A rifle cannot be manipulated to change the bullet's path. It is the sight alone that is to be adjusted. *See* Army Field Manual 3-22.9 *Rifle Marksmanship M16/M4 Series*; *see also* https://www.armystudyguide.com/content/army_board_study_guide_topics/m16a2/zero-and-m16a2-rifle.shtml

Of the eleven witnesses—nine laypersons and two experts—the prosecution offered in its case-in-chief during the contested portion of the trial, none testified that Page had the intent to kill. That is, the entire record is void of *any* testimony from *any* witness that Page intended to kill AP, resulting in Page's second grounds for habeas relief in the form of an unconstitutional conviction and sentence. Had the Army Court fully and fairly considered Page's claims, the probable and legally correct result would have been to affirm involuntary manslaughter and either assess a sentence of time-served (consistent with the case law presented) or direct a new sentencing hearing given the dramatic shift in the sentencing landscape (range of life imprisonment reduced to cap of 10 years).

All of this to say that counsel did not even try to defend his client with the substantial and available evidence that reasonably should have been introduced. His view that the evidence was inadmissible pursuant to Rules 602 and 701 is objectively unreasonable because it reflects basic misunderstandings of the rules of evidence and the applicable case law interpreted them. The insurmountable obstacles and hurdles counsel provided to justify his decisions actually confirm his misinterpretations, which the Army Court incorrectly adopted. The Army Court thereby positively but incorrectly endorsed counsel's miscalculations. At the same time, the Army Court sent a message that it is okay not to develop theories of admissibility based on accurate understandings of the rules and the law, even where the client was facing potential life in prison for murder. Accordingly, counsel and the Army Court revealed their misapprehension of the constitutional duties counsel has to zealously advocate, protect against prosecutorial overreach, and require the Government to abide by the Constitution.

For these reasons, Page respectfully asks the Court to exercise the power of the "Great Writ" to approve only so much of his conviction that extends to involuntary manslaughter and

order his release from Federal incarceration. *See Kauffman v. Secretary of the Air Force*, 415 F.2d 991, 997 (9th Cir. 1969) (incumbent upon the district court to examine whether the constitutional rulings of a military court conform to prevailing Supreme Court standards).

II. THE PARTIES

Petitioner Jeffery T. Page, formerly Specialist Jeffery T. Page, Bravo Company, 67th Armor Regiment, 2d Brigade Combat Team, 4th Infantry Division, United States Army, is incarcerated by Federal officials in the United States Disciplinary Barracks (USDB) on Fort Leavenworth, Kansas. Respondent is the senior Federal officer responsible for the Military Corrections Complex in which Page is confined. The United States Army Litigation Division, United States Army Legal Services Agency, 9275 Gunston Road, Fort Belvoir, Virginia 22060, and The United States Attorney's Office for the District of Kansas, 444 S.E. Quincy, Suite 290, Topeka, Kansas 66683, represent Respondent.

III. JURISDICTION

The Court possesses subject matter jurisdiction pursuant to 28 U.S.C. § 2241, habeas corpus for servicemembers. The Court is authorized to grant relief as law and justice require pursuant to 28 U.S.C. § 2243. On February 12, 2018, the CAAF summarily denied Page's Petition for a Grant of Review. *United States v. Page*, 2017 CCA LEXIS 614 (A.C.C.A., Sept. 14, 2017), *review denied*, 2018 CAAF LEXIS 72, 77 M.J. 266 (Feb. 12, 2018). Because the CAAF, in its discretion, denied Page's Petition for a Grant of Review, further direct appeal to the United States Supreme Court was precluded. Article 67, Uniform Code of Military Justice (UCMJ); 10 U.S.C. § 867; 28 U.S.C. § 1259. Pursuant to Rule for Courts-Martial (RCM) 1209, direct appeal is final where a petition for review is denied or otherwise rejected by the CAAF.[3]

[3] The first level of appeal in the military process involves the Court of Criminal Appeals for the servicemember's branch, for example, the Army Court of Criminal Appeals. 10 U.S.C. § 866. This court consists of uniformed Judge

IV. VENUE

Because Page is confined by Federal officials in Leavenworth, Kansas, venue is proper in this district pursuant to 28 U.S.C. § 2241.

V. PROCEDURAL HISTORY

The trial judge accepted Page's plea of guilty to one specification of involuntary manslaughter in violation of Article 119, UCMJ; 10 U.S.C. § 919. The maximum authorized punishment for this offense included ten years' confinement, reduction to the lowest enlisted grade, forfeiture of all pay and allownaces, and a dishonorable discharge.

After the plea was accepted, the prosecution sought conviction for the higher offense of unpremeditated murder. Under the Uniform Code of Military Justice, an accused can plead to a lesser Charge and the prosecution still has the option to attempt to prove greater Charges. Contrary to Page's sworn testimony to the trial judge explaining in his own words the elements of the offense of involuntary manslaughter, the judge found Page guilty of one specification of unpremeditated murder, in violation of Article 118, UCMJ; 10 U.S.C. § 918. The military judge dismissed the involuntary manslaughter Charge and its Specification and all other Charges and Specifications. The maximum authorized punishment for unpremeditated murder included "such punishment other than death that a court-martial may direct." *Id.* The approved sentence here includes reduction to the lowest enlisted grade of E-1, confinement for twenty-six years, and a dishonorable discharge. Page remains confined at the USDB on Fort Leavenworth, Kansas.

Advocates appointed by The Judge Advocate General. *Id.* Review at the first level is mandatory for sentences involving death, confinement in excess of one year, dismissal of an officer, or a punitive discharge (bad conduct discharge or dishonorable discharge) for an enlisted servicemember where the right to appellate review has not been waived. *Id.* The second level of appeal involves the Court of Appeals for the Armed Forces, consisting of five civilian judges appointed by the President. 10 U.S.C. § 867. Review at the second level is largely discretionary. 10 U.S.C. § 867. If the CAAF denies review, the military appellate process is concluded and access to the United States Supreme Court is not available. *Id.* If the CAAF grants review, appeal of its decision can be pursued before the United States Supreme Court. 28 U.S.C. § 1259.

Page appealed to the Army Court, which sits on Fort Belvoir, Virginia, south of Washington DC, and which consists of uniformed Lieutenants-Colonel (0-5), Colonels (0-6), and one Brigadier General (0-7) who serves as the Chief Judge. Each is a commissioned officer and licensed attorney personally selected by The Judge Advocate General of the Army, a three-star Lieutenant General (0-9) and the senior-most uniformed legal officer in the Army. On September 14, 2017, after briefing, the Army Court denied Page's request for a hearing or oral argument, denied the errors he alleged, and approved the findings and the sentence pursuant to Article 66, UCMJ; 10 U.S.C. § 866.

Page timely filed a petition for a grant of review before the CAAF in Washington DC, the 5-member civilian court superior to the Army Court and the other military departments' Courts of Criminal Appeals. Within its discretion, the CAAF summarily denied to grant review on February 12, 2018, which ended Page's direct appeal. This, his first petition for a writ of habeas corpus, follows.

* * * * *

VI. STATEMENT OF FACTS

A. Page's Upbringing and Short Time in the Infantry

Page is a native of Michigan and the oldest of three children. His father worked at the nearby Ford plant and his mother home-schooled her children until high school. Page excelled in swimming on a YMCA team and mathematics, had a grade point average of 3.6/4.0, tutored sixth graders, and was selected to the National Honor Society. (R. at 635-37). Son of an alcoholic father, his parents divorced after his graduation from high school, sending his family into pieces. Distracted by family challenges, Page left college and joined the U.S. Army Infantry. (R. at 638).

By most accounts, Page is a quiet person with a reserved manner and a piercing wit that is sarcastic but humorous in an "Infantry" or "gallows humor" sort of way. (R. at 893). His unit thought of him as "light-hearted" and one who "did not take things too seriously." (R. at 896). He had no prior civilian or military disciplinary actions.

By all accounts, he was a good Soldier, could be relied upon to get things done, always performed the tasks given to him, and was generally in a "good mood." (R. at 348). Page gave medical personnel no indicators of violence or "red flags." (R. at 349). He had not previously deployed to Iraq or Afghanistan. This deployment to Jordan, to guard a Patriot Missile Battery within a Royal Jordanian Air Base, was his first. (Pros. Ex. 24).

B. Deployment to the Kingdom of Jordan to Guard a Patriot Missile Battery

In the late fall of 2013, Page deployed with his unit, part of the 2d Brigade Combat Team, 4th Infantry Division, to Muwaffaq Salti Air Base in the Kingdom of Jordan. (Charge Sheet). The mission in Jordan was to provide security for an air artillery site located on, and within, the secured Jordanian Air Base.

Soldiers worked rotating shifts between days and nights. (R. at 288). For example, a Soldier was on duty for 12 hours for two days in a row, then one day off, followed by 12 hours for two nights in a row. (R. at 288-89). On their day-off, rather than rest, the Platoon Leader, First Lieutenant (1LT) Brown, ordered Soldiers to train for the Expert Infantry Badge (EIB), conduct PT, and perform Quick Reaction Force (QRF) drills. (R. at 292). The rotating schedule caused noncommissioned officers (NCOs) to raise safety and complacency issues, which were disregarded by 1LT Brown. (R. at 336).

The squad's weapons were housed in a CONEX in the "living support area," or "LSA." Ammunition, however, was contained in magazines elsewhere, to include a 4' x 6' guard shack at the Patriot Missile site's entry control point (ECP). (R. at 239). A runway separated the LSA from the missile site. On the LSA, the Air Artillery Company had a Base Operations Center (BDOC). Down at the missile site, there was separate BDOC for the Platoon.

Before relieving the previous shift, Soldiers drew their weapons from the CONEX on the LSA then drove approximately 6 – 7 miles around the runway to their duty location. (R. at 362). Soldiers could reach their duty location sooner if they drove directly across the runway, which generally was not permitted. (R. at 362).

During duty, Page's nine-member squad was divided, with two soldiers remaining on the LSA at the ADA BDOC and seven Soldiers assigned to the missile site. Soldiers spent four hours in a guard shack at the ECP, four hours in the BDOC, and four hours driving around the perimeter. (R. at 206; 298). The two Soldiers assigned to the ADA BDOC stayed there the entire twelve-hour shift.

The weapons status was "amber," meaning a 30-round magazine was in the magazine well, but no round was chambered, and the rifle must be set on "safe." (R. at 292). An M4 magazine is designed to hold 30 rounds maximum and still function properly. Staff Sergeant Wyvill testified at the pretrial hearing that an M4 is not designed to function properly with 31 rounds in a magazine, that is, the magazine will not easily or properly "seat" in the weapon's lower receiver. (R. at 153, Art. 32(b)). Although Soldiers had magazines in their weapons, 1LT Brown never directed NCOs to conduct random spot-checks to ensure that no Soldier had gone to weapons status "red," meaning that a round was to be kept in the chamber, with the weapon one step closer to being able to fire.

C. Dry-Firing Authorized and Encouraged by Non-Commissioned Officers

Soldiers wore "full battle rattle" in the "triple digit" (100 to 115-degree) oppressive desert heat. Dehydration and heat exhaustion were substantial and very real concerns. The location was remote and austere. The duty was uneventful and monotonous. The Soldiers had irregular sleep patterns that disrupted their rest-cycles and caused many to sleep in their uniforms.[4] It was hot, dry, and sandy. As a result, Soldiers were found asleep at their post, nodding off during duty, veering off the road while driving, and idling the wearisome time away by playing video games on their cell phones while on duty, and on occasion "dry-firing" and/or "flagging" one another. (R. at 249; 292; 510).

Dry-firing is a practice where Soldiers aim their rifles at each other and practice their breathing and trigger pull while no round is in the chamber. It is officially prohibited, but unofficially practiced in the field on occasion. Widely accepted as "hip-pocket" training, a dry-fire involves using the front site post and the rear aperture to secure a sight-picture on a target, or placing a red dot of a mounted reflex or holographic sight on a target, then a Soldier uses other marksmanship skills such as breath control and trigger squeeze until the metallic "click" of the hammer is felt and heard. The selector switch is normally off "safe" and on "semi" during a dry-fire, otherwise, the Soldier practicing the dry-fire drill would not be able to fully suppress the trigger, defeating the purpose of the drill. (R. at Art. 323 – 24; 335). One noncommissioned officer in the squad, Sergeant (SGT) Nys, encouraged his Soldiers to dry-fire while on duty, and did so regularly with them. (R. at Art. 323).

[4] The Platoon Leader, 1LT Brown, believed that Soldiers only needed four hours sleep. (R. at 176).

An expert in military psychiatry testified that Page's unit was suffering from "operational stress" due to "chronic sleep deprivation," which is correlated to an increase in accidents. (R. at 437).

D. Page's Leaders Chamber Rounds – Rifles Ready to Fire

Five-and-one-half months into the deployment to Jordan, on 14 May 2014, Page was on the first of his two-day "day" shifts and was assigned to the guard shack at the ECP. Toward mid-afternoon, a "sand truck" approached the ECP and was perceived as a Vehicle-Born Improvised Explosive Device Threat (VBIED). (R. at 142). Following his Sergeant's example, Page pulled his charging handle, sending a round into the chamber of his rifle, and approached the "sand truck" to secure and search it for threats. (R. at 142). Solders were authorized to "go red," that is, to chamber a round and take the safety off.

As it turns out, the "sand truck" was not a threat, and the soldiers eventually allowed it to pass through the ECP. The Squad Leader did not inspect Page's rifle to ensure that it had been cleared of the chambered round.

E. Shift Change-Over in the Guard Shack Before the Shooting

When the night shift assumed duties at approximately 9:00 pm on May 14, 2014, Page returned to the LSA, put his rifle in the CONEX, did physical training (PT, as was required), ate dinner, and went to sleep around midnight. As per usual, the next morning before 9:00 am, the second day of his "day" shift, Page drew his rifle from the CONEX and rode to the missile site, taking up duty in the guard shack with MacCaskill.

Ammunition was stored in 30-round clips in the guard shack. Upon assuming duty, Soldiers inserted a 30-round magazine into their rifles, but kept the weapon in "amber," meaning no round in the chamber and the safety engaged. During the shift change-over, Gabriel Mancha performed

a "push-test" of each of the nine or ten 30-round magazines before he "signed over" the ammunition to Page. (R. at 442). While performing this test, Mancha observed that one magazine was easier to "push," indicative of having 29 as opposed to 30 rounds in it. (R. at 443).

F. While AP Was Bringing Lunch to Page, He Shot AP, Ran to His Assistance, And Was in Psychogenic Shock

The ECP guard shack had a small portal looking back into the missile site. Page often sat on a folding chair near the portal. On this day, AP went to pick up lunch and was returning to the guard shack. Forgetting that he had chambered a round the evening before, Page wrongly decided to dry-fire at AP as he walked from the dining facility back to the guard shack. Instead of hearing the metallic click of the dry-fire, a round went off and struck AP in the head, approximately 55 feet away. (R. at 145-46).

Immediately, Page radioed the BDOC for medical assistance, then bolted from the guard shack to begin combat life-saving on AP.[5] Page asked the unit's medic what he could do to help. (R. at 146). While the medic worked on AP, Page uttered that he "could not believe he shot him, and that he was sorry." Page was "in psychogenic shock." (R. at 343).

After he helped put AP on the litter and loaded AP into the frontline ambulance, or "FLA," Page returned to the guard shack. Sergeant Duty arrived a moment later and upon taking Page's rifle, counted the rounds in the magazine – there were 30. (R. at 304). He also picked up the spent casing from the guard shack floor and placed it on the portal windowsill. (R. at 303).

Page's hands were shaking, he was holding his head, and his cigarette was shaking. He was 22 years-old and had been in the Army for just over two years. (Pros. Ex. 24).

G. Leadership Did Not Enforce Weapons Safety Procedures Before the Shooting

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[5] Staff Sergeant Wyvill testified at the Article Art. 32(b) hearing that he received Page's radio call in the BDOC. Page radioed, "man-down, man-down." Thinking that the squad was receiving sniper fire from a nearby ridgeline, SSG Wyvill sought clarification, to which Page radioed, "No, it's my fault, I shot AP." (R. at 113-14, Art. 32(b)).

Prior to the shooting, the Platoon Leader and senior NCOs filmed a skit which depicted Soldiers waving weapons at one another without regard for muzzle awareness. (R. at 127). The Company Master Gunner, SSG Rapp, requested that the depiction not be shown because it contained "weapons violations." (R. at 128). It was shown to the unit, to include Page.

The Platoon Leader, 1LT Brown, was absent from the missile site for prolonged periods of time and overruled NCO recommendations to make the weapons status "green" as opposed to "amber," given the severe risk of an accident in the face of little to no threats. (R. at 286-87; 292). Discipline was so lax and the duty so mundane that leaders let soldiers play electronic video games on their cell phones while on duty. (R. at Art. 32-33, Art. 32(b)).

Soldiers drawing their own weapons from the CONEX violated unit policy. (R. at 1019, Art. 32(b)). The unit had no weapons clearing barrels. (R. at 500). The unit had no weapons clearing signs. Squad leaders and NCOs did not visually inspect rifle chambers to ensure they were properly cleared. (R. 1089, Art. 32(b)). Clearing "was on each individual Soldier."

"Everybody fully admitted that they veered from the [weapons handling] policy." (R. 1021, Art. 32(b)). Clearing barrels appeared after 15 May 2014, the day of the shooting. *Id*. Page stated under oath that he forgot that he had charged his weapon the day before, that he did not think a round was in the chamber, and that his mindset was that of culpable negligence.

There is no dispute that the round was fired in broad daylight, around lunchtime, among numerous witnesses, to include MacCaskill, who was standing "6-8" inches from Page when the round discharged, and that Page admitted that he shot AP moments after the shooting. (R. at 208; 459).

H. The Trial – The Prosecution Alleged Four Different Mindsets for the Single Act

The prosecution charged three theories of murder: one requiring premeditation and two requiring specific intent, one theory of manslaughter requiring culpable negligence, and one theory of negligent homicide requiring negligence – for a single act. In all, the prosecution alleged four distinct states-of-mind for the same act.

Page pled guilty to involuntary manslaughter. The judge found the plea provident, and accepted Page's guilty plea. Seeking to prove the greater offenses of premeditated and unpremeditated murder, the prosecution called eleven witnesses to testify about the only question at issue: Page's mindset when he squeezed the trigger. Although no witness for the prosecution offered direct evidence of Page's mindset, the trial judge ultimately convicted Page of unpremeditated murder.

I. Unpremeditated Murder (Specific Intent to Kill) or Involuntary Manslaughter (Culpable Negligence)

> The elements of unpremeditated murder are:
>
> (a) That a certain named or described person is dead;
>
> (b) That the death resulted from the act or omission of the accused;
>
> (c) That the killing was unlawful; and
>
> (d) That, at the time of the killing, the accused had the intent to kill or inflict great bodily harm upon a person.

Article 118, UCMJ; 10 U.S.C. § 918 (2012).

The explanation of unpremeditated murder notes that:

> It may be inferred that a person intends the natural and probable consequences of an act purposely done. Hence, if a person does an intentional act likely to result in death or great bodily injury, it may be inferred that death or great bodily injury was intended. The intent need not be directed toward the person killed, or exist for any particular time before commission of the act, or have previously existed at all. It is sufficient that it existed at the time of the act or omission (except if death is inflicted in the heat of sudden passion

> caused by adequate provocation. For example, a person committing housebreaking who strikes and kills the householder attempting to prevent flight can be guilty of murder even if the householder was not seen until the moment before striking the fatal blow.

Article 118c(3)(a) (internal citation omitted).

The maximum authorized sentence for this conviction is "such punishment other than death." Article 118e(2). Here, the trial judge sentenced Page to 26 years' confinement.

The elements of involuntary manslaughter are identical except for subsection (d). Pursuant to the involuntary manslaughter statute, subsection (d) reads "that this act or omission of the accused constituted culpable negligence." Article 119, UCMJ; 10 U.S.C. § 919 (2012). The explanation of involuntary manslaughter notes that:

> Culpable negligence is a degree of carelessness greater than simple negligence. It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission. Thus, the basis of a charge of involuntary manslaughter may be a negligent act or omission which, when viewed in the light of human experience, might foreseeably result in the death of another, even though death would not necessarily be a natural and probable consequence of the act or omission. ***Acts which may amount to culpable negligence include negligently conducting target practice so that the bullets go in the direction of an inhabited house within range; pointing a pistol in jest at another and pulling the trigger, believing, but without taking reasonable precautions to ascertain, that it would not be dangerous***; and carelessly leaving poisons or dangerous drugs where they may endanger life.

Article 119c(2)(a)(i), UCMJ (emphasis added).

The maximum authorized punishment is 10 years confinement. Article 119(e)(2).

J. Page Asked the Army Court of Criminal Appeals (ACCA) to Approve Only Involuntary Manslaughter and Reassess the Sentence Because Counsel Failed to Call 12 Witnesses Who Would Have Testified That They Saw Nothing During the Deployment Indicating Page Intended to Kill AP

On appeal, Page highlighted the weakness of the prosecution's purely circumstantial evidence of his specific intent to kill and noted specifically that: a) not one witness testified that Page intended to kill AP; b) there was significant evidence of culpable negligence which largely remained unchallenged; c) the physical evidence corroborated Page's testimony during his guilty plea allocution, as did other witness testimony, of culpable negligence rather than specific intent to kill; d) the undisputed facts demonstrated that the murder conviction was and remains factually and legally insufficient; and e) factually similar caselaw informed that involuntary manslaughter was the appropriate conviction. The Army Court's decision discusses none of these salient and material points.

The Army Court failed to address the undisputed fact that *not one soldier* testified that they thought Page intended to kill AP. Of the eleven witnesses -- nine lay persons and two experts the government offered in its case-in-chief -- none testified that Page had the intent to kill. That is, the entire record is void of *any* testimony from *any* witness that Page intended to kill AP.

Page urged the Army Court to recognize the noticeable absence of witness testimony to murder, and focus on the abundant and compelling testimony to involuntary manslaughter. For example, three CID agents testified that the entire investigation, to include blanket and repeated interviews and a forensic search of Page's laptop computer, 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 [AP] 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 [AP]. 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, the conclusion was that the shot was the result of negligence. What is more, the 1088-page verbatim Article 32(b) hearing transcript contains sworn testimony from 12 witnesses that Page had no intent to kill. The Army Court, however, ruled that this type of witness testimony was not admissible.

Page asked the Army Court to evaluate the physical evidence proving manslaughter rather than murder. For example, Page testified during the providence inquiry that he chambered one round about 3:00 p.m. the day before the shooting (May 14) during a vehicle borne improvised explosive device (VBIED) alert, and that he forgot the round was in the chamber. Sergeant Duty, who secured Page's rifle moments after the shot and confirmed 30 rounds remained in the magazine and one 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 30 rounds remained in Page's magazine and the casing from the spent round was recovered reinforces Page's testimony that he chambered a round the day before and

placed a new 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 of the guard shack magazines contained 29 rounds, corroborating 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 300 rounds were accounted for moments after the shot backs Page's testimony and supports SGT Duty's causation assessment, *supra*. The guard shack had ten 30-round M4 magazines, for a total round-count of 300. Page had one round in the chamber, which was fired and its casing recovered on the floor of the guard shack by SGT Duty. Page also had 30 rounds in his magazine.

Three hours prior to the shot when Page and Macaskill came on duty, SPC Mancha counted the magazines and one, pursuant to a "push-test," had but 29 rounds. All other magazines had 30 rounds. Accordingly, that Page had one bullet unknowingly in the chamber from the day prior, 30 in his magazine, a different guard-shack magazine had 29, and the balance of the magazines had 30, accounts for all 300 rounds. That all rounds are accounted for validates Page's testimony, as well as the testimony of the other 12 witnesses, who found no intent to kill, but rather that the shooting was the result of a terrible accident, partially due to mis-allocation of live ammunition that resulted in one extra round in Page's weapon, and in the chamber of his weapon. But, nowhere in the Army Court's opinion is the physical evidence fully or fairly evaluated.

Another example of the physical evidence corroborating Page's testimony that went unaddressed by the Army Court: his rifle "double-fed" after the fatal 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 30 rounds. If a soldier attempts to load a 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 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 – an occurrence whereby two rounds rather than one are stripped off the top of a loaded magazine causing the bolt to fail to close – which is also consistent with Page's testimony that he chambered a round the day before.

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

The mere fact that Page did not pull the charging handle is strong evidence of his intent not to fire an actual bullet, rather, to dry fire. The Army Court ignored this critical and potentially dispositive fact.

Further, Page's immediate supervisors, his non-commissioned officers, SGT Nys and SGT Cullum, corroborate his testimony because each chambered a round during the afternoon of the VBIED incident (May 14), with SGT Cullum stating to Page, "watch and learn." (R. at 356-57).[6]

The Army Court's opinion is totally silent on Page's actions and mindset directly before the shot and directly after the shot – critical evidence bearing on the assessment of the correct state of mind. Before the shot, Page talked with Macaskill about leave, buying a truck, and women. (R.

[6] 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. 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.

at 210-11, Art. 32(b)). Also before the shot, Page talked with SSG Wyvill about re-enlistment and career advancement opportunities in the Army. (R. at 109, Art. 32(b)).

After the shot, Page radioed for help, ran to AP, assisted the medic, admitted he shot AP, 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 Army Court refused to acknowledge these material facts in its affirmance.

K. Page Urged the Court of Appeals for the Armed Forces (CAAF) That His Unpremeditated Murder Conviction and Sentence to 26 Years' Confinement is Unconstitutional

Page timely sought a Grant of Review before the CAAF, noting that the Army Court erred to the material prejudice of his substantial rights by misapplying the Sixth Amendment, Supreme Court holdings concerning the Sixth Amendment, the rules of evidence, and deprived him of full and fair appellate review given the one-sided decision considering only inculpatory inferences while ignoring exculpatory inferences, direct lay opinion testimony, and physical evidence corroborating Page's plea to involuntary manslaughter.

On February 12, 2018, the CAAF summarily denied Page's Petition for a Grant of Review. *United States v. Page*, 2017 CCA LEXIS 614 (A.C.C.A., Sept. 14, 2017), *review denied*, 2018 CAAF LEXIS 72, 77 M.J. 266 (Feb. 12, 2018).

* * * * *

VII. THE COURT IS AUTHORIZED TO DECIDE THE MERITS OF PAGE'S CLAIMS

This Court is authorized to reach and determine the merits of Page's constitutional claims and award the writ. Federal statutes, 28 U.S.C. § 2241 and 28 U.S.C. § 2243, empower this Court

to entertain a military prisoner's habeas claims and to grant relief as law and justice require. In *Burns*, 346 U.S. at 137, the Supreme Court made clear that civilian habeas review of military decisions is altogether proper when constitutional deprivations resulted in unfair proceedings or unreliable results, and consequently unjust confinement. In *Burns*, the Supreme Court observed:

> The constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers – as well as civilians – from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispending with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civilian courts.

Burns, 346 U.S. at 142.

Although determinations made in military proceedings are final and binding on all courts, 10 U.S.C. § 876, the district courts' jurisdiction over a petition for habeas from a military prisoner is not displaced. *Schlesinger v. Councilman*, 420 U.S. 738, 745 (1975) (taking note of the binding nature of court-martial decisions on civil courts, but also recognizing the civil courts' jurisdiction to review habeas petitions stemming from court-martial convictions); *Gusik v. Schilder,* 340 U.S. 128, 132 (1950) (describing the "terminal point" of court-martial proceedings where civil habeas corpus review may begin).

Where constitutional protections were not observed at the trial court level or during direct appeal, the Federal habeas court is empowered to address those claims. *Monk v. Zelez,* 901 F.2d 885, 893 (10th Cir. 1990) ("The writ of habeas corpus shall issue immediately."); *Burns*, 346 U.S. at 139 (explaining that Federal civil courts have jurisdiction over habeas petitions alleging the proceedings "denied them basic rights guaranteed by the Constitution"); *Dodson v. Zelez*, 917 F.2d 1250, 1252 (10th Cir. 1990) (federal jurisdiction to review court-martial proceedings requires "[t]he asserted error . . . be of substantial constitutional dimension."); *Dixon v. United States*, 237

F.2d 509, 510 (10th Cir. 1956) ("in military habeas corpus the civil courts have jurisdiction to determine whether the accused was denied any basic right guaranteed to him by the Constitution").

The Tenth Circuit uses a four-part test to determine whether a Federal habeas court should reach the merits of a constitutional challenge to a court-martial conviction or sentence: (1) whether the asserted error is of substantial constitutional dimension; (2) whether the issue is one of law rather than one of disputed fact previously determined by a military tribunal; (3) whether military considerations warrant different treatment of the constitutional claim(s); and (4) whether the military courts gave adequate consideration to the issues involved and applied proper legal standards. *Mendrano v. Smith,* 797 F. 2d 1538, 1542 n.6 (10th Cir. 1986) ("our cases establish that we have the power to review constitutional issues in military cases where appropriate."); *Monk*, 901 F.2d at 888 (constitutional claim is subject to our further review because it is both "substantial and largely free of factual questions."). In *Monk*, the Tenth Circuit favorably cited *Calley v. Callaway*, 519 F.2d 184, 199-203 (5th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976). *Id.* "Consideration by the military of such [an issue] will not preclude judicial review for the military must accord to its personnel the protections of basic constitutional rights essential to a fair trial and the guarantee of due process of law." *Calley*, 519 F.2d at 203.

This Court has discretion to determine if Page's claims were fully and fairly considered by the military, reach the merits, and award the writ. In *Dodson,* 917 F.2d at 1252, the Court noted that a district judge has a "large amount of discretion" when determining whether a military habeas petitioner's claims were fully and fairly considered on direct appeal: "[w]e recognize that these factors still place a large amount of discretion in the hands of the federal courts." Turning to the definition of full and fair consideration, the Tenth Circuit in *Watson* explained that "full and fair"

consideration has not been defined precisely, but leaves the Article III trial judge with the discretion to reach the merits and determine if constitutional protections were correctly considered and applied:

> Although there has been inconsistency among the circuits on the proper amount of deference due the military courts and the interpretation and weight to be given the "full and fair consideration" standard of *Burns*, this circuit has consistently granted broad deference to the military in civilian collateral review of court-martial convictions. Although we have applied the "full and fair consideration" standard, we have never attempted to define it precisely. Rather, we have often recited the standard and then considered or refused to consider the merits of a given claim, with minimal discussion of what the military courts actually did.

Watson v. McCotter, 782 F.2d 143, 144 (10th Cir.), *cert. denied*, 476 U S. 1184 (1986) (internal citations omitted).

Consequently, the applicable federal habeas statutes, 28 U.S.C. § 2241 and 28 U.S.C. § 2243, and the Supreme Court and Tenth Circuit precedents in *Burns*, *Watson, Mendrano*, *Monk*, and *Dodson*, *supra*, authorize this Article III court to reach the merits of constitutional habeas challenges arising from Article I courts-martial and issue the writ -- even when the issue was briefed and decided by the military before arriving in Federal court.

Put another way, none of the applicable legal authorities requires the Federal civilian judiciary to follow an Article I court's constitutional determinations lock-step. To the contrary, *Burns*, (on which the Tenth Circuit's decision in *Watson* is based), specifically states that review is narrow, not foreclosed, and Article III review is appropriate where "military review was legally inadequate to resolve the claims which they have urged upon the civil courts." *Burns*, 346 U.S. at 146.

The instant case falls within the permissible scope of review. This is especially so where, like here, the military's "full and fair consideration" is fatally flawed. Military review cannot be

"full" where pivotal evidence was not evaluated, material evidence was misstated, and the appellate court misapplied the law. Nor can review be "fair" where Supreme Court precedents interpreting the Sixth Amendment in a Federal criminal trial were misapplied. As the Tenth Circuit observed in *Lips v. Commandant*, 997 F.2d 808, 811 (10th Cir. 1993), "[o]nly when the military has not given a petitioner's claims full and fair consideration does the scope of review by the federal civil court expand."

Examples where the court correctly determined that the military had not given a petitioner's claims full and fair consideration, and thus reviewed the merits of a military habeas petitioner's claims in the Tenth Circuit include: *Mendrano*, 797 F.2d at 1541-42 ("full review of petitioner's claim is especially appropriate here" in context of Due Process and Sixth Amendment right to jury trial); *Wallis v. O'Kier*, 491 F.2d 1323, 1325 (10th Cir.), *cert. denied*, 419 U.S. 901, (1974) ("Wallis asserted in his habeas corpus petition that he was being deprived of his liberty in violation of a right guaranteed to him by the United States Constitution. Where such a constitutional right is asserted and where it is claimed that the petitioner for the Great Writ is in custody by reason of such deprivation, the constitutional courts of the United States have the power and are under the duty to make inquiry."); *Kennedy v. Commandant, U.S. Disciplinary*, 377 F.2d 339, 342 (10th Cir. 1967) ("We believe it is the duty of this Court to determine if the military procedure for providing assistance to those brought before a special court-martial is violative of the fundamental rights secured to all by the United States Constitution."); and *Monk*, 901 F.2d at 888 (reviewing reasonable doubt instruction and granting petitioner's request for a writ).

That this Court may determine the merits of Page's claims is further shown by looking to the purpose of the military justice system and the basis for Article III deference to Article I courts-martial. To be sure, Article III courts ought to defer to the military courts insofar as "[t]he purpose

of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and, thereby, strengthen the national security of the United States." Part I-1, Manual for Courts-Martial, United States (2016 Ed.); *see also* *Burns*, 346 U.S. at 141 (noting that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty," and that federal courts have "had no role in [military law] development"). The military courts are surely better equipped than the civilian courts in their analysis of the Manual for Courts-Martial or matters impacting good order and discipline.

But this is not the case where the habeas issues involve fundamental constitutional guarantees applicable to all citizens involving unpremeditated murder and potential life in prison. Whether counsel fulfilled his duties under the Sixth Amendment's standard for effective assistance of counsel at trial, or whether a military appellate court conducted a meaningful review to ensure constitutional safeguards were observed, has nothing to do with the unique nature of the military as a distinct society -- the basis for civilian judicial deference. The Sixth Amendment applies equally in both the military and civilian settings, unaffected by the military's unique position in American society. Indeed, it is incumbent upon the district court to examine whether the constitutional rulings of a military court conform to prevailing Supreme Court standards. *Kauffman v. Secretary of the Air Force*, 415 F.2d 991, 997 (9th Cir. 1969).

Accordingly, there is no reason to defer to the military courts where, as here, the habeas claims involve application of the Constitution during trial and appeal. Congress and the Supreme Court have defined Article III review of military convictions to be appropriate in situations where military courts denied a servicemember "basic rights guaranteed by the Constitution." *Burns*, 346 U.S. at 139. Here, each of Page's habeas grounds involve constitutional rulings of a military court

which do not conform to prevailing Supreme Court standards and were thus neither fully nor fairly reviewed. In this case, the Court may evaluate the merits and award the writ.

* * * * *

VIII. GROUNDS FOR WHICH PAGE SEEKS HABEAS CORPUS RELIEF

The Supreme Court held in *Burns*, which remains applicable in the Tenth Circuit today:

> The constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect Soldiers – as well as civilians – from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispending with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civilian courts.

Burns, 346 U.S. at 142.

The Article I legislative courts, military courts in this case, failed to give adequate consideration to the issues involved, failed to apply proper legal standards to his claims, and neither fully nor fairly considered his constitutional claims such that this Article III Court may reach the merits and decide the issues to ensure constitutional guarantees and justice were properly observed. *Burns*, 346 U.S. at 137.

A. GROUND ONE - SIXTH AMENDMENT INEFFECTIVE ASSISTANCE OF COUNSEL

LAW

In *Strickland v. Washington*, 466 U.S. 668, 687 (1984), 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." 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 test requires two specific showings: that counsel (1) "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment;" and (2) "that the deficient performance prejudiced the Appellant." *Id.* at 687. The Court is charged with evaluating the claims of ineffectiveness as to their cumulative effect in light of the totality of the circumstances. *Strickland*, 466 U.S. at 695-96. In judging the reasonableness of counsel's challenged conduct, the judge will look to the facts of the particular case, viewed as of the time of counsel's conduct. *Id*. at 690.

Counsel's performance is objectively unreasonable only where "the identified acts or omissions were outside the wide range of professionally competent assistance," as determined by "prevailing professional norms." *Id*. In reviewing the adequacy of counsel's performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id*. at 689. Meanwhile, to establish prejudice, a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. A reasonable probability "is a probability sufficient to undermine confidence in the outcome." *Ibid*. "When determining prejudice, [a court] must consider the errors of counsel in total, against the totality of the evidence in the case." *Stewart v. Wolfenbarger*, 468 F.3d 338, 361 (6th Cir. 2006).

SPECIFIC GROUNDS

Counsel's knowing and tactical decision, based on his misunderstanding of the applicable rules of evidence, not to call any of 12 witnesses who possessed exonerating and mitigating testimony relevant to the main legal question at issue, Page's mindset, was objectively unreasonable and caused actual prejudice in the conviction for murder instead of manslaughter and 26 years' confinement instead of a lesser term. *See, e.g., Smith v. Dretke*, 417 F.3d 438 (7th Cir.

2005) (habeas granted for ineffective assistance of counsel for failure to call witness to corroborate accused's testimony); *White v. Roper*, 416 F.3d 728 (8th Cir. 2005) (habeas granted for ineffective assistance of counsel for failure to call two witnesses who would have directly supported 's theory).

There is a 1088-page verbatim transcript of the pretrial hearing. Counsel was present for and participated in the lengthy hearing. Review of the transcript shows that no fewer than 12 witnesses testified that Page did not intend to kill AP. The witnesses not only possessed lay opinions based on personal knowledge (admissible per Mil. R. Evid. 602, 701, and 704) but also stood to describe events and activities they witnessed throughout the deployment from which the judge could infer culpable negligence rather than specific intent to kill.

Nevertheless, counsel failed to call these witnesses, or otherwise even try to elicit their testimony, to provide the judge with substantial first-hand, inferential and opinion evidence favorable to Page and unfavorable to the prosecution. Examples of the type of testimony counsel could have elicited include:

1) Staff Sergeant Wyvill, 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 [AP]?
>
> A. I don't.

(R. at 196).

2) Macaskill, standing 6-8 inches away from 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 SPC Page?
>
> A. [AP?].
>
> Q. [AP]. 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 [AP] 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 [AP] did he?
>
> A. No.
>
> Q. He didn't say anything to you that would indicate intent to harm [AP], right?
>
> A. Correct.

> Q. He didn't act in any manner towards [AP] that would indicate he intended to harm [AP]?
>
> 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 [AP]?
>
> 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 [AP] 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 [AP]?
>
> 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 [AP]?
>
> A. There was nothing to indicate that he was in a state of mind to want [AP] 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 [AP]. Correct?
>
> A. That is correct, sir.

(R. at 890).

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

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

(R. at 1047).

10) 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 brought the Charges, and various enlisted leaders and soldiers who knew both Page and AP during the five and one-half months of the deployment to Jordan. Three CID agents, who conducted blanket interviews and led the entire criminal investigation, testified that there was nothing in the investigation to show that Page intended to kill AP. The AFOSI, which initially investigated the shot before the Army CID took over, concluded that the shot was a negligent discharge.

When viewed in the table displayed below, it becomes clearer that counsel was on notice of at least 14 sources of materially exculpatory and mitigating evidence, but either failed to call the witnesses and/or failed to ask them the right questions to elicit the exonerating and mitigating 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	Hearing Verbatim Transcript	Court–Martial Transcript
1	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	Brenzika	No intent to kill (921)	Not called to testify
6	Thibodeau	No intent to kill (1047)	Not called to testify
7	Wilson	No intent to kill (1062)	Not called to testify
8	Macaskill	No intent to kill (310)	Not asked about intent
9	Wyvill	No intent to kill (181)	Not asked about intent
10	Nys	No intent to kill (539)	Not asked about intent
11	Curley	No intent to kill (644)	Not asked about intent
12	Adams	No intent to kill (364)	Not asked about intent

Counsel's failure to call these witnesses or ask questions leading to exonerating testimony cannot reasonably be classified as a mere matter of trial strategy within the range of objectively reasonable professional judgments. *See Jones v. Calloway*, 842 F.3d 454 (7th Cir. 2016) (counsel ineffective for failing to call witness possessing exculpatory testimony in murder trial). Had the

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

Effective counsel would have reviewed the rules of evidence, sought guidance to resolve questions, planned his foundations, and sought to admit the testimony into evidence. Prudent counsel would have developed various lines of questioning using various rules of evidence to press the necessary effort to admit the evidence. If counsel drew an objection, he would have been prepared to address it or offer an alternative theory of admissibility. Counsel unreasonably failed to tactically develop this evidence for admission, but instead, determined not to even try based on his incorrect understanding of Mil. R. Evid. 602, 701, and 704, all of which provided theories of admissibility that effective counsel would have pursued under the circumstances of this case.

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 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. This evidence, from the soldiers who spent the five-and-one-half-month deployment working twelve hour shifts in the Jordanian heat with Page, his NCOs who supervised him, an AR 15-6 investigating officer, and the three CID agents who investigated the shot, all swore that Page

did not intend to kill. It was incumbent upon counsel to bring these matters to the trial judge and zealously argue the evidence during closing. That did not happen because counsel knowingly decided not to try, which is an unacceptable error in professional judgment.

Absent from the Army Court's opinion is an application of the Sixth Amendment, *Strickland*, and its progeny to the cumulative effects of these deficiencies. *Strickland*, 466 U.S. at 687. This absence suggests that Page's Sixth Amendment ineffective assistance of counsel claim was neither fully nor fairly reviewed, as case law evaluating similar facts demonstrates that Page was deprived of this constitutional right to effective assistance of counsel during findings and sentencing. *See, e.g., Holmes v. McKune*, 59 Fed. Appx. 239, 2003 U.S. App. LEXIS 1769 (10th Cir. Jan. 31, 2003) (counsel's failure to investigate and present ineffective); *Cargle v. Mullin*, 317 F.3d 1196 (10th Cr. 2003) (counsel failed to interview or call at least six witnesses who could have provide testimony undermining prosecution's witnesses); *Dixon v. Snyder*, 266 F.3d 693 (7th Cir. 2001) (counsel ineffective for errant assumption of the law); *Pavel v. Hollins*, 2001 U.S. App. LEXIS 16809 (2d Cir. July 25, 2001) (counsel ineffective based on assumption of prosecution's evidence and failure to call witnesses who would have supported accused's account); *Horton v. Massie*, 2000 U.S. App. LEXIS 1232 (10th Cir. Jan. 31, 2000) (counsel failed to call witnesses who could have corroborated petitioner's account); *Chambers v. Armontrout*, 907 F.2d 825 (8th Cir.), *cert. denied* 498 U.S. 950 (1990) (counsel failed to call witness who would have supported petitioner's claim).

The unreasonable failure to call these 12 witnesses and examine them must fall below the standard of care required of counsel defending against a murder Charge, especially when counsel was on specific notice of the witnesses' verbatim testimony under oath, which stood to exonerate Page of murder, conclusively establish that the shot was a regrettable accident, corroborate Page's

plea to involuntary manslaughter, and provide bases for a mitigated sentence far below that which was entered. *See generally Williams v. Taylor*, 529 U.S. 362 (2000) (Federal habeas corpus action, the Supreme Court determined that petitioner's constitutional right to effective assistance of counsel was violated and that a state supreme court analyzed the ineffective-assistance claim under the wrong standard).

For these reasons, the Army Court's decision is contrary to, and, an unreasonable application of clearly established Federal law as determined by the Supreme Court. The Army Court failed to fully and fairly apply not only Sixth Amendment binding precedent, but went lock-step with counsel's misunderstanding of the rules of evidence, all of which is objectively unreasonable and deprived Page of his constitutional right to effective counsel and due process.

* * * * *

GROUND TWO – UNCONSTITUTIONAL CONVICTION AND SENTENCE

LAW

The Army Court is empowered to affirm only those findings of guilty that it finds, upon appellate review of the entire record, to be correct in law and fact. Article 66(c), UCMJ; 10 U.S.C. § 866. The standard of review pursuant to Article 66, UCMJ is *de novo*. *United States v. Walters,* 58 M.J. 391, 395 (C.A.A.F. 2003). The Army Court is not authorized to approve any finding or sentence that is the result of legal error that materially prejudiced an Appellant's substantial trial rights. Article 59, UCMJ; 10 U.S.C. § 859 (2012).

The applicable test for legal sufficiency is whether, considering the evidence in the light most favorable to the government, a rational fact finder could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 318-19 (1979). The

applicable test for factual sufficiency is whether, after weighing the evidence of record and making allowances for not having personally observed the witnesses, the court is convinced of appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). The court is required to take a "fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The evidence must leave "no fair and reasonable hypothesis other than appellant's guilt." *United States v. Billings*, 58 M.J. 861, 869 (Army. Ct. Crim. App. 2003) (citation omitted).

Specific Grounds

On direct appeal, Page urged the Army Court to consider the following undisputed evidence, which it was obligated to do *de novo*, which weighed against specific intent to kill and in favor of his plea to involuntary manslaughter by culpable negligence. The Army Court declined to evaluate any of these 51 points in its decision, which must be a deprivation of meaningful appellate review and fundamental due process.

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

2) He had been in the Army for about two 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) 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 Page's unit was suffering from "operational stress" due to "chronic sleep deprivation" which is correlated with an increase in accidents;

12) Page had no previous history of discipline;

13) Page had never previously zeroed his M4 rifle;

14) Page never previously fired his weapon;

15) 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 Page, thought AP a sub-standard soldier and an "oddity;"

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

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

30) Page did not know for certain whether AP 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 Page and SPC Perkins;

32) SSG Wyvill testified that minutes before the shooting, he and 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 Page was going to shoot himself;

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

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

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

42) After the shot, Page radioed for help;

43) He ran to AP's aid;

44) He helped the medic attend to AP;

45) The unit medic testified that Page's hands were shaking and Page was in psychogenic shock;

46) While helping treat AP, Page freely admitted that he shot AP 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) Page chambered a round during the VBIED threat the day before the shooting;

50) 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 May 14, the day before the shooting; and

51) Not one witness testified that Page intended to kill AP.

Revealing with a strong measure of certitude that the Army Court neither fully nor fairly evaluated Page's appeal, none of these points appear in the decision, even upon *de novo* review. Having overlooked these dozens of relevant points altogether, the Army Court instead focused

exclusively on the prosecution and found that “favorable government evidence was …voluminous.” (Army Opinion Fn 4). The Army Court’s opinion is accordingly so lob-sided in favor of the prosecution that it can be reasonably seen as a subjective advocate’s brief defending a position and result rather than an objective application of the Constitution and the law to the evidence presented by both adversaries.

Further revealing that the Army Court’s review was neither full, fair, not compliant with due process, its decision does not embrace, evaluate, or distinguish the caselaw Page presented in support of his claim that involuntary manslaughter was the appropriate 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*. Nowhere in the Army Court’s decision is *Markert* mentioned notwithstanding the apparent relevance.

Page also cited *United States v. Jacobs*, 9 M.J. 794 (N-M. Ct. Crim. App. 1980), to inform that involuntary manslaughter is appropriate in his case. 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. Yet, the Army Court did not include this case in its decision.

Page further cited *United States v. Peterson,* 17 U.S.C.M.A. 548 (1968), as it 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 and wounding five. The trial court adjudged a sentence which included five years confinement, the convening authority approved two years confinement by agreement, which the appellate court upheld. *Peterson*, 17 U.S.C.M.A. at 548. Although Peterson is binding precedent from the Army's superior court, it is not mentioned in Page's case.

Still further, Page cited *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 Army Court declined to apply any of these holdings or rationales to Page's case. And, Page concluded his testimony to the trial judge: "[a]nd, I'm very, very sorry for what happened, Your Honor. I never wanted to hurt [AP], ever." (R. at 160). The lead CID agent summed the

results of the investigation up when he concluded, "[t]here was nothing to indicate that [Page] was in a state of mind to want [AP] dead." (R. at 872, Art. 32(b)).

Federal law obligated the Army Court to approve only the finding and sentence that were correct in law and fact, 10 U.S.C. §§ 866, and those unaffected by material prejudice to Page's substantial trial rights, 10 U.S.C. § 859. These mandates encompass *de novo* probing measures to ensure that constitutional guarantees were observed. Because the Army Court's decision overlooked at least 51 points of evidence in favor of the lesser conviction, spent considerable effort discussing prosecutorial evidence to the wholesale exclusion of evidence in favor of Page, and refused to address the involuntary manslaughter precedents Page presented in his papers, his trial and appeal were so fundamentally unfair as to be denial of constitutional due process.

IX. PRAYER FOR RELIEF

WHEREFORE, Petitioner Jeffery T. Page respectfully prays that the Court:

1) Award the writ, reverse, overturn, and vacate his unpremeditated murder conviction, approve only so much of the finding that extends to involuntary manslaughter, and release Page directly for time already service in confinement, which is within the range of terms for involuntary manslaughter;

2) Order Respondents to immediately, completely, and expeditiously make all such changes to all of Pages's official and unofficial records in Respondents' care, custody, and/or control in order to fully effectuate, enable, and carry out the Order of this Court;

3) Award Page costs and attorneys' fees; and

4) Grant such other relief as may be appropriate and to dispose of this matter as law and justice require, 28 U.S.C. § 2243; or alternatively,

5) Pursuant to Rule 5 of the Rules Governing Section 2254 Cases in the United States

District Courts (Habeas Rules), order the Respondents to show cause why Page's Petition should not be granted, produce the transcript of trial, the transcript of all post-conviction hearings (before the Army Court and the CAAF), other relevant records in the case, file its answer, motion, or other response, and afford Petitioner the opportunity to reply to the Respondents' answer;

6) Order discovery on behalf of Petitioner pursuant to Habeas Rule 6;

7) Order expansion of the record pursuant to Habeas Rule 7;

8) Conduct a hearing at which evidence may be offered concerning the factual allegations of the Petition; and

9) Grant such other relief as may be appropriate and to dispose of this matter as law and justice require. 28 U.S.C. § 2243.

Respectfully submitted,

Jeffery T. Page

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VERIFICATION

Pursuant to 28 U.S.C. § 2242, Petitioner Jeffery T. Page's application for a Writ of Habeas Corpus is in writing and signed and verified by his attorneys acting on his behalf.

CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2018, I electronically transmitted Petitioner Jeffery T. Page's Petition for a Writ of Habeas Corpus Under 28 U.S.C. § 2241, to the Clerk's Office using the CM/ECF System for filing, forwarding to a judge pursuant to the Court's assignment procedure per Habeas Rule 4, and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants: United States Attorney for the District of Kansas.

By: /s/ Christopher Joseph
Christopher Joseph