No. 20-3005

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JEFFERY T. PAGE,

Plaintiff-Appellant,

v.

COMMANDANT, UNITED STATES DISCIPLINARY BARRACKS, FORT LEAVENWORTH, KANSAS,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS (TOPEKA)
HONORABLE JOHN W. LUNGSTRUM
NO. 5:19 CV-03020-JWL

APPELLANT'S OPENING BRIEF

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May 20, 2020

Oral Argument Requested

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GLOSSARY OF TERMS

The following terms used in Appellant's Opening Brief are drawn from the U.S. Army's Field Manual for M4 Rile Marksmanship, FM 3.22-9 unless otherwise noted.

Chambering: The step in the cycle of operation that refers to fully seating the round in the chamber of the rifle.

Charging Handle: Device on a firearm which, when operated, results in the hammer or striker being cocked or moved to the ready position. It allows the operator to pull the bolt to the rear. The cocking handle has a number of functions: it facilitates the ejection of a spent shell casing or unfired cartridge from the chamber; it loads a round from the magazine or by hand through the chamber; it clears a stoppage such as a jam, double feed, stovepipe or misfire; it verifies that the weapon's chamber is clear of any rounds or other obstructions; it moves the bolt in to the battery, acting as a forward assist (but not necessarily); it releases a bolt locked to the rear, such as would be the case after firing the last round on a firearm equipped with a last-round-hold-open feature.

Clearing: Process of ensuring no round is in the chamber and that the firearm is in a safe, not ready to fire status.

CONNEX: a large metal cargo container used by the U.S. Army for shipping supplies, as to overseas bases.

Cycle of Operation: The eight steps involved in firing a round of ammunition: feeding, chambering, locking, firing, unlocking, extracting, ejecting, and cocking.

Dry-Fire: A technique used to simulate the firing of a live round with an empty weapon. Any application of the fundamentals of marksmanship without live ammunition may be referred to as dry fire.

Dry-Fire Exercises: Repeated dry-fire exercises are the most efficient means available to ensure soldiers can apply modifications to the fundamentals. Multiple dry-fire exercises are needed, emphasizing a rapid shift in position and

point of aim, followed by breath control and fast trigger squeeze. Blanks or dummy rounds may be used to train rapid magazine changes and the application of immediate action. The soldier should display knowledge and skill during these dry-fire exercises before attempting live fire.

Magazine: Device or chamber for holding a supply of cartridges to be fed automatically to breech of a firearm. It is the area from where ammunition is pulled and put into the firing chamber.

Optic: Reflex (nontelescopic) sight.

Round: May refer to a complete cartridge or to a bullet.

Sight Alignment: Placing the center tip of the front sight post in the exact center of the rear aperture.

Zeroing: Adjusting the rifle sights so bullets hit the aiming point at a given range.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the lower court interpreted its Article III standard of review of Article I constitutional rulings too restrictively to avoid adjudicating Page's claims, in contravention of 28 U.S.C. § 2241, the Supreme Court's holding in *Burns v. Wilson*, and this Court's holdings in *Monk v. Zelez* and *Dodson v. Zelez*.

2. Whether the Article I process was "legally inadequate" per *Burns* to resolve Page's claims where it refused to recognize that the testimony of 12 witnesses and two law enforcement reports would have resulted in a lesser conviction for manslaughter rather than the greater conviction for murder.

3. Whether the Article I appellate tribunal failed to apply proper legal standards and failed to give adequate consideration to Page's claims when it determined that an unpremeditated murder conviction and sentence to 26 years confinement are constitutionally sufficient while ignoring an entire body of applicable manslaughter caselaw, the explanation of manslaughter in the statute, the definition of culpable negligence in the manslaughter statute, and over 50 undisputed points signifying manslaughter as the conviction consistent with due process.

PRELIMINARY STATEMENT OF JURISDICTION

The lower court possessed jurisdiction to resolve Page's Article III challenges to Article I military tribunals' determinations of the Constitution's

meaning and applicability. Page invoked 28 U.S.C. § 2241 (Federal habeas corpus for military petitioners), 28 U.S.C. § 2243 (Article III court may enter orders to do justice), and 28 U.S.C. § 1331 (Federal question jurisdiction).

On November 25, 2019, the lower court denied Page's Petition for Writ of Habeas Corpus, having declined to reach the merits of Page's constitutional claims and adjudicate them. (Doc. 19). The district judge erred by refusing to apply Article III expertise to Article I determinations of constitutional law. The lower court errantly reasoned that because Article I military tribunals had "fully" and "fairly" considered Page's constitutional claims, Article III review of Page's two constitutional claims was precluded. *Id*.

On January 21, 2020, Page filed a Notice of Appeal which was docketed before this Court the same day. Fed. R. App. P. 4(a)(1)(B). This Court possesses jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE CASE

Having exhausted his direct military appellate options, Page brought the instant civil case pursuant to 28 U.S.C. §§ 2241 and 2243 to challenge the constitutional rulings of Article I military tribunals that so contaminated his trial and appeal to render due process absent without leave. *See, e.g., Keeney v. Tamayo-Reyes*, 504 U.S. 1, 14 (1992) (habeas corpus is not an appellate proceeding, rather, an original civil action in a Federal civil court).

On March 18, 2015, May 18, 2015, and June 15 – 18, 2015, an Article I military judge accepted Page's plea of guilty to involuntary manslaughter under 10 U.S.C. § 919 at Fort Carson, Colorado. The prosecution "proved up" unpremeditated murder under 10 U.S.C. § 920. Page appealed to the U.S. Army Court of Criminal Appeals pursuant to 10 U.S.C. § 866, which denied his claims and provided no relief. *United States v. Page*, 2017 CCA LEXIS 614 (A.C.C.A., Sept. 14, 2017).

Page then appealed to the U.S. Court of Appeals for the Armed Forces ("CAAF"), which possesses discretionary review authority pursuant to 10 U.S.C § 867. 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.

STATEMENT OF FACTS

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

A native of Michigan and the oldest of three children, Page's father worked at the nearby Ford plant and his mother home-schooled her children until high school. Page excelled in mathematics and swimming on a YMCA team, had a grade point average of 3.6/4.0, tutored sixth graders, and was selected to the National Honor Society. (R. 635). 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. 638).

Page was a good Soldier and was generally in a "good mood." (R. 348). Page gave medical personnel no indicators of violence or "red flags." (R. 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. To the Kingdom of Jordan to Guard a Patriot Missile Battery

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. 288). For example, a soldier was on duty for 12 hours for two days in a row, then had one day off, followed by 12 hours for two nights in a row. (R. 288-89).

Weapons were housed in a CONNEX. 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. 239). Before relieving the previous shift, soldiers drew their weapons from the CONNEX then drove approximately 6 – 7 miles to their duty location. (R. 362).

Soldiers spent four hours in a guard shack, four hours in the operations center, and four hours driving around the perimeter. (R. 206). Weapons status was "amber," meaning a 30-round magazine in the rifle but no round chambered with the selector switch on "safe." (R. 292).

An M4 magazine is designed to hold 30 rounds maximum and still function properly. An M4 is not designed to function properly with 31 rounds in a magazine; that is, the magazine will not properly "seat" in the weapon's lower receiver. (R. 153, Art. 32(b)).

C. Dry-Firing Authorized and Encouraged

Soldiers wore "full battle rattle" in the triple digit oppressive desert heat. 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. Soldiers were found asleep on duty, occasionally veered off the road while driving, and idled the time away by playing video games

on their cell phones, and on occasion they engaged in "dry-firing" and/or "flagging" one another. (R. 249; 292; 510).

Dry-firing is a practice where soldiers aim their rifles at each other and practice their breathing and trigger squeeze while no bullet is in the chamber. Nys, encouraged his Soldiers to dry-fire while on duty, and did so regularly with them.

D. Page's Leaders Chamber Rounds

Five months into the deployment to Jordan, on May 14, 2014, Page was on the first of his two-day "day" shifts. A truck approached and was perceived as a threat (R. 142). Following his Sergeant's example, Page pulled his charging handle, sending a round from his M4 magazine into the chamber of his rifle, and approached the "sand truck" to secure and search it for threats. *Id*. Solders were authorized to "go red," that is, to chamber a round and take the safety off their rifles, setting conditions to fire.

The "sand truck" was not a threat, and the soldiers eventually allowed it to pass. 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 p.m. on May 14, 2014, Page returned to his living area, put his rifle in the CONNEX, ate dinner, and

went to sleep. The next morning, Page drew his rifle from the CONNEX and took up duty in the guard shack

Ammunition was stored in 30-round magazines in the guard shack. Soldiers inserted a 30-round magazine, but kept the weapon in "amber," *i.e.*, status where the rifle is not ready to fire. During the shift change-over, Mancha performed a "push-test" of each of the ten 30-round magazines before he "signed over" the ammunition to Page. (R. 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. 443).

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

The guard shack had a small portal looking back into the missile site. Page sat on a chair near the portal. AP went to pick up lunch and was returning to the guard shack. Forgetting that he had chambered a round the evening before when the "sand truck" posed a potential threat, Page carelessly decided to dry-fire at AP as AP walked from the dining facility back to the guard shack. A round went off and struck AP in the head, approximately 55 feet away. (R. 145).

Page radioed for medical assistance, then bolted from the to begin lifesaving on AP.[1] Page asked the unit's medic what he could do to help. (R. 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. 343).

After he helped put AP on the litter and loaded AP into the ambulance, Page returned to the guard shack. Duty arrived and upon taking Page's rifle, noticed it had jammed, counted the rounds in the magazine – there were 30. (R. 304). He also picked up the spent casing from the guard shack floor and placed it on the portal windowsill. (R. 303). There were 30 rounds in the magazine and a spent shell casing on the floor, for a total of 31 rounds for a 30-round magazine – thus confirming that one round had been in the chamber.

After the incident, Page's hands were shaking, he was holding his head, and his cigarette was shaking.

G. Leadership Did Not Enforce Weapons Safety Before the Shooting

Prior to the shooting, leadership filmed a skit that depicted soldiers waving weapons at one another without regard for muzzle awareness. (R. 127). The Company Master Gunner requested that the depiction not be shown because it

[1] Wyvill testified at the Article Art. 32(b) hearing that Page radioed, "No, it's my fault, I shot AP." (R. at 113-14, Art. 32(b)).

contained "weapons violations." (R. 128). It was shown to the unit, to include Page.

The Platoon Leader, 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. 286-87).

Soldiers drawing their own weapons from the CONNEX violated unit policy. (R. 1019, Art. 32(b)). The unit had no weapons clearing barrels. (R. 500). The unit had no weapons clearing signs. Leaders did not visually inspect rifle chambers to ensure they were cleared. (R. 1089, Art. 32(b)).

"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 pulled the charging handle of his rifle the day before during the truck threat, 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. (R. 459).

H. Page Accepted Responsibility

Page pled guilty to involuntary manslaughter. Seeking to prove the greater offenses of premeditated and unpremeditated murder, the prosecution called eleven witnesses but not one could provide any testimony of 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. Direct Article I Appeal

In addition to alleging that his counsel unreasonably failed to call 12 witnesses possessing exonerating testimony and introduce two exculpatory law enforcement reports, Page highlighted the weakness of the prosecution's purely circumstantial evidence of his specific intent to kill and noted 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 legally insufficient; and e) factually similar caselaw informed that involuntary manslaughter was the appropriate conviction. The Article I appellate tribunal discussed none of these salient and material points.

It also 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 Article I tribunal 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. 853; 874; 890; Art. 32(b)). Specifically, the lead investigator testified that every witness 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. 872, Art. 32(b)).

The 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. 890, Art. 32(b)).

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.

The 1088-page verbatim Article 32(b) hearing transcript contains sworn testimony from 12 witnesses that Page had no intent to kill. The Article I tribunal, however, ruled that this type of witness testimony was not admissible.

Page asked the Article I tribunal to evaluate the physical evidence proving manslaughter rather than murder. For example, Page testified that he chambered one round about 3:00 p.m. the day before the shooting (May 14, 2015) during the truck threat following the examples of his leaders, and that he forgot the round was in the chamber. Sergeant Duty, who secured Page's rifle moments after the shot, confirmed 30 rounds remained in the magazine and one casing on the floor, and swore that:

> The only way I could think [the shooting] is possible is maybe on a previous shift [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. 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 bullet 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, proving 31 rounds were in the rifle.

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

That all 300 rounds were accounted for moments after the shot backs Page's testimony and supports Duty's causation assessment that Page had errantly left the round in the chamber of his rifle the day before. 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, 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.

Another example of the physical evidence corroborating Page's testimony that went unaddressed by the Article I and Article III courts: 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 rifle 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 the shooting when the truck was approaching the check point Page was manning.

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 M4's charging handle the day of the fatal shot – because a round was already chambered from the day before.[2] The mere fact that Page did not pull the charging handle is strong evidence of his intent not to fire an actual bullet, but rather, to dry fire.

Page's supervisors corroborate his testimony because each chambered a round during the afternoon of the truck incident. Cullum stated to Page, "watch and learn." (R. 356-57).[3] This testimony is undisputed.

The Article I and Article III court opinions are 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 and bearing on whether Page's claims were truly "fully" and "fairly" considered. Before the shot, Page talked with Macaskill about leave, buying a truck, and women. (R. 210-11,

[2] Pulling the charging handle strips a bullet off the top of the magazine and sends the bullet into the chamber. If a soldier does not pull his charging handle or otherwise cause the bolt to strip a round from the magazine into the chamber, the rifle will ordinarily not fire at all.

[3] Page requested during pretrial discovery the paper vehicle entry logs from the guard shack as well as the computer vehicle entry records. None were forthcoming, even though the records existed. Page sought these records to reinforce his testimony that the sand truck incident where he chambered a round was May,14, 2015, the shift before and the day before the fatal shot.

Art. 32(b)). Also before the shot, Page talked with Wyvill about re-enlistment and career advancement opportunities in the Army. (R. 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. 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. Omitting these points as if they did not happen omits large swaths of material that should have been "fully" and "fairly" considered.

SUMMARY OF THE ARGUMENT

Page's claims fit squarely within Supreme Court and this Circuit's precedents that hold that where an Article I tribunal determines questions of substantial constitutional law that are largely free of factual issues, Article III courts are not only directed by Congress through statutes to adjudicate the merits of those claims, but also dutybound to rule on the merits as the branch of government vested with the obligation to judicially review and determine whether other branches of government complied with prevailing Article III standards. This fundamental separation of powers construct has thus far gone entirely unobserved.

The district judge errantly shut the Federal civil courthouse doors on Page. To reach the determination that an Article III court sitting within the Tenth Circuit is limited to a standard of review so narrow to preclude actual evaluation of constitutional questions fails to consider a developed body of law authorizing -- and indeed, compelling -- review of Article I decisions to ensure they are consistent with Article III court's interpreting the Constitution and resultant caselaw, as a check and balance to Article I legislative tribunals.

The lower court failed to embrace the holdings and rationales in the leading Supreme Court case in this area of the law, *Burns v. Wilson*, as well as Tenth Circuit holdings in *Monk, Dodson*, *Dickson, Dixon, Kennedy, Lips, Lundy, McCotter, Mendrano,* and *Wallis*, *infra*, all of which uniformly hold that substantial questions of constitutional law largely free of factual issues brought under Federal habeas pursuant to Section 2241 should be actually determined by Article III courts. Nor did the lower court consider *Calley, Gusik, Kauffman*, and *Schlesinger*, *infra*, from the Supreme Court and other Circuit Courts of Appeal, providing similar guidance.

The district judge failed to recognize that the Article I tribunals refused to apply proper legal standards, a basis to award the Writ. 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 years confinement. *Id*. Nowhere in any Article I nor Article III decision is this relevant case, *Markert* and others discussed more fully below, mentioned or applied suggesting that review was neither "full" nor "fair," rather incomplete and unfair for failing to apply proper legal standards.

The district court also missed the point that Article I tribunals refused to apply the definition of involuntary manslaughter to Page's case. The *Manual for Courts-Martial* provides examples of what actions constitute involuntary manslaughter, to include pointing a firearm at a buddy and pulling the trigger believing that the weapon was not dangerous:

> 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*** . . . .

Manual for Courts-Martial, United States (2012), Part IV, ¶ 44(c)(2)(a)(i) (emphasis added).

Nor did the lower court acknowledge and analyze that Article I tribunals completely disregarded and declined to apply the law of culpable negligence in the

context of Page's constitutional claims that involuntary manslaughter is the accurate conviction.

The district court erroneously took no issue with the Article I tribunal's having accepted, indiscriminately and at face value, defense counsel's post trial faulty legal reasoning that the rules of evidence prevented his calling 12 exculpatory witnesses and introducing two exonerating police reports on the dispositive contested issue, Page's mindset – the difference between murder and manslaughter, and the difference between 26 years and a maximum of 10. Page urged the district judge to embrace that the Article I process was "legally inadequate to resolve the claims which [he] have urged upon the civil courts," *Burns*, 346 U.S. at 146, and that flawed process produced constitutionally unreliable results.

In mistakenly finding that Article I tribunals "fully" and "fairly" reviewed Page's claims, the lower court did not explain how review can be "full" when an Article I tribunal repeatedly failed to apply proper legal standards when it ignored an entire body of manslaughter caselaw, statutory explanations of manslaughter strikingly similar to Page's actions of pointing a firearm at a friend without verifying that it was not dangerous and squeezing the trigger, and the legal definition of culpable negligence, the *mens rea* for manslaughter, as if they were nonexistent.

Nor did the lower court explain how Article I review could be "fair" where a tribunal adopts a misapplication of the basic rules of evidence to accept a *post hoc* justification by defense counsel, whose interests on appeal were directly at odds with Page's, seeking to protect himself against a charge of ineffective assistance based on a total failure to call exonerating and mitigating witnesses on the only real and thus important questions of the trial – *mens rea* and appropriate sentence.

Since the Supreme Court announced the "full" and "fair" consideration test in *Burns v. Wilson* 67 years ago, this Circuit's jurisprudence on the metes and bounds of just what "full" and "fair" Article I consideration means "has been anything but clear." *Dodson v. Zelez*, 917 F.2d 1250, 1252 (10th Cir. 1990) ("The federal courts' interpretation -- particularly this court's interpretation -- of the language in *Burns* has been anything but clear.").

However, this Circuit was very clear in *Monk v. Zelez* and *Dodson v. Zelez*, that where a military habeas petitioner's Section 2241 constitutional claims are "substantial and largely free of factual issues," district courts face reversal for failing to ensure Article I compliance with the Constitution as interpreted by Article III courts. "In appropriate cases, however, we will consider and decide constitutional issues that were also considered by the military courts." *Monk v. Zelez*, 901 F.2d 885, 894 (10th Cir. 1990) (reversing District of Kansas's refusal to award Section 2241 Writ for military petitioner). Similarly, "we hold that [] the

[jury] voting procedures claim is subject to our review." *Dodson,* 917, F.2d at 1253. Although raised in his papers before the district judge, the lower court declined to apply *Monk* or *Dodson*, which resulted in an erroneous disposition of Page's constitutional claims.

By disregarding the guidance from the Supreme Court and this Circuit, the lower court misapprehended that its review authority expands commensurately with the weight of the constitutional deprivations Page presented.

The district court misconstrued the true breadth of its authority to rule on the Constitution and instead close-mindedly chose to shutter the Federal courthouse doors, leaving Page, a very young American soldier with no criminal history, without the protections of the Constitution, and convicted and sentenced for a capital crime he did not commit. He is not a murderer. He did, however, by his own testimony, commit an involuntary manslaughter and should be convicted and sentenced accordingly.

ARGUMENT

I. THE DISTRICT COURT'S INCOMPLETE CONSIDERATION OF APPLICABLE PRECEDENT AND MISPLACED RELIANCE ON INAPPOSITE CASELAW RESULTED IN AN ERRONEOUS DISPOSITION OF PAGE'S SECTION 2241 PETITION FOR A WRIT OF HABEAS CORPUS

On Article I appeal, Page alleged two main claims. First, Page asserted that his counsel was ineffective for having failed to present 12 witnesses who possessed

exculpatory testimony that Page was not guilty of unpremeditated murder. Page also alleged that his defense counsel unreasonably failed to introduce two favorable law enforcement reports. Page claimed that his counsel should have introduced these 14 points of evidence and that he suffered actual prejudice from these failures (conviction for a capital crime of violence and an additional 16 years confinement). Second, Page contended that the probative strength of the direct evidence of manslaughter substantially outweighed the indirect supposition of specific intent to kill and accordingly, the constitutionally compliant conviction was involuntary manslaughter.

On habeas review before the lower court, Page demonstrated that his two constitutional claims fell within the Article III court's standard of review under Supreme Court and Tenth Circuit precedents. The lower court side-stepped each of the bases Page alleged in support of review and instead selected distinct portions of a handful of inapplicable cases to cobble together support for the errant conclusion that Page's claims were not viable in Federal civil court. The lower court erred and should be reversed.

A. *De Novo* Standard of Review for a District Court's Denial of a Petition for a Writ of Habeas Corpus

This Court engages in *de novo* review of a district court's denial of a Section 2241 claim. *Fricke v. Sec'y of the Navy*, 509 F.3d 1287, 1290 (10th Cir. 2007). In

conducting a *de novo* review, this Court makes an independent determination of the issues, giving no special weight to the district court's determination. *Ocelot Oil Corp. v. Sparrow Indus*., 847 F.2d 1458, 1464 (10th Cir. 1988).

B. The Lower Court Erroneously Adopted an Overly Narrow View of Its Review Authority Under 28 U.S.C. § 2241, Despite Supreme Court and Tenth Circuit Precedents Demonstrating that It Should Have Reached and Decided the Merits of Page's Substantial Constitutional Claims, Which Were Not Given Adequate Consideration by Article I Military Tribunals

This Court and the lower court are 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 v. Wilson*, 346 U.S. 137 (1953), the leading case in this area of the law, the Supreme Court made clear that *de novo* 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*, a Section 2241 case, a plurality of 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.

Id. at 142.

The High Court acknowledged the vital role Article III courts play in ensuring compliance with rudimentary due process during Article I proceedings.

Generally, Article I military legal proceedings are final and binding on all courts, 10 U.S.C. § 876. Reaffirming the district court's role in checking Article I constitutional rulings, however, the Supreme Court has specifically found that 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); *see also Gusik v. Schilder,* 340 U.S. 128, 132 (1950) (describing the "terminal point" of court-martial proceedings where civil habeas corpus review may begin). *Burns*, *Schlesinger*, and *Gusik* clearly demonstrate that Article III courts are empowered to decide the merits of constitutional claims, even though Article I tribunals considered them previously. *See also 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).

1. *Burns v. Wilson* Authorizes Article III Review of the Merits and Awarding the Writ, But the Lower Court Failed to Apply It

The seminal Supreme Court case on this topic demonstrates that Page's claims are within the permissible scope of Article III review and the constitutional deprivations he brought to the attention of the lower court cannot stand under the Constitution and Section 2241 habeas jurisprudence.

In *Burns*, the Supreme Court agreed that the district court and the appellate court correctly dismissed the habeas petitions of three airmen [Air Force enlisted men] sentenced to death for rape and murder while stationed on the island of Guam, largely because their petition sought to simply relitigate their claims. 346 U.S. at 146.

The *Burns* Court emphasized that that military courts "have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights." *Id*. at 142. But, the Supreme Court qualified that Article III review *may* be precluded where a military petitioner seeks to retry the case in civil court. "[W]hen a military decision has dealt fully and fairly with an allegation raised in that [habeas] application, it is not open to a federal civil court to grant the writ simply to reevaluate the evidence." *Id*., (internal citation omitted).

In upholding the trial and appellate courts' denials of Article III review to the airmen in *Burns*, the Supreme Court reasoned that "[p]etitioners have failed to

show that military review was legally inadequate to resolve the claims which they have urged upon the civil courts. They simply demand an opportunity to make a new record, to prove *de novo* in the district court precisely the case which they failed to prove in the military courts." *Id*. at 146.

The same cannot be said here. Following the rationale in *Burns*, Page does not seek to relitigate, or litigate *de novo*, or to make a new record on claims already addressed by Article I military courts. Rather, Page seeks the justice the constitutional courts of the United States can provide to, as the *Burns* court noted, "protect [Page] from a violation of his constitutional rights." *Id*. at 142.

Before the lower court, Page laid bare that his murder conviction was the result of an "unfair proceeding," *id*., because a dozen witnesses possessing exculpatory and mitigating evidence were not presented, nor were exonerating police reports. Page showed that the Article I appellate tribunal failed to apply proper legal standards, *i.e*., an entire body of manslaughter caselaw, the definition of manslaughter contained within the statute (pointing a weapon in jest believing without verifying that it was loaded), as well as abandonment of objective appellate review by the Article I appellate court's exclusive focus on the prosecution's inferential evidence while refusing to even acknowledge the 50 points Page raised, to include physical evidence, favoring manslaughter.

He revealed that Article I authorities accepted, without critical assessment, verbatim portions of defense counsel's post-trial affidavit claiming the testimony and reports were inadmissible, when pursuant to the rules of evidence and caselaw, they were entirely admissible, especially went presented to a judge alone ("goes to weight, not admissibility").

That an Article I tribunal would accept the incorrect and *post hoc* legal reasoning of an attorney whose interest are totally at odds with Page's must be the "dispensing of 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" that *Burns* admonishes Article III courts to guard against. *Id*. at 142.

Page applied *Burns* to the foregoing to prove that Article I review was "bent" on affirming murder and his capital conviction as the products of constitutionally defective proceedings which understandably produced "unreliable results." *Id*. Although the district court cited *Burns*, it failed to apply its pivotal guidance to Page's claims. *Burns* was enough authority for the district court to award the Writ. The lower court erred by failing to apply the seminal case in this area of the law to Page's claims.

2. The Dissent in *Burns v. Wilson* Authorizes Article III Review of the Merits and Awarding the Writ, but the Lower Court Did Not Consider It

The dissent in *Burns* also informs that this Court's review of Page's constitutional claims and awarding the Writ are altogether appropriate if not necessary to protect and defend the integrity of the Constitution, Page, and the military justice system itself.

Justice William O. Douglas, joined by Justice Hugo Black, concluded the Constitution required Article III habeas review of the airmen's constitutional claims and noted that the Fifth and Sixth Amendments applied to military personnel. "But never have we held that all the rights covered by the Fifth and the Sixth Amendments were abrogated by Art. I, § 8, cl. 14 of the Constitution, empowering Congress to make rules for the armed forces." *Id*. at 152. The dissenting Justices expounded that Article III courts, not Article I courts, formulate the constitutional rules which the military must follow.

> If the military agency has fairly and conscientiously applied the standards of due process formulated by this Court, I would agree that a rehash of the same facts by a federal court would not advance the cause of justice. But where the military reviewing agency has not done that, a court should entertain the petition for habeas corpus. In the first place, the military tribunals in question are federal agencies subject to no other judicial supervision except what is afforded by the federal courts. In the second place, the rules of due process which they apply are constitutional rules which we, not they, formulate.

Id. at 154.

The lower court did not embrace the basic constitutional construct that Article III courts serve as the ultimate arbiters of the law's meaning and effect, that is, the fundamental American concept of separation of powers and checks and balances.

Page showed the court below that Article I tribunals failed to "conscientiously appl[y] the standards of due process" the Supreme Court formulated in a number of significant ways, not the least of which are affirming murder in the face of substantial evidence to the contrary that was not presented at his trial through no fault of Page's, and, upon Article I appeal, was misinterpreted and ignored altogether on appeal. When presented with Page's two developed claims – questions of substantial constitutional dimension denying Page rights guaranteed him by the Constitution – the lower court relinquished the obligation to probe Page's claims for conformity with the Constitution. The dissent in *Burns*, especially when read in conjunction with the plurality decision of the court, should have aided the district court to realize just how appropriate Page's claims were for Article III review and that his conviction and sentence are the result of a fatally flawed Article I process crying out for Article III intervention and expertise.

3. Tenth Circuit Precedents the Lower Court Overlooked Authorize Article III Review and Awarding the Writ

The Tenth Circuit has applied *Burns*, and favorably, to military petitioners reaching the merits of their constitutional claims and granting relief. Although briefed to the district court, none was addressed below. *See, e.g*. *Monk*, 901 F.2d at 893 ("The writ of habeas corpus shall issue immediately."); *Dodson*, 917 F.2d at 1252 (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"); *Mendrano,* 797 F. 2d at 1542 n.6 ("our cases establish that we have the power to review constitutional issues in military cases where appropriate.").

Turning to the definition of "full and fair" consideration, the Tenth Circuit in *Watson v. McCotter*, 782 F.2d 143, 144 (10th Cir. 1986), 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, 782 F.2d at 144.

As this Court 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." *See also Lundy v. Zelez*, 908 F.2d 593 (10th Cir. 1990) (Article III review of Article I rulings when question is constitutionally substantial and largely free of factual issues).

Although presented to the district court, it declined to apply *Monk, Dodson, Dixon, Mendrano*, nor *Lundy* to Page's claims. The court below did mention *Watson* and *Lips*, but neither is helpful here. For example, in *Watson*, this Court affirmed denial of a habeas petition that claimed entitlement to an evidentiary hearing before Article I tribunals. 782 F.2d at 145 ("[t]here is no indication in any of our decisions that the military must provide an evidentiary hearing on an issue to avoid further review in the federal courts.").

In *Lips*, this Court also affirmed denial of a habeas petition, but the petition was based on improper argument and cross-examination to which no trial objections were lodged and thus, procedural default barred relief. 992 F.2d at 811-12 (to obtain federal habeas review of claims based on trial errors to which no objection was made at trial, or of claims that were not raised on appeal, petitioner must show both cause excusing the procedural default and actual prejudice resulting from the error).

Neither of these situations applies to the claims Page presented below. To the extent the lower court relied on them, such reliance is misplaced.

4. *Monk v. Zelez* Authorizes Awarding the Writ, but The Lower Court Refused to Apply It

Absent in the lower court's decision is discussion of the Tenth Circuit's decisions in *Monk* and *Dodson*, which are instructive here, as this Court weighs its authority to reach the merits of constitutional issues that have been considered by Article I military tribunals.

In terms of precedential guidance this Court has given to the district courts on the issue of the reach of the review of constitutional issues in reviewing courts-martial, *Burns* does not stand alone. In *Monk*, the Tenth Circuit reversed the District of Kansas's denial of a military habeas petition brought by a Marine convicted of murdering his wife by strangulation. 901 F.2d at 886. Article I

tribunals reviewed but rejected his constitutional claims that flawed jury instructions led to his unlawful conviction and sentence. *Id*. at 888.

This Court, in reversing the District of Kansas, awarded Monk the Writ and concluded its decision with the following instruction: "the writ of habeas corpus shall issue immediately." *Id*. at 894. In determining to award the Writ, this Court applied *Burns,* 346 U.S. at 142 ("when a military decision has dealt fully and fairly with an allegation raised in that [petition for habeas corpus], it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence.").

This Court next reasoned that "[i]n appropriate cases, however, we will consider and decide constitutional issues that were also considered by the military courts." *Id*., citing *Mendrano,* 797 F.2d at 1541-42 & n. 6 (in pertinent part, "our cases establish that we have the power to review constitutional issues in military cases where appropriate"); *Wallis v. O'Kier*, 491 F.2d 1323, 1325 (10th Cir. 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"); and *Kennedy v. Commandant*, 377 F.2d 339, 342 (10th Cir. 1967) ("[w]e 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").

This Court held that Monk's "constitutional claim is subject to our further review because it is both 'substantial and largely free of factual questions.'" *Id*. citing *Mendrano*, 797 F.2d at 1542 n. 6; *Calley v. Callaway*, 519 F.2d 184, 199-203 (5th Cir. 1975) ("[c]onsideration 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"); *Burns*, 346 U.S. at 142 ("[t]he military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights); and *Wallis*, 491 F.2d at 1325 ("where a military prisoner is in custody by reason of an alleged constitutional violation, the constitutional courts of the United States have the power and are under the duty to make inquiry").

Having determined that Monk's constitutional claim was appropriate for Article III review, mainly because it was both a substantial constitutional issue and largely free of factual questions, this Court turned to the merits of the offending reasonable doubt instruction the Article I judge issued to the jury in Monk's murder trial for having strangled his wife to death. It framed the issue as "whether the ailing instruction by itself so infected the entire trial that the resulting

conviction violates due process." *Id*. (internal citations omitted). "This standard is met, and habeas corpus relief will be granted, if the instruction as given, in the context of the [jury] charge as a whole, 'could mislead the jury into finding no reasonable doubt when in fact there was some.'" *Id*.

Application of *Monk* demonstrates that Page's claims are substantial constitutional questions largely free from factual issues speaking directly to fundamental due process. The right to present a complete defense, call exonerating witnesses, introduce exculpatory reports, secure the effective assistance of counsel, and to be convicted and sentenced based only on the evidence supporting the offense beyond a reasonable doubt are surely questions of substantial constitutional dimension directed at the heart of notice and an opportunity to be heard in the interest of fundamental fairness.

Turning a blind eye to proper legal standards like manslaughter caselaw, the explanation of manslaughter concerning pointing a firearm at another without verifying that the firearm was not dangerous, or the definition of culpable negligence, as well as relying on inferential evidence of specific intent to the total exclusion of physical and corroborating evidence of manslaughter, deprived Page of basic due process.

Monk directly counsels that Page's claims fall within those "appropriate cases" where this Court "will consider and decide constitutional issues that were

also considered by the military courts." *Id*. at 894. Page's claims, like those brought in *Monk*, merit Article III review and determination under *Burns, Watson*, *Mendrano, Wallis, Kennedy, and Calley*, each of which this Court in *Monk* cited as providing sufficient authority to reach the merits and decide the issues even though Article I tribunals considered and rejected Monk's constitutional claims. In the context of fundamental due process, Page's Sixth Amendment and insufficient evidentiary claims are just as constitutionally substantial and free of factual issues as the defective jury instructions in *Monk*.

The lower court erred when it neither cited nor applied *Monk* or the cases cited therein to Page's claims.

5. *Dodson v. Zelez* Authorizes Awarding the Writ, but the Lower Court Declined to Apply It

If the lower court were uneasy relying on *Burns* and/or *Monk*, Circuit guidance was available, relevant, and instructive in *Dodson*, but again, the lower court errantly failed to identify apply it to Page's claims.

In *Dodson*, this Court reached the merits of a Marine petitioner's constitutional jury instruction claim and reversed the District of Kansas's denial of the Writ. 917 F.2d at 1262-63. A case involving robbery, premeditated murder, felony murder, and life imprisonment, Dodson challenged his Article I sentence to life imprisonment as constitutionally flawed because the jury did not vote by ¾ for

the sentence. *Id*. This Court held Dodson's due process rights were violated, reversed the District of Kansas, awarded the Writ, and directed the prosecution to either order a new sentencing hearing or to order no punishment. *Id*. at 1263.

In *Dodson*, this Court, relying on the Fifth Circuit's decision in *Calley*, *supra*, offered four elements to aid district courts sitting in the Tenth Circuit in determining whether they should adjudicate the merits of a military petitioner's constitutional claims previously addressed by Article I military tribunals.

> (1) The asserted error is of substantial constitutional dimension;
>
> (2) The issue is one of law rather than of disputed fact already determined by the military tribunal;
>
> (3) There are no military considerations that warrant different treatment of constitutional claims; and
>
> (4) The military courts failed to give adequate consideration to the issues involved or failed to apply proper legal standards.

Id. at 811.

First, like the constitutional issue presented in *Dodson*, Page's challenges are constitutionally substantial because they relate directly to due process, fundamental fairness, the Sixth Amendment, and the legal sufficiency of the conviction and sentence.

Second, Page's issues are largely free of factual issues and are questions of law.

Third, there are no military considerations that warrant different treatment. Indeed, the military had been trending away from swift justice in remote deployed settings overseas to maintain good order and discipline. Today, soldiers often wait over one year to go to trial while the prosecution returns them to the United States, employs experts, prepares litigation reports, conducts forensic cyber examinations, reviews social media postings, hires consultants, all of which has resulted in a body of jurisprudence which has grown to resemble that of state and Federal civil practice. To the point, however, this case presents no military exigencies.

Fourth, the Article I tribunals failed to give adequate consideration to the issues involved. In addition to failing to apply proper legal standards, as discussed more fully above, adequate consideration must mean "correct" or at a minimum, at least plausibly justified and defensible in the application of prevailing standards.

The lower court did not explain how review can be "full" when an Article I tribunal failed to apply proper legal standards when it ignored an entire body of manslaughter caselaw and the very definition of manslaughter as if they did not exist.

Nor did the lower court explain how Article I review could be "fair" where a tribunal adopts a misapplication of the basic rules of evidence to accept a *post hoc*

justification by defense counsel seeking to protect himself against a charge of ineffective assistance based on a total failure to call exonerating and mitigating witnesses on the only real and thus important questions of the trial – *mens rea* and appropriate sentence. Accordingly, the lower court's decision and the Article I determinations are neither correct nor plausibly justified as constitutionally compliant.

Page demonstrated that Article I review was "legally inadequate" to resolve his claims, *Burns*, 346 U.S. at 142, but the lower court neglected these pivotal points. Accordingly, the *Dodson* factors, which the lower court forewent, inform that the district court should have reached the merits and decided Page's claims. The lower court failed to recognize the true breadth of its authority in this case and thereby disserved not only Page but also the Constitution and the military justice system it was dutybound to check and balance.

6. The District Court Viewed *Burns v. Wilson* as a Jurisdictional Hurdle Rather Than an Aid in Determining to Reach the Merits and Award the Writ

If the district court were uncomfortable with considering and deciding Page's claims through application of *Burns, supra*, its search for and reliance on Circuit precedent reasonably should have included the published and precedential decisions in *Monk*, *Dodson,* and the cases cited therein, rather than the unpublished and inapposite decision in *Nixon v. Ledworth*, 635 F. App'x 560, 566 (10th Cir.

2016) (denial of habeas based on waiver and failure to provide a reasoned basis explaining error in the district court's conclusion that prior acts evidence was fully and fairly considered by Article I tribunals).

That the district court should have reviewed and applied *Dodson, supra,* is reinforced by its having cited *Thomas v. U.S. Disciplinary Barracks*, 625 F.3d 667 (10th Cir. 2010). The lower court cited *Thomas* for the singular proposition, supporting its erroneous dismissal of Page's claim, that generally, Article III review of Article I claims is limited. *Page*, 2019 U.S. Dist. LEXIS 206671 *3.

Reliance on *Thomas*, however, is misplaced because the Court resolved the case based on 28 U.S.C. § 2253(a), not Section 2241 as Page invokes. *Thomas*, 625 F.3d at 668 ("[w]e have jurisdiction under 28 U.S.C. § 2253(a)"). The point, though, is that *Thomas* specifically identified and evaluated a district court's use of the *Dodson* four-part test discussed more fully above. *Id*. at 670-71. Thus, in addition to Page's having briefed *Dodson*, a case the lower court relied upon to rule against Page informed the district judge of the appropriate test to apply. But, it too went ignored.

The same can be rightly said about the lower court's having cited *Roberts v. Callahan*, 321 F.2d 994 (10th Cir. 2003) for essentially the proposition that because Article I courts reviewed Page's claims, Article III court review is precluded. *Page*, 2019 U.S. Dist. LEXIS 206671 *4. This statement of the law is

inaccurate because it does not go far enough to include those instances when it is appropriate for an Article III court to consider and decide the merits of a challenge to an Article I constitutional ruling. Putting aside the lower court's incomplete and inaccurate statement of the applicable law, *Roberts* too specifically alerts readers of the *Dodson* four-factor test. But again, alerted to *Dodson* in a case the lower court determined to cite, it erroneously avoided applying *Dodson's* test, rationale, and holding to Page's claims.

What is more, the lower court's opinion misstates the Article I record, which reasonably gives the appearance that Page has received the benefit of a pretrial agreement when, he did not. The lower court wrote, "[Page] entered a guilty plea to involuntary manslaughter in violation of Article 119, UCMJ, in exchange for a sentence cap and the dismissal of a premeditated murder specification." *Page*, 2019 U.S. Dist. LEXIS 206671 *2. The problem, though, is that Page tried to enter into a negotiated plea in exchange for a sentence cap and dismissal of not only the premeditated specification, but also the unpremeditated murder specification, three times, but the prosecution did not consent. Because the prosecution sought to prove murder largely to assuage the concerns of AP's understandably devastated family, Page pled guilty to involuntary manslaughter in good faith without the benefit of any deal whatsoever.

The lower court's decision is approximately four pages, contains at least as many if not more legal and factual errors, suggesting the lower court repeatedly erred and thereby disserved the Constitution, Page, and the military justice system it was dutybound to check and balance.

II. NEITHER ARTICLE I NOR ARTICLE III COURTS HAS FULLY AND FAIRLY APPLIED PREVAILING PRECEDENTS TO PAGE'S SUBSTANTIAL CONSTITUTIONAL CLAIM THAT HIS COUNSEL'S PERFORMANCE WAS CONSTITUTIONALLY DEFICIENT

A. *De Novo* Appellate Review for Ineffective Assistance of Counsel

This Court reviews questions of constitutional law *de novo. In re Ruti-Sweetwater, Inc*., 836 F.2d 1263 (10th Cir. 1988).

B. The Article I Process Was Legally Inadequate to Resolve Page's Constitutional Claim Where it Misapplied *Strickland* and the Rules of Evidence to Accept Counsel's *Post Hoc* Justification for Having Failed to Call 12 Witnesses and Introduce Two Police Reports Which Stood to Exonerate Page of Murder and Result in a Lesser Conviction and Sentence

In *Strickland*, 466 U.S. at 687, 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 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 considering the totality of the circumstances. *Strickland*, 466 U.S. at 695-96.

Counsel's performance is unreasonable only where "the identified acts or omissions were outside the wide range of professionally competent assistance," as determined by "prevailing professional norms." *Id*. 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. "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).

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,[4] 701,[5] and 704[6]) 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.

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[4] Rule 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.

[5] Rule 701: 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; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

[6] Rule 704: An opinion is not objectionable just because it embraces an ultimate issue. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

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. Representative examples of the type of testimony counsel could have elicited include the following, as does a chart summarizing all 12 witnesses:[7]

1) 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. 196).

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

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

3) Catlin, the unit's medic related that:

[7] The verbatim transcript of all testimony is presented to the Court in Appellant's Appendix filed contemporaneously with this Opening Brief.

> Q. "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.

Wood, an 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. 890).

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 (to include two exonerating police reports):

	WITNESS	PRETRIAL HEARING	TRIAL
1	Catlin	No intent to kill (442)	Not called to testify
2	Nichols	No intent to kill (853)	Not called to testify
3	Wimberly	No intent to kill (874)	Not called to testify
4	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 be classified as a mere matter of trial strategy within the range of 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).

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: *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).

Absent from the Article I appellate tribunal's opinion is an application of the Sixth Amendment and *Strickland*. 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 evidence 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); *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).

The Article I tribunal failed to fully and fairly apply not only Sixth Amendment binding precedent, but went, apparently blindly, 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. The lower court erred by finding Article I review full and fair. It was neither.

III. NEITHER ARTICLE I NOR ARTICLE III COURTS HAS FULLY AND FAIRLY APPLIED PREVAILING CONSTITUTIONAL PRECEDENTS TO PAGE'SCLAIM THAT HIS UNPREMEDITATED MURDER CONVICTION AND SENTENCE ARE CONSTITUTIONALLY INSUFFICIENT

A. *De Novo* Appellate Review for Constitutional Sufficiency

The Article I appellate tribunal was 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. 10 U.S.C. § 866. That standard of review pursuant is *de novo*. *United States v. Walters,* 58 M.J. 391, 395 (C.A.A.F. 2003).

The 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). This 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).

B. Article I Tribunals Failed to Apply Proper Legal Standards by Ignoring an Entire Body of Caselaw Informing That This Case Is A Manslaughter And Not A Murder, Which Cannot Be "Full" and "Fair" Consideration of Page's Evidentiary Insufficiency Claim Under Constitutional Precedents

Neither Article I nor Article III courts acknowledged, adopted, or distinguished the caselaw Page presented. As discussed more fully, *supra*, in

Markert, 65 M.J. at 678, two Marines riding in the back of a vehicle drew their loaded pistols, pointed the weapons at each other, and the appellant shot his buddy in the head leading to his death. The court accepted the accused's plea to involuntary manslaughter and sentenced him to three years confinement. *Id*. (Page has already served six at this point).

The explanation of involuntary manslaughter involves pointing a firearm at another without checking whether it was loaded. *Manual for Courts-Martial, United States* (2012), Part IV, ¶ 44(c)(2)(a)(i) (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). Nowhere in the Article I tribunal's decision is *Markert* or application of the "firearms pointing" explanation of involuntary manslaughter. Nor did the lower court apply it when determining that this claim was fully and fairly considered.

Page 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. The appellant 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 [manslaughter conviction]…." *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, neither the Article I nor the Article III courts applied *Jacobs*.

Page cited *United States v. Peterson,* 17 U.S.C.M.A. 548 (1968). 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. Neither the Article I nor the Article III courts applied *Peterson*.

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).[8]

Page concluded his testimony: "[a]nd, I'm very, very sorry for what happened, Your Honor. I never wanted to hurt [AP], ever." (R. 160).

The lead investigator 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. 872, Art. 32(b)).

Neither the Article I courts nor the court below even acknowledged this relevant body of jurisprudence, which must be a failure to apply proper legal standards. The Article I and Article III court's opinions, viewed collectively, show overwhelmingly lopsided views favoring the prosecution, which evidences their willful blindness to the constitutional issues Page raised.

C. Article I Tribunals Selectively Chose Only Points Favoring Affirmance Rather Than Addressing Dozens of Undisputed Points Favoring Manslaughter, Which Cannot Constitute "Full" and "Fair" Consideration Under Constitutional Precedents

The Article I appellate opinion is so lopsided in favor of the prosecution that it can reasonably be seen as a subjective advocate's brief defending a position

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[8] A more recent example of a Marine dry-firing a weapon and shooting his friend in the eye killing him can be seen at the following link, where the prosecution agreed to a plea arrangement to 1 – 2 years confinement, even where the accused initially lied about the circumstances surrounding the shooting.
https://taskandpurpose.com/news/marine-sentenced-accidental-killing-fellow-marine

rather than an objective application of the Constitution and the law to the evidence presented by both adversaries.

Both the Article I and Article III courts below failed to evaluate any of the undisputed facts that would give rise to a conviction for manslaughter, rather than murder, which must be a deprivation of meaningful appellate review and fundamental due process.

These courts' opinions seem to have ignored, for instance, that during the time of the incident, Page, a high school graduate, was 22 years-old, had been in the Army for two years, and was on first deployment, pulling monotonous guard duty.

He and his fellow soldiers worked two 12-hour *night* shifts followed by two 12-hour *day* shifts – an alternating schedule that disrupted their sleep cycle. As a result, soldiers were found sleeping on duty; they occasionally veered off the road while driving; and they played video games on their cell phones on duty.

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.

These courts appear to have ignored the lax environment surrounding weapons within Page's unit. There were no clearing barrels, *i.e.*, those barrels full of sand in front of entrances in which soldiers would point their weapons and fire

them to ensure there was no round in the chamber. (Such clearing barrels appeared the day after Page shot AP, however.)

Leaders encouraged soldiers to "dry-fire" – a prohibited and unsafe act. These leaders, in fact, regularly conducted "dry-fires" with their soldiers. Page had never previously fired the M4 rifle assigned to him, or for that matter never "zeroed" it to ensure it would be accurate if he ever had to fire it. In fact, Page's M4 rifle optic was broken.

When the shot occurred, Macaskill was standing 6-8 inches from Page in the guard shack. It was daylight, around lunchtime, and other soldiers were around. Macaskill testified that before the shot, Page appeared "normal," and that the two talked about "leave," "buying a truck," and "women."

Wyvill testified that minutes before the shooting, he and Page were talking about career progression. Wyvill too testified that he had seen no unusual tension between Page and AP.

After the shot, Page radioed for help, ran to AP's aid, and then helped the medics render assistance. Duty thought Page was going to shoot himself after he realized what had happened. The medic testified that was in psychogenic shock. While helping treat AP, Page admitted that he shot AP while dry-firing and "being stupid."

The condition of Page's M4 rifle after the shot demonstrates that the shooting was accidental. The rifle was dirty, indicating it had not been maintained. The rifle "double-fed," indicating that there had been 30 rounds in the magazine and one in the chamber (*i.e.*, a round in the chamber that should not have been there). A separate M4 rifle magazine was recovered from the guard shack with 29 rounds in it, indicating that the extra round (the magazine should have held 30 rounds) was in the chamber of Page's rifle. The conclusion is that Page had chambered the round the day before, did not clear it, and it remained in the barrel when he pulled the trigger while "dry-firing" on guard duty the next day.

The Article I tribunal neither fully nor fairly evaluated Page's appeal. None of these points appear in the decision. Having overlooked these dozens of relevant points, the Article I tribunal instead focused exclusively on the prosecution and found that "favorable government evidence was …voluminous." (Army Opinion Fn 4). Its opinion is so skewed in favor of the prosecution that it can be reasonably seen as a subjective advocate's brief defending a position rather than an objective application of the Constitution and the law to the evidence presented. The lower court erred in finding that this claim was fully and fairly considered.

CONCLUSION

The lower court refused an American soldier and his family the basic access to Article III judicial review that Congress envisioned. Congress passed statutes

requiring the courts of the United States to determine whether Article I military tribunals correctly applied the Constitution to courts-martial and Article I direct appeals from courts-martial.

The lower court erred when it concluded it did not possess the authorization, constitutional power, discretion, if not outright mandate, to ensure that Article I military tribunals properly followed the Article III courts' interpretations of the Constitution.

Unmistakable judicial misapplications have worsened a tragic manslaughter. The Article I and Article III courts of the United States have thus far been content with the notion that failing to call 12 exonerating witnesses and introduce two exculpatory law enforcement reports on the most important trial question is somehow compliant with due process. At the same time, they have been equally content with side-stepping entire swaths of applicable manslaughter caselaw, ignoring the explanation of involuntary manslaughter under the statute, undisputed evidence attesting to manslaughter, and ignoring Tenth Circuit and Supreme Court precedents. Judicial review calls for more. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

For these reasons, discussed more fully above, Page respectfully requests that the Court award him a Writ of Habeas Corpus, set aside and vacate his conviction for unpremeditated murder, approve his conviction for involuntary

manslaughter, and consistent with the caselaw precedents cited *supra*, direct his release from confinement based on time already served.

Date: May 20, 2020

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STATEMENT OF RELATED CASES

Appellant Jeffery T. Page is aware of no other related cases in this Court.

Date: May 20, 2020

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellant respectfully requests oral argument to assist the Court in reaching a just decision. Oral argument stands to be helpful for any number of reasons, perhaps the most important being the need to amplify that under current Supreme Court and Circuit precedent, district courts' authority to review military Section 2241 challenges to Article I constitutional rulings is premised on an adjustable scale, that is, that the standard of review expands commensurately with the weight of the constitutional questions presented.

At issue is nothing less consequential as the role the Article III courts play in serving as check and balance ensuring the constitutionality of decisions Article I tribunals make, all to ensure our country's men and women serving the military are guaranteed the constitutional protections enjoyed by those they protect and defend.

As this Court itself has recognized in *Watson v. McCotter*, application of the "full and fair" consideration holding in the Supreme Court's 67-year old decision in *Burns v. Wilson* has been "anything but clear." The lack of clarity on the sliding breadth and depth of a district court's review of constitutional issues leads to less than predictable results and sets conditions for unfairly prejudicial violations of the Constitution to be sustained in the military courts.

Oral argument also stands to provide the Court with insight as to the growing and evolving nature of military justice as compared to the Federal and state criminal justice systems, such that deference to the military courts based on military exigencies is no longer a valid premise. Years ago, military justice, grounded in maintaining good order and discipline among the ranks, was often dispensed swiftly in deployed and remote settings during actual operations.

Today, unlike in 1953 when the Supreme Court issued its plurality in *Burns v. Wilson,* based at least in part on military exigencies, military justice practice consists of trials and appeals that occur with the benefit substantial preparation. Trials occur in state-of-the-art courtrooms overseas or in the United States; forensic experts in a wide variety of fields are employed; extensive motions practice is common; and an accused waits often more than one year for the case to come to trial. Litigation involves conducting social media investigations, issuing subpoenas, securing litigation reports, using cell phone technology, biometrics, satellite data, and aerostat footage.

Stated differently, a member of the public observing a military investigation and trial would likely see no discernable differences between it and a Federal civilian or state counterpart. The exigencies of combat, and need to ensure good order and discipline among the ranks, no longer justify deferring to Article I courts at the expense of servicemembers' constitutional rights.

Oral argument stands to be further helpful in explaining the interplay between various distinct bodies of law to include military, Federal habeas jurisprudence for military petitioners, separation of powers, checks and balances, constitutional law, and evidentiary law.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12, 894 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Times New Roman 14-point font.

Date: May 20, 2020

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SEPARATE CERTIFICATIONS

I hereby certify that (1) all required privacy redactions have been made pursuant to Tenth Circuit R. 25.5; (2) that the hard copies to be submitted to the court are exact copies of the version submitted electronically; and (3) that the electronic submission was scanned for viruses with the most recent version of a commercial virus scanning program, and is free of viruses.

Date: May 20, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: May 20, 2020

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Page v. Commandant

No. 20-3005

Appellant's Brief

ATTACHMENT 1

Opinion of the U.S. District Court for the District of Kansas

November 25, 2019

Page v. Commandant

United States District Court for the District of Kansas

November 25, 2019, Decided; November 25, 2019, Filed

CASE NO. 19-3020-JWL

Reporter
2019 U.S. Dist. LEXIS 206671 *; 2019 WL 6310179

JEFFERY T. PAGE, Petitioner, v. COMMANDANT, United States Disciplinary Barracks, Respondent.

Prior History: *United States v. Page, 2017 CCA LEXIS 614 (A.C.C.A., Sept. 14, 2017)*

Core Terms

military, fair consideration, military court, sentence, shooting, corpus, witnesses

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For Commandant, Respondent: Terra D. Morehead, LEAD ATTORNEY, Office of United States Attorney - KCKS, Kansas City, KS USA.

Judges: JOHN W. LUNGSTRUM, United States District Judge.

Opinion by: JOHN W. LUNGSTRUM

Opinion

MEMORANDUM AND ORDER

This matter is a petition for habeas corpus filed under *28 U.S.C. § 2241*. Petitioner, a prisoner at the United States Disciplinary Barracks (USDB), Fort Leavenworth, Kansas, challenges his confinement for twenty-six years, following his conviction by a general court-martial of unpremeditated murder in violation of Article 118, Uniform Code of Military Justice (UCMJ), *10 U.S.C. § 918*.

Procedural and Factual Background

On May 15, 2014, petitioner was guarding an American Patriot Missile battery on a Royal Jordanian Air Base near Amman, Jordan. As Specialist AP (AP) approached to deliver lunch to petitioner and another soldier, petitioner placed his rifle on semi-automatic and aimed it at him. Petitioner squeezed the trigger and shot AP from approximately **[*2]** fifty-five feet away, striking him in the head. AP later died from his injuries.

Petitioner has maintained that he did not realize there was a chambered round in his rifle and that his shooting of AP was accidental. He entered a guilty plea to involuntary manslaughter in violation of *Article 119*, UCMJ, in exchange for a sentence cap and the dismissal of a premeditated murder specification. The maximum punishment allowed for this charge is ten years' confinement, reduction to the lowest enlisted grade, and a dishonorable discharge.

Under the UCMJ, where an accused servicemember enters a plea to a lesser charge, the prosecution still may attempt to prove greater charges. Here, the military judge subsequently found petitioner guilty of one

specification of unpremeditated murder in violation of Article 118, UCMJ, *10 U.S.C. § 918* and dismissed the specification of involuntary manslaughter as a lesser-included offense. The military judge sentenced petitioner to a term of 26 years, reduction to the lowest enlisted grade of E-1, and a dishonorable discharge.

Petitioner appealed to the Army Court of Criminal Appeals (ACCA). After briefing, that court denied petitioner's request for a hearing or oral argument, **[*3]** denied his claims, and approved the findings and sentence imposed. *United States v. Page, No. 20150505, 2017 CCA LEXIS 614, 2017 WL 4124856 (Army Ct. Crim. App. Sep. 14, 2017)*.[1]

Petitioner then unsuccessfully sought review before the Court of Appeals for the Armed Forces (CAAF).

Standard of Review

A federal court may grant habeas corpus relief where a prisoner demonstrates that he is "in custody in violation of the Constitution or laws or treaties of the United States." *28 U.S.C. § 2241(c)*. However, the Court's review of court-martial proceedings is limited. *Thomas v. U.S. Disciplinary Barracks, 625 F.3d 667, 670 (10th Cir. 2010)*. The Supreme Court has stated that "[m]ilitary law, like state law, is a jurisprudence which exists separate from the law which governs in our federal judicial establishment," and "Congress has taken great care both to define the rights of those subject to military law, and provide a complete system of review within the military system to secure those rights." *Nixon v. Ledwith, 635 F. App'x 560, 563 (10th Cir. Jan. 6, 2016)*(unpublished)(quoting *Burns v. Wilson, 346 U.S. 137, 140, 73 S. Ct. 1045, 97 L. Ed. 1508 (1953)*). Habeas corpus review in this context is generally limited "to jurisdictional issues and to determination of whether the military gave fair consideration to each of the petitioner's constitutional claims." *Fricke v. Sec'y of Navy, 509 F.3d 1287, 1290 (10th Cir. 2007)*(emphasis and internal quotation marks omitted).

It is the limited role of the federal habeas courts "to determine whether the military have given fair consideration to each **[*4]** of the petitioner's claims." *Id.* (citing *Burns, 346 U.S. at 145*); *see also Lips v. Commandant, U.S. Disciplinary Barracks, 997 F.2d 808, 811 (10th Cir. 1993)*.

An issue is considered to have received full and fair consideration when it was briefed and argued to the military court, even if that court summarily resolved the issue. *See Roberts v. Callahan, 321 F.3d 994, 997 (10th Cir. 2003)*. "When a military decision has dealt fully and fairly with an allegation raised in [a habeas] application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence." *Thomas, 625 F.3d at 670*. Rather, when a federal court determines that a petitioner's claims received full and fair consideration in the military courts, it should deny the petition without addressing the merits. *Roberts, 321 F.3d at 996*.

Motion to expand the record

Petitioner moves to expand the record to present the following materials: petitioner's offer to plead guilty to manslaughter, the charging sheets, a social media posting from AP's mother, a complete transcript of the pre-trial hearing, and an affidavit prepared by petitioner's trial defense counsel explaining his defense strategy. Respondent opposes the motion.

Rule 7 of the Rules Governing Section 2254 Cases in the United States District Courts[2] provides that if the petition is not dismissed, "the judge may direct the parties to expand the record by submitting additional materials relating to the petition" and may require their authentication. **[*5]**

As the parties acknowledge, four of the five documents are part of the record of court-martial, and the Court has access to that material. The submission of this material therefore is more akin to the presentation of exhibits to highlight a portion of the lengthy record rather than an expansion of it. The fifth item, apparently a screenshot of a social media posting, is, as respondent argues, unauthenticated and of little weight in the determination of the fairness of the proceedings in the military courts. The Court will allow these submissions and has examined the materials in its review of the record.

Analysis

The petition presents two claims for relief. Ground 1 asserts that petitioner was denied his *Sixth Amendment* right to the effective assistance of counsel, and Ground

[1] The opinion is attached as Ex. 1 to the Answer and Return at Doc. 9-1.

[2] *Rule 1(b)* allows the district court to apply the rules to a habeas corpus petition filed under other provisions.

2 asserts that petitioner was subjected to an unconstitutional conviction and sentence.

Ineffective assistance of counsel

Petitioner contends that his trial counsel erred in failing to call at trial or sentencing any of the twelve witnesses who could have testified concerning his mindset at the time of the shooting.

These witnesses testified at the pretrial hearing conducted under Article 32 and included petitioner's squad leader, **[*6]** the service member who was standing inches away from petitioner in the guard shack at the time of the shooting, the junior medic who attended AP immediately after he was shot, three CID investigators, an AR 15-6 investigator, and leaders and soldiers acquainted with both petitioner and AP. All of the testimony offered at the Article 32 hearing showed that there was no indication that petitioner had a motive or intent to harm AP, that the shooting appeared to be unintentional, and that the initial assessment by investigators was that the shooting was due to negligence.

Petitioner presented claims of ineffective assistance to the ACCA in a submission under *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*[3] . He specifically challenged counsel's failure to call the witnesses who testified at the Article 32 hearing, his failure to introduce evidence that agents of the Air Force Office of Special Investigation (AFOSI) found that the shooting was the result of a negligent discharge of his weapon, and his failure to introduce evidence that the Criminal Investigation Command (CID) review of petitioner's laptop found no evidence of any motive or intent to harm AP.

The ACCA applied the standard announced in *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)* and addressed each point **[*7]** raised by petitioner. *See* Doc. 9-1, pp. 3-5. It first held no error occurred in the failure to call the witnesses at trial, stating that while their lay testimony concerning petitioner's lack of motive or specific intent was admissible at an Article 32 hearing, it was impermissible at trial under Military Rule of Evidence 602. The ACCA noted that defense counsel had used the cross-examination of government witnesses and direct examination of defense witnesses to develop circumstantial evidence of both unit leadership failures that arguably led to an unsafe culture of weapons handling and of petitioner's actions and statements surrounding the shooting. Finally, the ACCA observed that even if the opinion testimony of a lay witness were permissible at trial to establish petitioner's state of mind, such evidence "was a likely unsound tactical strategy" as it would allow the government to challenge these opinions and highlight unfavorable evidence in cross-examination.

Concerning the defense failure to present evidence of the AFOSI investigation, the ACCA noted that the investigation was conducted for only five hours before the CID assumed responsibility for it, that defense counsel interviewed **[*8]** the AFOSI agents, and that they would not testify that the petitioner's action was a negligent discharge of his weapon because such a conclusion was a premature characterization based on a temporary investigation. Based on these factors, the ACCA found that the decision not to present evidence of the AFOSI investigation was a reasonable tactical decision.

Likewise, the ACCA found no error in defense counsel's decision not to present evidence that petitioner's laptop held no evidence of motive or intent against AP. It noted that the key factor in issue was petitioner's state of mind at the moment he fired the weapon and that any evidence concerning the laptop's contents was of minimal importance.

The Court has carefully considered the analysis of the ACCA and concludes that petitioner's claims were given full and fair consideration as defined by the governing case law. The ACCA addressed petitioner's arguments under the correct standard announced in *Strickland* and provided a detailed analysis of his claims.

Unconstitutional conviction and sentence

Petitioner alleges that the evidence is insufficient to support his conviction and the resulting sentence. This claim was thoroughly briefed **[*9]** to the ACCA,[4] which summarily rejected it.[5]

[3] Under *Grostefon*, a military defendant may submit issues on appeal pro se even if proceeding with defense counsel and where counsel has declined to present the issues.

[4] Petitioner's reply brief and request for oral argument appear at Doc. 9-7.

[5] *See* Doc. 9-1, p. 2 ("Appellant asserts four assigned errors,

Applying the narrow framework of review applicable in this habeas corpus action, the Court concludes that the issue of the sufficiency of the evidence of petitioner's guilt of unpremeditated murder was given full and fair consideration. *See* *Roberts, 321 F.3d at 997* ("We have held that where an issue is adequately briefed and argued before the military courts the issue has been given fair consideration, even if the military court disposes of the issue summarily.")(citing *Watson v. McCotter, 782 F.2d 143, 145 (10th Cir. 1986)*). Therefore, the decision of the military court withstands review.

Conclusion

The Court has carefully considered the record and applied the narrow standard of review applicable in this military habeas corpus action. Because the record supports a finding that the military courts gave full and fair consideration to petitioner's claims, the Court concludes the petition must be denied.

IT IS, THEREFORE, BY THE COURT ORDERED the respondent's motion to expand the record (Doc. 15) is granted.

IT IS FURTHER ORDERED the petition for habeas corpus is denied.

IT IS SO ORDERED.

DATED: This 25th day of November, 2019, at Kansas City, Kansas.

/s/ John W. Lungstrum

JOHN W. LUNGSTRUM

U.S. District Judge

End of Document

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which merit no discussion or relief.").

Page v. Commandant

No. 20-3005

Appellant's Brief

ATTACHMENT 2

Opinion of the U.S. Army Court of Criminal Appeals

September 14, 2017

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
CAMPANELLA, SALUSSOLIA, and FLEMING
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist JEFFERY T. PAGE
United States Army, Appellant

ARMY 20150505

Headquarters, Fort Carson
Douglas K. Watkins, Military Judge
Colonel Paul J. Perrone, Jr., Staff Judge Advocate (pretrial)
Colonel Gregg A. Engler, Staff Judge Advocate (post-trial)

For Appellant: John N. Maher, Esq.; Captain Katherine L. DePaul, JA (on brief and reply brief).

For Appellee: Lieutenant Colonel A.G. Courie III, JA; Major Anne C. Hsieh, JA; Lieutenant Colonel Karen J. Borgerding, JA (on brief).

14 September 2017

SUMMARY DISPOSITION

FLEMING, Judge:

In this case we hold that appellant's defense counsel were not ineffective in that they made reasonable decisions about evidence at trial.

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas,[1] of unpremeditated murder in violation of Article 118, Uniform Code of Military Justice, 10 U.S.C. § 918 (2012) [hereinafter UCMJ]. The convening authority approved the adjudged sentence of a dishonorable discharge and

[1] Pursuant to a pretrial agreement, appellant pleaded guilty to involuntary manslaughter in violation of Article 119, UCMJ, in exchange for a sentence cap and the government's dismissal of a premediated murder specification. The military judge accepted appellant's plea to involuntary manslaughter but ultimately dismissed the specification, as a lesser-included offense, after entering a finding of guilty to unpremeditated murder.

confinement for twenty-six years and credited appellant with 518 days of confinement against the sentence to confinement.

Appellant's case is now pending review before this court pursuant to Article 66, UMCJ. Appellant asserts four assigned errors, which merit no discussion or relief. Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant personally raises ineffective assistance of counsel (IAC), which merits brief discussion, but no relief.

BACKGROUND

While on guard duty in Jordan, appellant placed his M4 rifle on semi-automatic, pointed and aimed his weapon into the area he was guarding at an approaching platoon member, Specialist (SPC) JP, who was bringing appellant his lunch. Appellant squeezed the trigger and shot SPC JP in the head from approximately fifty-five feet away. Specialist JP later died from his injuries.

The issue at trial was whether appellant had the specific intent to kill or inflict great bodily harm on Specialist (SPC) JP and committed the offense of unpremediated murder. Defense trial strategy centered on trying to present circumstantial evidence of appellant's lack of specific intent to kill SPC JP.

Defense asserted the shooting was accidental because appellant failed to remember chambering a round in his M4 a day prior to the shooting. He also alleged the unit had a practice of "dry-firing" at other soldiers. "Dry-firing," however, was explained at trial as "you raise your weapon up, aquire something *inanimate* in your optic, and then place the selector level to semi, and pull the trigger." (emphasis added). Defense profferred that unit leadership failures created fatigued soldiers who were complacent about weapons safety. This complacency led to appellant's failure to remember chambering a round and to clear his weapon.

Appellant asserts he received ineffective assistance of counsel (IAC) because his trial defense counsel failed: 1) to call multiple witnesses who testified at the Article 32, UCMJ, hearing regarding appellant's lack of motive and/or intent; 2) to introduce evidence of an alleged finding by Air Force Office of Special Investigation (AFOSI) agents that appellant negligently discharged his weapon; and 3) to introduce evidence that a Criminal Investigation Command (CID) review of appellant's laptop computer did not reveal any evidence that appellant had a motive or intent to kill SPC JP.[2]

[2] This court ordered affidavits from appellant's defense counsel.

LAW AND DISCUSSION

The Sixth Amendment guarantees an accused the right to the effective assistance of counsel. *United States v. Gooch*, 69 M.J. 353, 361 (C.A.A.F. 2011) (citing *United States v. Gilley*, 56 M.J. 113, 124 (C.A.A.F. 2001)). To establish that his counsel was ineffective, appellant must satisfy the two-part test, "both (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) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). We review both prongs of the *Strickland* test de novo. *United States v. Mazza,* 67 M.J. 470, 474 (C.A.A.F. 2009) (citing *United States v. Anderson,* 55 M.J. 198, 201 (C.A.A.F. 2001) and *United States v. Wiley,* 47 M.J. 158, 159 (C.A.A.F. 1997)). In evaluating the first *Strickland* prong, there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. "We also are constrained by the principle that strategic choices made by trial defense counsel are 'virtually unchallengeable' after thorough investigation of the law and the facts relevant to the plausible options." *United States v. Akbar*, 74 M.J. 364, 371 (C.A.A.F. 2015) (citing *Strickland*, 466 U.S. at 690-91). After reviewing the verbatim transcript of the Article 32, UCMJ, hearing,[3] the record of trial, and the affidavits submitted by appellant and trial defense counsel, we find appellant's trial defense counsel's conduct fell within the wide range of reasonable professional assistance.

Failure to Call Witnesses

Appellant alleges his counsel failed to call witnesses, who testified at the Article 32, UCMJ, hearing, to testify during the trial's findings phase as to appellant's lack of motive or specific intent. While such testimony is admissible at an Article 32, UCMJ, hearing, it is impermissible evidence at trial under Military Rule of Evidence [hereinafter Mil. R. Evid.] 602. *See* Rule for Courts-Martial [hereinafter R.C.M.] 405(h) (Mil. R. Evid. 602 does not apply at Article 32, UCMJ, hearings). A lay witness can testify at trial as to observed acts or possibly even words spoken by an appellant; however, it is impermissible for a lay witness to testify as to their personal opinion as to whether appellant possessed a specific motive or intent to kill.

The trial defense counsel, through cross-examination of government witnesses and direct testimony of defense witnesses, attempted to present circumstantial evidence of not only alleged unit leadership failures that created an unsafe weapons environment, but also on appellant's actions and statements immediately before, during, and after the shooting. Defense argued appellant's act of shooting SPC JP

[3] The court granted appellant's motion to attach the verbatim transcript of the Article 32, UCMJ, hearing.

was an accident resulting from culpable negligence, but appellant lacked the specific intent to kill or inflict great bodily harm. The defense strategy to illicit permissible lay witness testimony on circumstantial evidence regarding appellant's lack of motive or specific intent to kill was a reasonable choice in strategy from the available alternatives.[4]

Appellant also asserts his defense counsel failed to present testimony as to his lack of specific motive or intent during the presentencing phase. As stated in one defense counsel's affidavit, considering appellant's unpremeditated murder conviction, "and with it, the requisite associated intent, such testimony, sought now by [a]ppellant during pre-sentencing, would at its best, draw relevancy objections, and at its worst, constitute an impeachment of the findings." *See* R.C.M. 923 (limiting the presentation of evidence which impeaches findings). We concur with trial defense counsel that such an avenue of attack would have, at the most, been fruitless and, at the worst, been detrimental.

AFOSI Investigation

The AFOSI conducted only five hours of investigation on what was initially reported to them as a negligent discharge. One day after the shooting, CID took over the investigation from AFOSI. Trial defense counsel's affidavit establishes that the relevant AFOSI agents were interviewed. AFOSI agents would not testify that they made any finding that appellant's actions were a negligent discharge because "such a characterization would have been premature" and their investigation was only temporary until the lead agency, CID, assumed the investigation. After a thorough investigation by CID, appellant was ultimately charged with premediated murder, among other offenses. Defense counsel's tactical decision not to present evidence regarding AFOSI's minimal and incomplete investigation was reasonable.

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[4] Even assuming, arguendo, it was permissible for a lay witness to testify as to their personal opinion as to appellant's specific motive or intent or if such testimony could have been converted and favorably presented as defense evidence on appellant's character for peacefulness; this was a likely unsound tactical strategy because it opened the door for the government to challenge the lay witness' opinion with questions as to each favorable governmental circumstantial fact, which were voluminous, supporting that appellant possessed the specific intent to kill SPC JP. This government questioning would have decreased or negated the probative value of the witness' lay opinion but, more detrimentally, would have undermined the defense case by providing the government with an opportunity to re-highlight all unfavorable defense evidence regarding appellant's specific intent to kill.

Laptop Computer

Defense counsel's decision to not present evidence that CID failed to find evidence on appellant's computer establishing appellant's motive or intent to kill SPC JP was reasonable. The issue at trial was whether appellant committed an unpremeditated murder. Unpremeditated murder only requires as an element an intent to commit "an intentional act likely to result in death . . . . 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." *See* Article 118(b)(2) and (c)(3)(a), UCMJ.[5]

Defense counsel conceded at trial that appellant aimed and fired his weapon at SPC JP. Therefore, appellant's state of mind at the exact moment he pulled the trigger was the key factor. Defense counsel's strategy to present circumstantial evidence as to appellant's mindset immediately before, during, and after he shot SPC JP, instead of presenting a lack of computer evidence from a different time period, was reasonable. What appellant did not type on his computer on some previous day or time had minimal, if any, bearing on whether he committed an unpremeditated murder.

While finding appellant's trial defense counsel's performance did not fall below an objective standard of reasonableness, several reasons convince us that even if counsel's performance was ineffective, it did not give rise to a "reasonable probability" the result of the proceeding would have been different. The evidence appellant asserts his defense counsel failed to present at trial was either inadmissible or of such minimal probative value that there is no reasonable probability its presentation at trial would have a created a different result in the proceeding. Under *Strickland's* two-prong test, appellant fails to meet his burden that his trial defense counsel were ineffective.

CONCLUSION

The findings of guilty and sentence are AFFIRMED.

Senior Judge CAMPANELLA and Judge SALUSSOLIA concur.

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[5] Department of Army Pamphlet 27-9, Military Judge's Benchbook, Instruction 3-43-2(d), states "[t]he intent to kill or inflict great bodily harm may be proved by circumstantial evidence, that is, by facts or circumstances from which you may reasonably infer the existence of such an intent. Thus, it may be inferred that a person intends the natural and probable results of an act he purposely does."

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FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court

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No. 20-3005

Appellant's Brief

ATTACHMENT 3

Order Denying Petition by the U.S. Court of Appeals for the Armed Forces

February 12, 2018

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Appellee

USCA Dkt. No. 18-0040/AR
Crim.App. No. 20150505

v.

ORDER DENYING PETITION

Jeffery T.
Page,
Appellant

On consideration of the petition for grant of review of the decision of the United States Army Court of Criminal Appeals, it is by the Court, this 12th day of February, 2018,

ORDERED:

That the petition is hereby denied.

For the Court,

/s/ Joseph R. Perlak
Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (Maher)
Appellate Government Counsel (Korte)

Page v. Commandant

No. 20-3005

Appellant's Brief

ATTACHMENT 4

Judgment Entered by the U.S. District Court for the District of Kansas

November 25, 2019

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

JEFFERY T. PAGE,

Petitioner,

v. **Case No. 19-3020-JWL**

COMMANDANT, United States Disciplinary Barracks,

Respondent.

JUDGMENT IN A CIVIL CASE

( ) **JURY VERDICT.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

(x) **DECISION BY THE COURT.** This action came before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the petition for habeas corpus is denied.

Entered on the docket 11/25/19

Dated: November 25, 2019

TIMOTHY M. O'BRIEN
CLERK OF THE DISTRICT COURT

s/S. Nielsen-Davis
Deputy Clerk