

HABEAS CORPUS REVIEW OF MILITARY CONVICTIONS IN THE FEDERAL JUDICIARY: AN ENDURING NEED TO PROTECT CONSTITUTIONAL LIBERTIES

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ABSTRACT: *This article examines the current state of procedure, practice, and the law concerning federal habeas corpus petitions for military convictions. As the Iraq and Afghanistan wars near their third decade, the number of military personnel convicted of crimes in combat has increased due in large measure to operations within civilian populations. Although many of these convicted servicemembers have exhausted their direct military appeals, some are nonetheless hesitant to bring federal habeas corpus challenges, as they presume their case has been “fully and fairly considered,” and accordingly, a federal civilian court will defer to the military and not review the merits of a military petitioner’s claims. In some cases, this is the right answer. But, the Constitution and Supreme Court have made it clear that where a military prisoner’s trial or appeal was neither “fully nor fairly” reviewed—especially in the context of criminal due process and effective assistance of counsel—the federal judiciary is empowered under existing law to review the merits of a military petitioner’s claims and order habeas corpus relief. By examining a current case before the federal courts concerning an Army infantry officer who was convicted of murdering two Afghans and attempting to murder a third while on a patrol in a combat zone, this article provides specific examples of language and points of law for a military appellant to bring a potentially successful habeas petition.*

Habeas Corpus “is not now and has never been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose – the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.”

- Jones v. Cunningham, 371 U.S. 236, 243 (1963).

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I. INTRODUCTION

Some federal courts may view the military as uniquely equipped to resolve its own legal issues. As a result, when military necessities are mixed with legal questions, civilian courts often defer to the military legal system.¹

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However, the basis for civilian deference to military legal decisions does not exist when a military prisoner brings a habeas corpus petition claiming his or her individual Constitutional guarantees were not observed during a court-martial or subsequent appeal.²

In the habeas context, no military mission or national security decision is compromised by examining whether a military prisoner convicted at court-martial was afforded constitutional protections, even if a legal brief were filed and a military appellate court had issued a decision on the alleged error.³ This article posits that the federal judiciary is best positioned to decide whether the military followed the Constitution when imprisoning a servicemember, and presents the Army general court-martial, petition for a new trial, and appeal in *United States v. Lorange* as an example of the enduring need for civilian habeas review of military trials in the American system of checks and balances.⁴

II. WRIT OF HABEAS CORPUS

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¹ *Bennett v. Davis*, 267 F.2d 15, 17 (10th Cir. 1959) (“we inquire only to determine whether competent military tribunals gave full and fair consideration to all of the procedural safeguards deemed essential to a fair trial under military law.”).

² *Monk v. Secretary of the Navy*, 793 F.2d 364, 368–69 (D.C. Cir. 1986).

³ *See Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

⁴ ARMY 20130679, 2017 WL 2819756 (Army Crim. App. June 27, 2017), *review denied*, 77 M.J. 136 (App. Armed Forces 2017).

Before a servicemember can seek habeas corpus in federal civilian court, he must exhaust his direct military appeals.⁵ Once this is done,⁶ his remaining legal course of action is by way of a Petition for a Writ of Habeas Corpus (“habeas”) filed in federal civilian court, with the writ being a convicted servicemember’s last chance to ensure his imprisonment did not violate his constitutional rights.⁷

Bringing a habeas petition to court can be challenging. Some federal courts conclude that if a legal claim was fully and fairly reviewed by military appellate courts, the petition should not be granted in the civilian court.⁸ However, the seminal Supreme Court decision on this point of law makes clear civilian habeas review of military decisions is altogether proper when Constitutional deprivations resulted in unfair proceedings or unreliable results, and consequently unjust confinement.⁹

This article discusses the law and procedure involved when a military prisoner seeks habeas in a federal district court after his military appeals have been exhausted. Additionally, this article encourages federal civilian courts to closely inspect military cases, particularly when prosecutors fail to disclose exculpatory or mitigating evidence and when defense counsel fails to provide

⁵ *McKart v. United States*, 395 U.S. 185, 192 (1969). While determinations made in military proceedings are final and binding on all courts, 10 U.S.C. § 876, the federal civil courts’ jurisdiction over a petition for habeas corpus 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).

⁶ The first level of appeal in the military process involves the Court of Criminal Appeals for the servicemember’s branch, for example, the Army Court of Criminal Appeals. 10 U.S.C. § 866. This court consists of Judge Advocates appointed by The Judge Advocate General. *Id.* Review at the first level is mandatory for sentencing involving death, confinement in excess of one year, dismissal of an officer, or a punitive discharge (bad conduct discharge or dishonorable discharge) for an enlisted servicemember where the right to appellate review has not been waived. *Id.* The second level of appeal involves the Court of Appeals for the Armed Forces (CAAF), consisting of five civilian judges appointed by the President. 10 U.S.C. § 867; 10 U.S.C. § 942. Review at the second level is discretionary. 10 U.S.C. § 867. If the CAAF denies review, the military appellate process is concluded and access to the Supreme Court is not available. *Id.* If the CAAF grants review, appeal of its decision can be pursued before the Supreme Court. 28 U.S.C. § 1259.

⁷ *Machado v. Commanding Officer*, 860 F.2d 542 (2d Cir. 1988); *see also* Dwight H. Sullivan, *The Last Line of Defense: Federal Habeas Review of Military Death Penalty Cases*, 144 MIL. L. REV. 1, 7 (1994) (“The statutory authority for habeas corpus relief for military accused is 28 U.S.C. §2241.”) That statute allows “the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdiction” to issue writs of habeas corpus to prisoners “in custody under or by color of the authority of the United States.” *Id.* (quoting 2 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, *COURT-MARTIAL PROCEDURE* 26-33.00 (1991)). Additionally, the UCMJ’s legislative history is replete with assertions that Congress did not intend Article 76 to preclude federal habeas review of courts-martial. *Id.*

⁸ *Bennett v. Davis*, 267 F.2d 15, 17 (10th Cir. 1959).

⁹ *Burns v. Wilson*, 346 U.S. 137 (1953).

effective assistance at trial under the Fifth and Sixth Amendments, respectively. These issues have appeared in a number of recent military justice cases.¹⁰

The federal judiciary rightly recognizes constitutional failures as obligations to fulfill the habeas mandate to ensure the Constitution was applied correctly as to civilian petitioners.¹¹ That obligation extends to ensuring servicemembers are also protected from the very government overreach habeas was designed to correct.¹² This article does not, however, urge expansion of the law when it comes to denying habeas claims when a case is fully and fairly reviewed by the military. The federal judiciary already defers to military decisions, but only when the court is satisfied the Constitution was properly adhered to.¹³ As the Supreme Court noted in *Burns v. Wilson*

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 dispensing 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.¹⁴

Burns and subsequent cases support the argument that Article III judges should not hesitate to review constitutional challenges arising from Article I courts-martial, even when the issue was briefed and decided by the military before arriving in federal court.¹⁵

III. UNITED STATES V. LORANCE

Today, there are service members convicted and imprisoned for crimes in combat where the military appellate process has been inadequate to resolve fully and fairly their constitutional claims.¹⁶ Were it not for habeas review, these service members' release would be left to the will of the very authority that may

¹⁰ See, e.g., *Lorance*, ARMY 20130679, 2017 WL 2819756; *United States v. Staff Sergeant Robert Bales*, Army Number 20130743 (prosecution did not disclose involuntary ingestion of the anti-malarial drug, known to cause psychotic effects, as bearing on *mens rea* for murder and failed to disclose that Afghan witnesses flown into the United States left their fingerprints and DNA on improvised explosive devices); *United States v. Page*, ARMY 20150505, 2017 WL 4124856 (Army Crim. App. Sept. 14, 2017), *review denied*, 77 M.J. 266 (App. Armed Forces 2018) (where the sole issue at trial was whether the accused had the specific intent to kill—the difference being an unpremeditated murder conviction and a potential life sentence or a manslaughter conviction carrying a cap of ten years confinement. The Army Court of Criminal Appeals denied appellant's Sixth Amendment ineffective assistance of counsel claim and found defense counsel's performance reasonable even though counsel failed to call any of the 12 witnesses who previously testified under oath that appellant had no intent to kill. The appellant was convicted of murder and sentenced to 26 years. Arguably, had the exculpatory witnesses testified, appellant's conviction could have been the lesser manslaughter and his confinement capped).

¹¹ See *Yarborough v. Alvarado*, 541 U.S. 652 (2004).

¹² *Burns*, 346 U.S. at 142.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Watson v. McCotter*, 782 F.2d 143 (10th Cir.), *cert. denied*, 476 U.S. 1184 (1986).

¹⁶ *Bennett v. Davis*, 267 F.2d 15, 17 (10th Cir. 1959).

have unlawfully confined them in the first place. In fact, even if a military prisoner seeks direct access to the President of the United States for a commutation, clemency, or a pardon, the Department of Justice's Office of the Pardon Attorney will not process the request.¹⁷ Instead, in a disturbingly circular fashion, the Office of the Pardon Attorney will return the case to the same branch of the military that facilitated the imprisonment of the applicant.¹⁸

A. Kandahar Combat Patrol Leads to General Court-Martial

An examination of the case of service member Clint Lorange is instructive here. Lorange was a platoon leader in the Army's 82nd Airborne Division.¹⁹ The Division had been deployed to the Zhari District of Kandahar Province, Afghanistan.²⁰ Lorange had assumed leadership of a platoon only days before the patrol that gave rise to his general court-martial.²¹ On July 2, 2012, Lorange led his paratroopers on a combat patrol through a minefield near where previous attacks on the platoon resulted in four casualties, including the previous platoon leader.²²

While patrolling, one of Lorange's soldiers saw a motorcycle speeding toward the patrol carrying three military-age males.²³ Perceiving the motorcycle and its riders as an immediate threat to the exposed platoon, the observing soldier fired his rifle at the motorcycle, but missed.²⁴ The soldier later testified that he complied with the rules of engagement ("ROE") and was entitled to defend himself and his platoon.²⁵ Within seconds of the initial shots, Lorange radioed a "gun truck"—a light armored vehicle with a crew-served weapon he

¹⁷ E-mail from William Taylor II, Executive Officer, Office of the Pardon Attorney, U.S. Department of Justice (June 29, 2018) ("This is in response to your follow up email from earlier today inquiring further about the Department's policy with regard to military commutation requests. Please take a moment to review our longstanding policy on the subject at [:] <https://www.justice.gov/pardon/policies#s4>. The response you received earlier today was accurate because we do not handle or accept petitions on behalf of individuals wishing to seek commutation of sentence for a military conviction. That is outside of the scope of our mission and that is best response I can provide.") (underline emphasis original).

¹⁸ *Id.*

¹⁹ United States v. Lorange, Record of Trial, Allied Papers, CID Agent's Activity Summary, Vol. III. [hereinafter "R."].

²⁰ *Id.*

²¹ A general court-martial is the highest or most serious level court-martial in the military justice system. *See* Article 16, Uniform Code of Military Justice [hereinafter "UCMJ"]; 10 U.S.C. § 816 (2012).

²² R. Allied Papers, CID Agent's Activity Summary, Vol. III.

²³ Micah Zenko, *Targeted Killings and Signature Strikes*, COUNCIL ON FOREIGN RELATIONS (July 16, 2012), <https://www.cfr.org/blog/targeted-killings-and-signature-strikes> ("The term "military-age male" is not defined in military doctrine, though it is routinely used by military officials in counterinsurgency operations to describe individuals who are deemed guilty not based on evidence, but rather on their demography. For example, in unsecured areas of Afghanistan all "fighting-age males," which comprise any male between the ages of fifteen and seventy, may be required to undergo a biometric scan by U.S. soldiers or Afghan security forces.").

²⁴ R. 366.

²⁵ R. 585–86.

had placed in an overwatch position to protect the patrol—to fire on the motorcycle.²⁶ Two of the riders were killed, and one escaped.²⁷ Lorange never fired a shot.²⁸

As the patrol continued its mission, moments later and only a few meters away, a second tense and quickly evolving engagement occurred in which Lorange's platoon shot and killed two other local Afghans and wounded a third.²⁹ As Lorange's platoon patrolled back to their outpost, a platoon member recognized one of the deceased motorcycle riders as a village elder.³⁰ At that point, the case became a "civilian casualty" or "CIVCAS" case.³¹

Despite the soldier who testified that he fired pursuant to the ROE, Lorange's reliance on that threat assessment, the fatal rounds from the gun truck striking within seconds of the first soldier's missed shots, and the fact that Lorange never fired his rifle, the Army nonetheless prosecuted Lorange for two specifications of murder, attempted murder, and several lesser offenses.³² Nine paratroopers in the platoon were also initially accused of murder, but were later given immunity and ordered to cooperate in the case against Lorange.³³ Lorange was convicted; sentenced to 19 years in prison in the United States Disciplinary Barracks ("USDB") at Fort Leavenworth, Kansas; and dismissed from the Army.³⁴

However, Lorange's case was not a trial of all the facts available to the prosecution and bearing on whether he is guilty of the murders and attempted murder, and justly imprisoned for his actions in a combat zone where the enemy often blended in with the local-national population.³⁵ After his court-martial, Lorange retained a new team of attorneys and investigators who learned that prosecutors did not disclose exonerating fingerprint and DNA evidence that showed that the platoon did not kill innocent civilians as the prosecution claimed, but rather, enemy bomb makers who left their fingerprints and skin particles on improvised explosive device ("IED") components in the Afghan battlefield.³⁶

B. Biometric Fingerprint And DNA Evidence Should Have Been Disclosed

In *Lorange*, the soldier who fired his rifle at the three riders testified that he did so after having conducted a ROE assessment and decided that he was

²⁶ R. 384; 497; 501; 655; 658; 675.

²⁷ R. Allied Papers, Criminal Investigation Division Report of Investigation, 0254-12-CID379-77688, at 4–5.

²⁸ *Id.*

²⁹ R. 512–13.

³⁰ R. 315; 631.

³¹ *Id.*

³² R. Charge Sheet.

³³ U.S. v. 1LT Clint A. Lorange, R. Allied Papers, 23 January 2013, Orders to Testify and Grants of Immunity from Major General John W. Nicholson, Jr.

³⁴ R. 985. A dismissal is an authorized punishment and is the officer equivalent of a Dishonorable Discharge.

³⁵ R. Clemency Matters. During the investigation and trial, Army biometrics databases contained information that Ahad's, Aslam's, Karimullah's, and Rahim's fingerprints and/or DNA were recovered from IED components.

³⁶ *Id.* The biometrics data proving AHAD, ASLAM, KARIMULLAH, and RAHIM as terrorists, through DNA and/or fingerprints, existed. (Clemency Matters).

authorized to defend himself and the platoon.³⁷ Had the IED-making evidence been properly disclosed before trial, Lorance’s attorneys would have been able to defend Lorance by arguing that his order—issued seconds after the ROE-compliant shots—ended up killing enemy personnel, not civilians. Under military law, when ROE compliance results in the elimination of lawful targets, these are considered justified killings.³⁸ Accordingly, in Lorance’s case there could be neither two specifications of murder, nor attempted murder, involving the three riders, especially given Lorance’s intent to protect his platoon. With the biometric evidence in hand, the defense could have made it clear to the jury that Lorance’s instincts were accurate and his actions justified by the ROE.

The prosecution could have readily located the fingerprint and DNA evidence as it existed at the time by entering the names of the local nationals contained in the investigatory reports into government databases.³⁹ Such databases were used frequently throughout Afghanistan to plan missions, target the enemy, authorize access to Coalition installations, and as part of “information operations” and “mapping the population” in order to reliably discern innocent civilians from enemy combatants during counter-insurgency or “COIN” operations.⁴⁰

Prosecutors also withheld from Lorance’s attorneys a significant activity report (“SIGACT”) that was created 30 days after the motorcycle engagement.⁴¹ The report stated that Lorance’s platoon was being scouted for an impending “ambush or attack,” and that there was at least one “insurgent killed-in-action confirmed.”⁴² The report stood to assist the defense in preparing for trial in at least two meaningful ways. First, it challenged the prosecution’s claim that the second engagement, which resulted in two deaths and one wounded, were unrelated to the motorcycle engagement. Second, it undercut the prosecution’s allegations that the three riders were civilians.

The jury never learned of other significant facts. For example, witnesses against Lorance were themselves initially accused of murder, given immunity, and instructed to cooperate with prosecutors, but defense counsel did not reveal these facts—which would have explained why soldiers were testifying against their platoon leader.⁴³ Further, the jury did not receive the testimony or sworn written statement made by Lorance’s predecessor, who had

³⁷ R. at 585–86.

³⁸ See UCMJ art. 118; 10 U.S.C. § 918; MANUAL FOR COURTS-MARTIAL, UNITED STATES, RCM 916 (2018) (providing that the killing of an enemy combatant in battle is justified).

³⁹ See CENTER FOR ARMY LESSONS LEARNED, COMMANDER’S GUIDE TO BIOMETRICS IN AFGHANISTAN – OBSERVATIONS, INSIGHTS, AND LESSONS (No. 11-25, 2011) at 37.

⁴⁰ *Id.*

⁴¹ JOCWATCH 2012-07#0055: Offensive Engagement (update 09) as of 040917D*AUG 2012. (NATO’s Joint Operations Center Watch, or JOCWATCH, is an incident-reporting tool widely used within the Afghan theater of operations).

⁴² *Id.* at 1 (“At 0619D* C-Troop CAV received ICOM (Industrial Common Ownership Movement) chatter indicating a pending ambush on a combined patrol moving toward an insurgent position. The ICOM chatter lasted for nearly 90 minutes.”).

⁴³ See generally Record of Trial (Civilian defense counsel did not cross-examine soldiers to reveal to the jury that they were initially accused of murder, given immunity by the commanding general who brought the case to trial against Lorance, then instructed to cooperate with the prosecution).

suffered peppering shrapnel wounds to the face, eyes, and abdomen in the previous IED attack.⁴⁴ Before the statement was disclosed to Lorance’s trial defense attorneys, someone had struck a line through the portion of his statement in which Lorance’s predecessor wrote that he would never allow motorcycles to get near his platoon for fear of an explosion—the very reason Lorance’s soldier fired on the threat, and the very reason Lorance gave the order to fire to his overwatch gun truck.⁴⁵

C. Petition For A New Trial And Appeal

Customarily, a military appellant brings his general court-martial appeal to the relevant Court of Criminal Appeals pursuant to Article 66, UCMJ.⁴⁶ For a convicted soldier, the appropriate court is the U.S. Army Court of Criminal Appeals (the “Army Court”).⁴⁷ However, Lorance believed the prosecution’s failure to disclose exculpatory evidence favorable to the defense justified a new trial, thereby dispensing with the need to raise all appellate errors. Lorance determined the undisclosed fingerprint and DNA evidence should be presented to a new jury to exonerate him of the two specifications of murder and attempted murder allegations, and at the very least, be considered as powerful mitigation evidence to reduce his sentence.⁴⁸ Accordingly, he filed a Petition for a New Trial (“new trial petition”) pursuant to Article 73, UCMJ; 10 U.S.C. § 873; and Rule for Courts-Martial (“RCM”) 1210. Lorance premised this separate basis for post-conviction relief on the fingerprint and DNA evidence left on IEDs, which suggested the Afghans who were killed were not civilians but enemy bombmakers. Lorance sought expedited consideration of his new trial petition before the customarily lengthy process involved in bringing his overall appeal.⁴⁹

The Army Court declined to consider the new trial petition separately, instead waiting 18 months to decide it as part of Lorance’s overall appeal.⁵⁰ Without explanation or rationale, the Army Court denied Lorance’s request for oral argument.⁵¹ It is worth noting the judge who wrote the affirming opinion purportedly never served in any overseas combat assignments.⁵² This is potentially significant, for had the military judge served in an overseas combat assignment, it stands to reason that he would have been familiar with biometrics, fingerprints, DNA, and how the U.S. Military identifies local-nationals and matches bombmakers to bombs to distinguish civilians from enemy combatants.⁵³

⁴⁴ R. Allied Papers, CID Agent’s Activity Summary, Vol. III.

⁴⁵ Sworn statement of Army First Lieutenant Dominick V. Latino, Fort Belvoir CID office, File Number: 0254-12-CID379-77688 (0181-12-CID122) dated 3 AUG 12, found in pretrial allied papers by Lorance appellate defense team.

⁴⁶ 10 U.S.C. § 866 (2012).

⁴⁷ *Id.*

⁴⁸ *See generally* Appellant Brief to the Army Ct.

⁴⁹ *See* UCMJ art. 73; 10 U.S.C. § 873 (2012); RCM 1210.

⁵⁰ *See* UCMJ art. 66; 10 U.S.C. § 866 (2012).

⁵¹ R. Order Denying Oral Argument, June 16, 2017.

⁵² Dep’t of Defense Office of Military Commissions (2018), <http://www.mc.mil/Portals/0/pdfs/CMCRJudges/Judge%20Herring%20Bio.pdf>

⁵³ *See generally* See CENTER FOR ARMY LESSONS LEARNED, COMMANDER’S GUIDE TO BIOMETRICS IN AFGHANISTAN – OBSERVATIONS, INSIGHTS, AND LESSONS (No. 11-25, 2011).

1. Biometrics – Fingerprints, DNA, And “An Abyss.”

Article 73, UCMJ and RCM 1210 require that the reviewing appellate court consider “newly-discovered” evidence forming the basis for the new trial petition.⁵⁴ However, the Army Court declined to accept as reliable the fingerprint and DNA evidence offered by a sworn affidavit from a biometrics expert that the purported civilians left their fingerprints and skin on IED components.⁵⁵ Instead, according to the Army Court, even if the prosecution disclosed the fingerprint and DNA evidence, it “[c]ould] see no scenario for the admissibility of such evidence during trial.”⁵⁶

The Army Court wrongly decided this question for at least nine compelling reasons. First, in reaching the inadmissibility finding, the Army Court relied on the undisputed fact that Lorange was not aware of the fingerprint and DNA evidence when he relied on the ROE-assessment of the motorcycle threat to order additional fire. Equally important to the fairness of the trial is the countervailing legal point that fingerprint and DNA evidence were relevant and admissible to rebut the prosecution’s claim that the purported victims were civilian casualties. The Army Court declined to address this critical point of law—one that stood to adjust the landscape toward a trial of all the facts.⁵⁷

Second, Lorange was entitled to develop and present affirmative defenses to the capital allegations, such as self-defense, defense of others, duress, or justification.⁵⁸ Indeed, as a platoon leader, one of Lorange’s main responsibilities was to safeguard his fellow soldiers.⁵⁹ Had Lorange not given the order to fire on the motorcycle, and instead, the riders drove up and detonated hidden bombs killing or wounding American paratroopers, Lorange could have faced dereliction of duty charges.⁶⁰

Third, the fingerprint and DNA evidence was admissible as it relates to mitigation or extenuation during sentencing.⁶¹ The Army Court failed to discuss this point of law.⁶² Fourth, the evidence was admissible and required as the basis for Lorange’s statutory and regulatory petition for a new trial—which the Army Court also failed to address in its opinion.⁶³ Fifth, the Army Court had no contradicting or countervailing evidence, affidavit, legal authority, or scientific authority contradicting Lorange’s biometric evidence. That is, the government offered no evidence with which the Army Court could dispute the validity of Lorange’s sworn expert affidavit.⁶⁴

⁵⁴ United States v. Williams, 37 M.J. 352 (C.M.A. 1993).

⁵⁵ United States v. First Lieutenant Clint A. Lorange, United States Army Court of Criminal Appeals, Number 20130679, June 27, 2017 (unpublished opinion), petition for grant of review denied, U.S. Court of Appeals of the Armed Forces, Docket Number 17-0599/AR, December 19, 2017.

⁵⁶ *Id.* at 7.

⁵⁷ See Mil. R. Evid. 401; 402; 403.

⁵⁸ See RCM 916 (c) (“A death, injury, or other act caused or done in the proper performance of a legal duty is justified and not unlawful.”).

⁵⁹ See ARMY REGULATION 600-20, ARMY COMMAND POLICY.

⁶⁰ See Article 92, UCMJ; 10 U.S.C. §892 (2012).

⁶¹ See RCM 1001(c)(1)(A) (extenuation); RCM 1001(c)(1)(B) (mitigation); and RCM 1001(c)(3) (rules of evidence relaxed).

⁶² *Id.*

⁶³ See UCMJ art. 73; see also RCM 1210.

⁶⁴ See Mil. R. Evid. 702.

Sixth, the Army Court's decision fails to address the favorable impact the fingerprint and DNA evidence would likely have had on the jury.⁶⁵ For the jury, which was composed of combat veterans from the 82nd Airborne, would likely have found knowledge that the ROE-compliant shots killed enemy combatants to be significant with regard to the jury's findings related to self-defense, defense of others, justification, and duress.⁶⁶ Additionally, such knowledge would have likely resulted in a lesser sentence if considered as evidence relevant to extenuation and mitigation during the sentencing phase.⁶⁷ Stated differently, Lorance's order—which was based on his soldier's threat analysis—eliminated bombmakers, which shows Lorance's decision to engage the motorcycle was a reasonable use of force in war—not murder or attempted murder. Indeed, the Supreme Court has held that federal officers who use deadly force in self-defense or defense of others need not be "correct," but rather need only to have acted reasonably under the circumstances.⁶⁸

Seventh, the Army Court did not recognize or apply the Army Center for Lessons Learned's leading publication about how trustworthy, reliable, and commonplace the use of biometric identification is in Afghanistan. Lorance included the COMMANDER'S GUIDE TO BIOMETRICS IN AFGHANISTAN in his papers and cited it frequently to try to convince the Army Court that exculpatory evidence from biometric searches is reliable and trustworthy because courts have accepted fingerprint and DNA evidence for decades.⁶⁹ The federal government has spent billions to develop and refine biometrics in Afghanistan over the years.⁷⁰

Eighth, the Army Court found that the prosecutor and investigators involved do not have to "search into the abyss of the intelligence community for the potential existence of unspecified information."⁷¹ This finding is problematic for at least three important reasons: (A) a reasonably professional murder and attempted murder investigation includes identifying and investigating murder victims, an attempted-murder victim, and eyewitnesses;⁷²

⁶⁵ See generally *Lorance*, Army Number 20130679.

⁶⁶ R. Allied Papers, General Court-Martial Convening Orders listing officers detailed to serve as the jury in *United States v. 1LT Clint A. Lorance*.

⁶⁷ See RCMs 916 and 1001.

⁶⁸ See, e.g., *Graham v. Connor*, 490 U.S. 386, 397 (1989) (the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation).

⁶⁹ Erin Murphy, *DNA in the Criminal Justice System: A Congressional Research Service Report* (*From the Future)*, 64 UCLA L. REV. DISC. 240 (2016).

⁷⁰ US Government Accountability Office, *Defense Biometrics: DOD Can Better Conform to Standards and Share Biometric Information with Federal Agencies*, GAO-11-276, May 2, 2011 at 1. ("Defense Department spending on biometrics programs is enormous, set at \$3.5 billion for the 2007 through 2015 fiscal years, according to the Government Accountability Office.")

⁷¹ *Lorance*, Army Number 20130679 at 6.

⁷² See ABA CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, Standard 3-5.4, (4th edition, 2014) (the prosecutor should diligently seek to identify all information in the possession of the prosecution *or its agents* that tends to negate the guilt of the accused, mitigate the offense charged, impeach the government's witnesses or evidence, or reduce the likely punishment of the accused if convicted."); see also *United States v. Jackson*, 59 M.J. 330, 334 (App. Armed Forces 2004) (discovery is not limited to matters within the scope of trial counsel's personal knowledge).

(B) characterizing basic identity and affiliation facts as “unspecified information” is an underappreciation of basic criminal investigative techniques;⁷³ and (C) referring to a biometric search as an “abyss” is an underappreciation of the relative ease and accessibility of reliable data.⁷⁴ For example, Lorance explained the confidence the Army has in biometric evidence by citation to a March 2015 federal technology journal.⁷⁵ The cited journal article outlined the following:

The Army's Program Executive Office for Enterprise Information Systems is in charge of a DOD-wide biometrics database that has been in the works for half a decade. The Automated Biometric Identification System is a central repository for biometrics data from various combatant commands and military services. The system can process as many as 30,000 daily submissions and hold as many as 18 million records, according to PEO EIS.

For example, a soldier on patrol in Afghanistan uses a device known as the Biometrics Automated Toolset to collect biometrics. It's hardware, called the Secure Electronic Enrollment Kit II, automatically captures and formats fingerprints and iris and facial images, and has a keyboard for soldiers to type in biographical information about the subject. The handheld device connects to a central workstation that links up with any of the several dozen servers across Afghanistan for storing biometric data.

The data is then sent to the ABIS database in West Virginia for correlation. The FBI and the departments of State and Homeland Security, among other agencies, use ABIS to identify biometrics

⁷³ See, e.g., Department of the Army, Field Manual 3-19-13, *Law Enforcement Investigations*, January 2005 at 12-59 (Decedent Profile Information Establishment and Record). The CID interviewed Afghan witnesses who confirmed names and identities, and the defense made a written request for criminal histories of any Afghan connected to the case. The CID Agent Activity Summaries list “Ahad,” “Karimullah,” and “Rahim as interviewees who confirmed “Aslam” and “Ghamai” were killed. Lorance’s platoon shot and killed Mohammad Aslam and Ghamai, but Karimullah escaped. (ROI Number 0254-12-CID379-77688, at 4-5) (“Mr. AHAD stated his father, brother, and uncle were traveling on a motorcycle . . . his father . . . ASLAM and his brother . . . GHAMAI were killed by U.S. Forces;” “KARIMULLAH then ran into the village to find help”). Special Agent Rasmussen, CID, wrote that, “KARIMULLAH is an important interview, as he was uninjured as a rider on the motorcycle while his relatives were killed.” *Id.* Thus, the information was specified by both the CID and the defense notwithstanding the Army Court’s finding that it was “unspecified information.”

⁷⁴ See CENTER FOR ARMY LESSONS LEARNED, COMMANDER’S GUIDE TO BIOMETRICS IN AFGHANISTAN – OBSERVATIONS, INSIGHTS, AND LESSONS (No. 11-25, 2011) at 7 and 11 (“convictions are now occurring in Afghan courts based solely on biometric evidence;” “[t]hrough [Department of Defense Automated Biometric Identification System], fingerprints are matched and shared with the Department of Homeland Security (DHS) and Federal Bureau of Investigation (FBI).”).

⁷⁵ R. Appellant’s Revised Reply Brief at 27 (citing Sean Lyngaas, *Can the Pentagon Keep Pace with Biometrics?*, FCW (Mar. 11, 2015), <https://fcw.com/Articles/2015/03/11/Can-the-Pentagon-keep-pace-on-biometrics.aspx?Page=1> (last visited Dec. 4, 2018)); see also *Handbook: The Commander’s Guide to Biometrics in Afghanistan*, Center for Army Lessons Learned, No. 11-25, April 2011, Fort Leavenworth, Kansas, available at <https://info.publicintelligence.net/CALL-AfghanBiometrics.pdf>.

matches for criminal cases and people on intelligence watch-lists of suspected terrorists.⁷⁶

The Army uses the same databases many times per day to target terrorists, kill terrorists, capture terrorists, authorize local nationals onto American installations, and for many other uses. For example, *The Commander's Guide to Biometrics in Afghanistan*, created and published by the Army's Center for Lessons Learned, provides:

Biometrics is a decisive battlefield capability being used with increasing intensity and success across Afghanistan. It effectively identifies insurgents, verifies local and third-country nationals accessing our bases and facilities, and links people to events. The biometric technology allows the targeting of persons of interest (POIs) more precisely and helps to provide desperately needed security for local populations. Across Afghanistan, there are normally four to five watch-list hits each day based solely on biometrics. These watch-list hits allow the identification and potential detainment of POIs who operate counter to Afghan, International Security Assistance Force (ISAF), and coalition goals. Beyond Afghanistan, biometrics enables the tracking of POIs across international borders and prevents them from entering the United States.⁷⁷

The Army's use of biometrics to fight the war in Afghanistan extends throughout the chain-of-command, from the most senior to the most junior.⁷⁸ General David H. Petraeus, the American Commander in Iraq and Afghanistan and former Director of the Central Intelligence Agency (CIA) urged biometric resources in Afghanistan.⁷⁹ The Government Accountability Office (GAO) noted in a 2017 report that, "[s]ince 2008 DOD has used biometric and forensic capabilities to capture or kill 1,700 individuals and deny 92,000 individuals access to military bases."⁸⁰ Neither the Army Center for Lessons Learned, Lorange's biometric expert, General Petraeus, GAO, nor the other governmental agencies cited within the *Commander's Guide to Biometrics* views biometrics as part of an abyss.

Lorange presented the above-mentioned authorities to the Army Court in his papers and noted that the search to confirm the victims' identities and eyewitness identities is often no more complicated than a Google search.⁸¹

⁷⁶ Lyngaas, *supra* note 76; *Handbook: The Commander's Guide to Biometrics in Afghanistan*, *supra* note 76.

⁷⁷ See COMMANDER'S GUIDE TO BIOMETRICS IN AFGHANISTAN at Forward.

⁷⁸ *Id.* at 1 ("Within Afghanistan, Task Force Biometrics deploys personnel at the brigade combat team (BCT) and regional command (RC) levels to work with unit commanders and their staffs to help integrate biometrics more effectively into mission planning and execution.").

⁷⁹ Thom Shanker, *To Track Militants, U.S. Has a System That Never Forgets a Face*, N.Y. TIMES (July 13, 2011), http://www.nytimes.com/2011/07/14/world/asia/14identity.html?_r=0 (last visited Dec. 3, 2018) (General Petraeus lauds the technology . . . 'Based on our experience in Iraq, I pushed this hard here in Afghanistan, too, and the Afghan authorities have recognized the value and embraced the systems.'").

⁸⁰ GAO Highlights, "DOD Biometrics and Forensics; Progress Made in Establishing Long-Term Deployable Capabilities, But Further Actions Are Needed," GAO 17-580, August 2017, at 1.

⁸¹ R. Appellant's Brief and Appellant's Petition for a New Trial.

Lorance's expert affiant explained the biometric process to the Army Court and applied the process to reach his case-specific findings.⁸² The COMMANDER'S GUIDE TO BIOMETRICS IN AFGHANISTAN describes, with the backing and authority of the Center for Army Lessons Learned, the ease and reliability of biometrics.⁸³ Yet, the Army Court seems to have overlooked both. Without any supporting evidence or citation to any authority, the Army Court mischaracterized biometrics as an "abyss."⁸⁴

The prosecution and associated investigators had complete access to the biometric data to verify these identities and any terrorist affiliations, and should have done so as part of a fundamentally complete investigation. Whether they did or not remains to be seen. What is undisputed, however, is that no biometric evidence was forthcoming to Lorance until his appellate defense team used the names in the CID reports to retrieve fingerprint and DNA evidence showing that bombmaking from US Army records that existed at the time of trial.⁸⁵ And, as it turns out, this refusal to consider biometrics was pivotal in *Lorance*. It stands to reason that when the purported victims are characterized as civilians killed in a combat zone during a combat patrol where the enemy blends in with the local-national population, confirming just who they are is not only reasonable but also required before capital charges can be responsibly brought against an American officer.⁸⁶

This is especially so when, like here, the prosecutor lines out the names of the purported victims on the Charge Sheet shortly before trial and inserted "a male of apparent Afghan descent," so as to argue that the unidentified victims could not have been targeted because they were civilians.⁸⁷ But, a mere database search away, fingerprint and DNA evidence was available to confirm identities, prove bombmaking activity, and prove that Lorance's instincts were correct.⁸⁸

Further, the prosecution claimed that the second engagement on the patrol was irrelevant to Lorance's order to fire on the riders.⁸⁹ However, after trial, an Army operational report surfaced stating that Lorance's platoon was being scouted for an "impending ambush or attack" and that at least one insurgent was confirmed killed that day.⁹⁰ This evidence should have been turned over to the defense for its pretrial preparation and potential use for trial. It

⁸² R. Appellant's Petition for a New Trial.

⁸³ See CENTER FOR ARMY LESSONS LEARNED, COMMANDER'S GUIDE TO BIOMETRICS IN AFGHANISTAN – OBSERVATIONS, INSIGHTS, AND LESSONS (No. 11-25, 2011).

⁸⁴ *Lorance*, Army Number 20130679, *supra* note 8 (The Army Court also held that a trial counsel has no duty to search biometrics databases in response to a defense written request for criminal records or histories of violence maintained by military agencies in connection with the local-nationals involved in the case, again, finding no violation of the Fifth Amendment, *Brady*, or RCM 701(a)(2) by failing to produce the biometric records).

⁸⁵ R. Appellant's Brief and Appellant's Petition for a New Trial. .

⁸⁶ See RCM 701(a)(6) (prosecutor shall disclose evidence which reasonably tends to negate guilt, reduce the degree of guilt, or reduce the punishment); see also ARMY REGULATION 27–26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, ¶ 3.8(d).

⁸⁷ R. Charge Sheet.

⁸⁸ *Id.*

⁸⁹ R. Appellee's Brief.

⁹⁰ See *supra* note 47.

was not. Had the jury seen the report, the verdicts may have been different or the sentence mitigated as the evidence negated prosecutorial claims that the purported victims were civilian casualties. All of this was before the Army Court for nearly two years, but the Court found none of it availing.⁹¹

2. The Army Court Found Counsel's Assistance Effective Under the Sixth Amendment

In addition to Fifth Amendment deprivations, the Sixth Amendment's right to effective assistance of counsel at trial was also fundamentally disregarded in *Lorance*. In *Strickland v. Washington*, 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."⁹² The Court of Appeals for the Armed Forces has applied this standard to courts-martial, noting that to prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate: (1) that his counsel's performance was deficient and (2) that this deficiency resulted in prejudice.⁹³

In judging the reasonableness of counsel's challenged conduct, the judge will look to the facts of the particular case, viewed as of the time of counsel's conduct.⁹⁴ Furthermore, the court will consider the totality of the circumstances, bearing in mind "counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work . . . [and] recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."⁹⁵

Civilian and military courts have recognized defense counsel's obligation to conduct a reasonable pretrial investigation in order to develop defenses and challenge the prosecution's evidence at trial. For example, the Ninth Circuit noted, "[a]t the heart of an effective defense is an adequate investigation. Without sufficient investigation, a defense attorney, no matter how intelligent or persuasive in court, renders deficient performance and jeopardizes his client's defense."⁹⁶ Similarly, the Eleventh Circuit observed, "[i]n many cases, '[p]retrial investigation is . . . the most critical stage of a lawyer's preparation."⁹⁷ *Lorance's* attorneys were mindful of these obligations. In *Lorance*, the following facts were not disputed:

- a) Counsel arrived the night before this fully contested two specifications of murder and attempted murder trial from another out of town trial;
- b) The second time counsel met with *Lorance* was the morning of the trial;

⁹¹ R. Appellant's Petition for a New Trial.

⁹² 466 U.S. 668, 686 (1984).

⁹³ *United States v. Green*, 68 M.J. 360, 361-62 (C.A.A.F. 2010).

⁹⁴ *Strickland*, 466 U.S. at 690.

⁹⁵ *Id.*

⁹⁶ *Richter v. Hickman*, 578 F.3d 944, 946 (9th Cir. 2009); *United States v. Scott*, 24 M.J. 186, 192 (C.M.A. 1987) (finding ineffective assistance of counsel when defense counsel failed to conduct adequate pretrial investigation).

⁹⁷ *House v. Balkcom*, 725 F.2d 608, 618 (11th Cir. 1984).

- c) Counsel did not interview the witnesses for or against Lorange;
- d) Counsel did not secure the fingerprint or DNA evidence showing the purported victims were not civilians, but rather, terrorist bombmakers;
- e) Counsel did not reveal to the jury during cross examination that multiple soldiers who testified against Lorange were themselves initially charged with murder, given immunity, and ordered to cooperate in the case against Lorange;
- f) Counsel went so far, post-trial, to swear in an affidavit that not interviewing witnesses was a “superior” trial tactic;
- g) Counsel never interviewed any Afghani witness;
- h) Counsel did not interview the Afghani attempted-murder victim, even though his telephone number was listed in the investigatory notes;
- i) Counsel did not interview the Afghan man the platoon shot in the arm during the second engagement; and
- j) Counsel made no attempts to walk the battlefield, especially given reports that the Afghan National Army may have fired on the three local nationals riding on the single motorcycle towards First platoon.⁹⁸

Accordingly, counsel in *Lorange* did not possess the investigatory foundation to make informed tactical decisions at trial, largely because he failed to investigate “all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.”⁹⁹ These undisputed facts were before the Army Court, which, upon application of the *Strickland* standard and its progeny, found the facts unavailing when the court decided that counsel’s performance was neither deficient nor prejudicial to Lorange.¹⁰⁰ Absent from the Army Court’s opinion, though, is an application of the law to counsel’s failure to interview the attempted murder victim, an eyewitness who was shot in the arm, and a third witness who identified the three motorcycle riders. The Army CID interviewed these material witnesses on behalf of the prosecution, however, defense counsel did not.¹⁰¹ This absence suggests that Lorange’s Sixth Amendment ineffective assistance of counsel claim was neither fully nor fairly reviewed.

3. Lorange Was Acquitted Of Changing The ROE

Another theory on which the prosecution relied was that Lorange took it upon himself to change the ROE to authorize deadly force against motorcycles on

⁹⁸ R. Defense Counsel’s Affidavit to Army Court.

⁹⁹ ABA Standards for Criminal Justice: Prosecution and Defense Function, Standard 4-4.1(a) (3d ed. 1993).

¹⁰⁰ See *supra* note 58.

¹⁰¹ R. Allied Papers, ROI Number 0254-12-CID379-77688, at 4-5) (“Mr. AHAD stated his father, brother, and uncle were traveling on a motorcycle . . . his father . . . ASLAM and his brother . . . GHAMAI were killed by U.S. Forces;” “KARIMULLAH then ran into the village to find help”). Special Agent Rasmussen, CID, wrote that, “KARIMULLAH is an important interview, as he was uninjured as a rider on the motorcycle while his relatives were killed.”

sight.¹⁰² Had Lorange actually issued that statement to the platoon during a pre-mission briefing on the morning in question, as the theory went, the foreseeable consequences of American rounds fired at motorcycles would more readily prove Lorange's intent to unlawfully kill and thereby constitute murder and attempted murder. The charge also fit into the prosecution's aggressive efforts to paint Lorange as a "bad apple" who sought to manufacture combat in search of a Combat Infantry Badge, as presented during argument before the jury.¹⁰³ In spite of the prosecution's efforts, the jury found Lorange not guilty of changing the ROE to engage motorcycles on sight.¹⁰⁴ However, Lorange's acquittal on this charge was not mentioned in the Army Court's decision.

The same can be said about critical testimony of ROE compliance, which the Army Court did not include in its written decision. During trial, the soldier who fired at the three motorcycle riders testified that he did so to protect his unit and himself in compliance with the ROE that authorized self-defense and unit self-defense.¹⁰⁵ Lorange reproduced this transcript testimony in his papers to highlight the evidence of ROE compliance on which he based his order to the gun truck.¹⁰⁶ Lorange then alerted the Army Court that five witnesses stated that the fatal rounds from the gun truck were fired (1) "three seconds," (2) "a few seconds," (3) "five seconds," (4) "10 seconds," (5) and "20–30 seconds" after the initial volley.¹⁰⁷ Yet, nowhere in the Army Court decision are these undisputed facts addressed with regard to the pivotal question of whether the rounds fired from the gun truck based on Lorange's order were justified, made in self-defense, or in the unit's self-defense. More importantly, the Army Court did not address the most critical argument head on: whether ROE compliant-rounds fired in a volatile, unfolding, complex, and ambiguous combat environment that killed IED-makers could lawfully constitute two specifications of murder or attempted murder.

The Army Court's inclusion of facts suggesting Lorange changed the ROE despite the fact the jury rejected those facts, its omission of ROE information favorable to Lorange, and its declination to tackle the most critical issue Lorange presented—a point that reasonably stood to require a new trial or a complete reversal—demonstrate that Lorange's new trial petition and separate appeal were neither fully nor fairly considered and that his Fifth and Sixth trial protections were inadequately safeguarded.

¹⁰² R. Charge Sheet (Violation of Article 107, UCMJ, THE SPECIFICATION: In that First Lieutenant Clint A. Lorange, U.S. Army, did, at or near Strong Point Payenzai, Afghanistan, on or about 2 July 2012, with intent to deceive, make to the Soldiers of 1st Platoon, C Troop, an official statement, to wit: that the Rules of Engagement for U.S. Forces had changed, that anyone on a two-wheeled motorcycle is considered hostile, and the platoon was authorized to engage them on sight, or words to that effect, which statement was totally false, and was then known by First Lieutenant Lorange to be so false).

¹⁰³ R. at 132 (Prosecutor: "Lieutenant Lorange manufactured combat to get what he wants."); *see also* R. at 404; 782; 784 (CIB).

¹⁰⁴ *See* Article 107, UCMJ; 10 U.S.C. § 907 (2012).

¹⁰⁵ *See* R. at 585–86.

¹⁰⁶ R. Appellant's Brief.

¹⁰⁷ R. at 384, 497, 501, 655, 658, 675.

4. The CAAF Summarily Denies Lorange's Petition For A Grant Of
Review

Lorange's attorneys then submitted a petition for review to the CAAF, which the court denied without addressing any of the constitutional issues raised.¹⁰⁸ After the CAAF declined to address the merits of Lorange's appeal, the next step was to send the case to the Secretary of the Army for final action.¹⁰⁹

5. Army General Officers Publicly Misquote The Trial Findings

Yet while Lorange's case was pending before the Secretary and awaiting his decision, a series of events unfolded that displayed a misapprehension or outright misstatements of basic facts regarding Lorange's case and convictions. On March 15, 2018, the Chief judge of the Army Court, who is also the Commander of the U.S. Army Legal Services Agency, appeared in uniform at the Center for Strategic and International Studies (CSIS)—a respected Washington D.C. think tank.¹¹⁰ The judge participated in a discussion about the *My Lai* massacre,¹¹¹ during which he made public comments about Lorange as a "bad apple" who wanted to fight the war his own way, and likened Lorange to First Lieutenant William Calley of the *My Lai* Massacre.¹¹² The Chief Judge echoed the Army Court's incorrect conclusion that Lorange changed the ROE to fire on motorcycles on site, despite the fact the jury found Lorange not guilty of that offense.¹¹³ Specifically, the Chief Judge wrongly informed the audience the following:

Clint Lorange was a very aggressive Lieutenant, who had his own ideas about how the war in Afghanistan should be being fought. Those ideas were not in align[ment] with the rules of engagement. And that's the fundamental fact that starts us off the trail here. And off the rails. Lorange gives his Soldiers guidance that is not in accordance with the ROE. Motorcycles are allowed to be engaged on sight - that's the guidance given. Not a lawful order, but his Soldiers don't necessarily know that, because a change to the ROE would logically come through the chain of command.¹¹⁴

Lorange's defense team wrote the Chief Judge and expressed concerns that if the recommendation the Judge Advocate General is required to provide the Secretary or his designee was the same as the Chief Judge's remarks to the

¹⁰⁸ R. Appellant's Petition for Grant of Review.

¹⁰⁹ See Article 71, UCMJ; 10 U.S.C. § 871 (2012); RCMs 1203 and 1206 (Secretary may remit or suspend any part or amount of the unexecuted part of any sentence).

¹¹⁰ Center for Strategic & International Studies (CSIS). *The My Lai Massacre History, Lessons, And Legacy: A panel discussion with historians and military law experts* Thursday, March 15, 2018 1:30 p.m. - 3:30 p.m. CSIS Headquarters, podcast available: <https://www.csis.org/events/my-lai-massacre-history-lessons-and-legacy>

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ The Chief Judge's comments can be seen and heard at <https://www.csis.org/events/my-lai-massacre-history-lessons-and-legacy> (last viewed August 22, 2018) 1:34; see also <https://www.youtube.com/watch?v=Nu8ODkvwZpg> (last viewed August 22, 2018) 1:34.

CSIS, a serious miscarriage of justice would be perpetuated by the provision of inaccurate legal advice.¹¹⁵ The Chief Judge initially granted a request for a meeting, but the meeting was rescheduled several times, until it appeared the door was closed.¹¹⁶ The Chief of the Criminal Law Division in the Office of The Judge Advocate General assured Lorange that the concerns he expressed via letter to the Chief Judge would be taken into consideration when the Secretary acted on the case.¹¹⁷ Despite this, the Judge Advocate General of the Army Lieutenant General Charles Pede echoed similar comments to those of the Chief Judge to at least one Member of the United States House of Representatives.¹¹⁸

In June 2018, the Secretary of the Army's designee took final action on Lorange's case, taking no favorable action and ordered Lorange dismissed from the Army.¹¹⁹

Throughout processing Lorange's case led by the efforts of Lorange's appellate defense team, the Secretary of the Army received several hundred thousand written and signed petitions from concerned Americans urging disapproval of the findings and the sentence.¹²⁰ Representatives of the Army Judge Advocate General's Corps informed Lorange that if he did not coordinate removal of the dozens of bankers' boxes containing the petitions from the Pentagon, they would be thrown in the garbage.¹²¹ Pursuant to Article 74, UCMJ; 10 U.S.C. § 874 (2012), the Secretary of the Army may remit any part of any court-martial sentence. To encourage the Secretary of the Army to remit Lorange's sentence, that is, to disapprove the findings and the sentence, Lorange coordinated these citizens petitions from the American public for delivery to the Secretary of the Army. Because legal officers of the Army's Judge Advocate General's Corps wrote Lorange and informed him to remove 55 banker's boxes of petitions or they would be shredded, this material was apparently not before

¹¹⁵ Lorange's letter to the Chief Judge of the Army Court can be read at <https://www.freeclintlorance.com> (last viewed August 22, 2018).

¹¹⁶ E-mail exchanges between Kevin Mikolashek, Esquire and Brigadier General Berger's Executive Officer between March and May 2018 confirming a meeting, setting the meeting for May 7, 2018, followed by a series of scheduling conflicts.

¹¹⁷ Letter from Office of The Judge Advocate General ("OTJAG") Chief of Criminal Law, Colonel William D. Smoot dated April 12, 2018.

¹¹⁸ Telephone conference with Republican Party of Louisiana, July 2018. Notes on file with authors.

¹¹⁹ R. at Final Action dated June 14, 2018.

¹²⁰ A representative sample of the signed pardon petitions can be viewed at: <https://www.freeclintlorance.com>. Representatives of the Army Judge Advocate General's Corps informed Lorange that if he did not coordinate removal of the dozens of bankers' boxes containing the petitions from the halls of the Pentagon near the Secretary of the Army's office, they would be thrown in the garbage.

The Office of the Judge Advocate General Criminal Law Division received approximately 55 boxes of petitions in support of a presidential pardon. A representative copy of the petition is attached. They do not have space to store these boxes. If you want these petitions, please contact MAJ [] at 571-xxx-xxxx (office) to make arrangement for pickup. If they don't receive an answer by the end of the week (May 19, 2017), they will assume the petitions are not wanted and shred them.

Email dated May 15, 2017 from Captain Scott Martin and Lieutenant Colonel Melissa Ridgely, HQDA, OTJAG entitled "Lorange Pardon Petitions."

¹²¹ *Id.*

the Secretary of the Army's designee when he declined to remit any portion of Lorance's sentence and instead approved it.

On June 26, 2018, the Army Chief of the Criminal Law Division wrote Lorance's legal team and stated, "I am confident that [Lorance's] conviction and sentence, as well as the appellate review, were appropriately decided."¹²² The Army's treatment of thousands of citizens' petitions on behalf of Lorance disrespects his statutory rights underscoring the need for the federal judiciary to reach the merits of habeas corpus petitions involving similar issues.¹²³

6. The Pardon Attorney Sends Lorance's Request Back To The Army

In December 2016, Lorance filed a request "disapprove the findings and the sentence" to President Obama, the Office of the Pardon Attorney, and the Secretary of the Army.¹²⁴ In February 2017, Lorance revised his requests to address President Trump, as well as the Office of the Pardon Attorney and the Secretary of the Army.¹²⁵

In August 2018, members of the Army's Criminal Law Division informed Lorance that neither of his requests were received and that he should consider resubmitting, even though several hundred thousand petitions for a pardon were received and were going to be shredded if Lorance did not coordinate their removal from the Office of the Secretary of the Army. The same personnel informed Lorance that the Office of the Pardon Attorney refuses to process applications for Presidential clemency, commutation, or pardons for military applicants. Accordingly, Lorance's ultimate freedom remains with the institution and its representatives who imprisoned him in the first place, which is a compelling reason why the federal judiciary should probe into whether or not a servicemember's case was truly "fully" and "fairly" considered by the military justice system.

Lorance must be the type of case the Supreme Court had in mind when it wrote in *Burns*, over 65 years ago, that habeas relief is warranted for a soldier where the military justice process dispensed with rudimentary fairness. As the Court in *Burns* observed, Article III review is intended when the military process is inadequate to ensure compliance with the Constitution.¹²⁶ To do otherwise is not only to abandon the protections the Great Writ was designed to protect, (found in Article I of the Constitution) but also to allow serious miscarriages of justice under the guise of legitimate jurisprudence to go unchecked. Pursuant to Supreme Court precedent, this corrective review is

¹²² Letter from Colonel William D. Smoot, Chief, Criminal Law Division, dated June 26, 2018.

¹²³ Email dated May 15, 2017 from Captain Scott Martin and Lieutenant Colonel Melissa Ridgely, HQDA, OTJAG entitled "Lorance Pardon Petitions."

¹²⁴ Request for Presidential Action – Disapprove Convictions, addressed to President Barack H. Obama, the Pardon Attorney, and the Secretary of the Army, dated December 10, 2016.

¹²⁵ Request for Presidential Action – Disapprove Convictions, addressed to President Donald J. Trump, the Pardon Attorney, and the Secretary of the Army, dated February 14, 2017.

¹²⁶ *Burns*, 346 US at 143.

needed in the American system of checks and balances because *Lorance* was neither fully nor fairly decided by the military justice system.¹²⁷

IV. THE FEDERAL HABEAS STATUTE FOR MILITARY PETITIONERS

The United States Constitution prohibits suspension of the “Privilege of the Writ of Habeas Corpus” except in cases of “Rebellion or Invasion.”¹²⁸ Implementation of habeas for military personnel is governed by 28 U.S.C. § 2241(c)(1), which authorizes pursuit of a writ by a person held in custody by the United States seeking release. This includes military members convicted at court-martial and sentenced to confinement. The statute states:

Writs of habeas may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

¹²⁷ *Id.* at 142. The prosecution in *United States v. Staff Sergeant Robert Bales*, Army Number 20130743, portrayed local national Afghan victim-impact witnesses as gardeners and farmers after it flew them into the United States on domestic airliners among the American public. *Id.*, Appellant’s Brief; *see also* Petition for a Writ of Certiorari, No 17-1583 dated May 6, 2018. As it turns out, at least two witnesses left their fingerprints and DNA on bombs that went undisclosed to the defense and the court. *Id.* To be sure, the Army flew known bomb makers on domestic commercial airlines between Atlanta, Georgia and Seattle, Washington. *Id.* Bales’ petition for certiorari is available at the Supreme Court’s website which details the evidence. *Id.* Similarly, the Army sought the death penalty against Staff Sergeant Bales initially, but it failed to disclose that it ordered him to ingest mefloquine, an anti-malarial drug that is now proven to cause long-term if not permanent psychotic side effects in a certain percentage of the population. *Id.* Involuntary mefloquine ingestion could have compromised Bales’ specific intent or *mens rea* for murder. The prosecution did not turn over that evidence either. The military justice process must have been inadequate to resolve these claims Bales brought. The Army Court again denied to review the terror evidence and held that Bales’ *mens rea* was not compromised, a finding made without any consultation with medical experts to make that determination. *Id.* Indeed, the only evidence before the Army Court was that Bales’ *mens rea* was compromised. *Id.* at Appellant’s Brief, Affidavits of Dr. Remington Nevin. But, the Army Court overlooked the only sworn expert medical evidence.

¹²⁸ U.S. Const. art. I, § 9.

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States.

V. COLLATERAL APPEAL AND DIRECT APPEAL OF A COURT-MARTIAL

A habeas petition is a *collateral* appeal because a military appellant must first go through the required steps of *direct* appeal.¹²⁹ The differing appeal routes are based largely on the types of courts involved. Legislative courts are named after the constitutional article from which jurisdiction is derived.¹³⁰ Article I of the Constitution confers legislative authority with the Congress. The courts the legislature sets up to adjudicate specialized issues are accordingly called “legislative courts.” Thus, court-martial are Article I legislative courts.

Once the service-level appeal is completed, a military appellant may appeal to the CAAF pursuant to 10 U.S.C. § 867. The decision to seek appeal to the CAAF is voluntary and the decision to grant review is discretionary.¹³¹ If the CAAF grants review, a military appellant dissatisfied with the result may file a petition for *certiorari* with the United States Supreme Court pursuant to 28 U.S.C. § 1259.

Federal civilian courts are Article III courts named after the Constitutional Article from which power is derived. Article III of the Constitution confers judicial authority in the Supreme Court and today’s federal judiciary. This includes the 94 United States District Courts, 13 United States Courts of Appeal, and United States Supreme Court.¹³² For military prisoners confined at the United States Disciplinary Barracks at Fort Leavenworth, Kansas, the appropriate federal District Court is the United States District Court for the District of Kansas.¹³³ Appeals from that Court can be taken to the United

¹²⁹ The *collateral appeal* of a military court-martial involves filing a petition for habeas in the United States District Court for the district in which the military member is confined, with appeal to the relevant United States Court of Appeals if necessary, and then again, potentially, to the United States Supreme Court. *Denedo v. United States*, 66 M.J. 114, 119 (Armed Forces App. 2008). A *direct appeal* begin with the service-specific Court of Criminal Appeals for the branch of the military of which the appellant is a member. *Id.* For example, a soldier appeals to the Army Court; a sailor or marine appeals to the U.S. Navy-Marine Corps Court of Criminal Appeals; an airman appeals to the U.S. Air Force Court of Criminal Appeals; and a coastguardsman appeals to the U.S. Coast Guard Court of Criminal Appeals. Jay L. Thoman, *The Military’s Approach to Appellate Law*, 12 J. APP. PRAC. & PROCESS. 283, 284 (2011). Appeals to these service-specific courts are required by 10 U.S.C. § 866.

¹³⁰ *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 62 (1982).

¹³¹ *Id.*

¹³² See *Stern v. Marshall*, 564 U.S. 462, 482 (2011); see also *Introduction to the Federal Court System*, U.S. DOJ, <https://www.justice.gov/usao/justice-101/federal-courts> (last visited August 15, 2018).

¹³³ The Army and other services have diverse regional confinement facilities around the world, but the overwhelming majority of habeas petitions would be filed during the time the servicemember is at The Disciplinary Barracks at Fort Leavenworth given the length of time it usually takes to file the direct appeals. See Haasenritter, D.K., *Military Correctional System: An Overview*” CORRECTIONS TODAY, December 2003.

States Court of Appeals for the Tenth Circuit.¹³⁴ The next stage of appeal from the Tenth Circuit is by Petition for a Writ of *Certiorari* to the Supreme Court.¹³⁵

To summarize, the *direct* military appellate process for courts-martial is to the service-specific Court of Criminal Appeals, the CAAF, and potentially, the United States Supreme Court. The *collateral* appellate process involves the United States District Court, the United States Court of Appeals, and potentially, the United States Supreme Court.¹³⁶

A habeas petition challenges the validity of the court-martial convictions and sentence based on legal errors.¹³⁷ To ensure that a petition for habeas is properly within the federal court's jurisdiction, it is necessary to demonstrate the direct appeal process has been completed (exhaustion doctrine) before a case may be properly heard as a collateral appeal.¹³⁸ Ordinarily, only claims presented during the direct appeal process can be entertained in the collateral appeal.¹³⁹ The exception would be newly discovered, exculpatory evidence.¹⁴⁰

Habeas practice can be viewed as a means of ensuring federal civilian review of the military's convictions and sentences when the Supreme Court cannot provide such review.¹⁴¹ District judges are appointed by the President and confirmed by the Senate to the bench for life.¹⁴² Their review of military trials and appeals is a civil as opposed to criminal proceeding.¹⁴³

VI. STATUTE OF LIMITATIONS FOR A MILITARY PRISONER TO FILE A HABEAS PETITION

The *Anti-Terrorism and Effective Death Penalty Act of 1996* established a one-year limit on the filing of most federal habeas petitions.¹⁴⁴ In most cases, the "triggering" date is "the date on which the judgment became final by conclusion of direct review."¹⁴⁵ Pursuant to RCM 1209, a military sentence is final when review is completed by a Court of Criminal Appeals, and

- a) The accused does not file a timely petition for review by CAAF and the case is not otherwise under review by that court; or
- b) A petition for review is denied or otherwise rejected by CAAF; or

¹³⁴ See Federal Rule of Appellate Procedure (FRAP) 4. The Tenth Circuit is the appeal court for federal trial level courts located in Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. United States Court of Appeals for the Tenth Circuit, <https://www.ca10.uscourts.gov/> (last visited August 15, 2018).

¹³⁵ Supreme Court of the United States, <https://www.supremecourt.gov/> (last visited August 15, 2018).

¹³⁶ See Richard Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, 108 MIL. L. REV. 5, 19 (1985) (discussion of direct and collateral appeal of courts-martial in the military and civilian courts).

¹³⁷ 32 C.F.R. § 516.20(a).

¹³⁸ *McKart v. United States*, 395 US 185, 192 (1969).

¹³⁹ *Massaro v. United States*, 538 US 500, 504 (2003).

¹⁴⁰ *Id.*

¹⁴¹ See generally *Keeny v. Tamayo-Reyes*, 504 U.S. 432, 440 (1995).

¹⁴² U.S. Const. art. II, § 2, cl. 2; U.S. Const. art. III, § 1.

¹⁴³ *Mayle v. Felix*, 545 U.S. 644, 655 (2005).

¹⁴⁴ 28 U.S.C. § 2244(d)(1996).

¹⁴⁵ 28 U.S.C. § 2244(d)(1)(1996).

c) Review is completed in accordance with the judgment of CAAF and:

- (1) A petition for a writ of certiorari is not filed within applicable time limits;
- (2) A petition for a writ of certiorari is denied or otherwise rejected by the Supreme Court; or,
- (3) Review is otherwise completed in accordance with the judgment of the Supreme Court.¹⁴⁶

These rules are subject to a statutory “tolling” provision¹⁴⁷ and in some cases, the equitable “tolling” doctrine.¹⁴⁸

VII. PETITION CONTENTS AND INVOLVED PARTIES

The starting place for a military prisoner seeking habeas relief is completing a *Petition for a Writ of Habeas Corpus Under 28 U.S.C. § 2241*.¹⁴⁹ This document seeks the basic information a court will likely need to begin the process.¹⁵⁰ The military prisoner seeking relief is the “petitioner.” By statute, the proper respondent to a habeas petition is the person who has custody over the petitioner.¹⁵¹ In the case of a military prisoner confined at Fort Leavenworth, Kansas, the proper respondent is the Commandant, United States Disciplinary Barracks. It should be noted that although these rules state “Section 2254,” referring to 28 U.S.C. § 2254, Habeas Rule 1(b) authorizes the district courts to apply these rules to petitions brought by military prisoners.¹⁵²

VIII. SUBJECT MATTER JURISDICTION TO HEAR A MILITARY PRISONER’S HABEAS CLAIM

Ordinarily actual physical custody is required for the federal court to evaluate a petition. However, courts have liberally construed the “in custody” requirement and found custody whenever a petitioner suffers some present restraint from a conviction.

¹⁴⁶ *Id.*

¹⁴⁷ The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”)’ Pub. L. No. 104-132, 110 Stat. 1214.

¹⁴⁸ See, e.g., *Lawrence v. Florida*, 549 U.S. 327, 336 (2007).

¹⁴⁹ Entitled “AO 242 (Rev. 09/17).” United States District Court for the District of Kansas, available at <http://ksd.uscourts.gov/index.php/local-rule/rule-9-1-habeas-corporus-motions-to-vacate-and-civil-rights-complaints-by-prisoners/>

¹⁵⁰ For a list of this information, see *Rule 9.1 Habeas Corpus, Motions to Vacate, and Civil Rights Complaints by Prisoners*, U.S. DISTRICT COURT FOR THE DISTRICT OF KANSAS, <http://ksd.uscourts.gov/index.php/local-rule/rule-9-1-habeas-corporus-motions-to-vacate-and-civil-rights-complaints-by-prisoners/> (last visited November 13, 2018).

¹⁵¹ RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS Rule 2(a) (2010), <http://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf> at (last visited Nov. 13, 2018) (providing “If the petitioner is currently in custody under a state-court judgment, the petition must name as respondent the state officer who has custody.”) [hereinafter “Habeas Rules”]; see also *Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004) (quoting and applying 28 U.S.C. § 2242).

¹⁵² Habeas Rules, *supra* note 132, at Rule 2(b) (“The district court may apply any or all of these rules to a habeas petition not covered by Rule 1(a).”).

Accordingly, a petitioner need not be actually confined when seeking relief; rather, he must be a person who, as a result of a federal criminal court, “is subject to restraints ‘not shared by the public generally.’”¹⁵³ That is, any person who cannot come and go as she pleases meets the “status” requirement of subject matter jurisdiction.¹⁵⁴ So long as a petition is filed at the time the petitioner is in custody, the claim will remain viable.¹⁵⁵ Stated differently, where a prisoner files a petition while in custody, his subsequent release does not render the petition moot, rather, it may proceed and the District Court may grant relief.¹⁵⁶ Once jurisdiction is properly invoked, it cannot be defeated by a prisoner’s release prior to the completion of the proceedings.¹⁵⁷

Interestingly, even if a petitioner is no longer in custody and has no restrictions, that is, is not on probation or parole, habeas may still be available in the District Court pursuant to what is referred to as *federal question* jurisdiction pursuant to 28 U.S.C. § 1331. This situation can occur where a servicemember is sentenced only to a bad conduct discharge and no confinement, and thus, no “custody” exists for purposes of the federal habeas statute.

The Supreme Court held Congress did not intend to confine collateral attacks on court-martial proceedings to one statute only, namely, 28 U.S.C. § 2241.¹⁵⁸ Consequently, even where a petitioner is not in custody, or has completed a sentence to confinement without restrictions, he may still pursue habeas in the appropriate federal district court so long as federal question jurisdiction exists pursuant to 28 U.S.C. § 1331.¹⁵⁹

IX. VENUE: WHERE DOES A MILITARY PRISONER FILE HIS PETITION FOR HABEAS

The question of where venue is appropriate, that is, in which federal district court a petition must be filed, is governed by 28 U.S.C. § 2241(d). The statute states that the application for a writ of habeas may be filed in the district court for the district wherein such person is in custody, as discussed above. Where the military habeas Petitioner is no longer in custody and seeks habeas under federal question jurisdiction, venue is proper where he resides.

A petitioner’s physical presence within the territorial jurisdiction of the district court is not in and of itself determinative of whether venue is appropriate, however. Because the writ of habeas does not act upon the person who seeks relief, but upon the person who holds him in alleged unlawful

¹⁵³ *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973).

¹⁵⁴ *Jones*, 371 U.S. at 243 (paroled petitioner is “in custody” because parole restrictions “significantly restrain petitioner’s liberty to do those things which in this country free men are entitled to do”).

¹⁵⁵ *Maleng v. Cook*, 490 U.S. 499, 492 (1989); *see also* *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984) (petitioner was in custody even though his conviction was vacated when he applied for trial *de novo* and he had been released on personal recognizance).

¹⁵⁶ *Carafas v. LaVallee*, 391 U.S. 234, 239 (1968); *Levy v. Parker*, 396 U.S. 1204, 1205 (1969).

¹⁵⁷ *See Gosa v. Mayden*, 413 U.S. 665, 670 n.3 (1973).

¹⁵⁸ *Schlesinger v. Councilman*, 420 U.S. 738, 748–53 (1975).

¹⁵⁹ *See, e.g., United States Ex. Rel. New v. Rumsfeld*, 448 F.3d 403, 406 (D.C. Cir. 2006).

custody, a district court may act within its respective jurisdiction as long as the custodian can be reached by service of process.¹⁶⁰

X. THE EXHAUSTION DOCTRINE: WHETHER THE CLAIMS WERE PRESERVED DURING DIRECT APPEAL

Before a military prisoner can bring a habeas petition in federal civilian court, he ordinarily must have exhausted available remedies within the military. This is known as the “exhaustion doctrine,” which the Supreme Court first announced in *Gusik v. Schilder*.¹⁶¹ This means all direct review in the military must be completed before federal habeas relief can be pursued.¹⁶² Colloquially, the federal courthouse doors remain closed unless and until the military direct appellate process is final. Where a petition contains exhausted and unexhausted claims, the District Court is authorized to dismiss the unexhausted claims.¹⁶³

For a federal district court to have jurisdiction over a habeas petition, the exhaustion doctrine also requires that the claims presented to the district court must be essentially the same claims reviewed on direct appeal within the military justice system.¹⁶⁴ Claims presented before military courts that set conditions for the military court to reach the merits will ordinarily satisfy the exhaustion requirement.¹⁶⁵ Where a claim is raised, but the military court did not consider it or decided the case on other grounds, exhaustion will be satisfied, thus opening the doors to the federal civilian courthouse.¹⁶⁶ In other words, claims must be raised in the direct appeal to be preserved for later collateral appeal.

A potential roadblock is where a military petitioner did not preserve a claim by appropriate objection at trial, but later has raised the point before the military appellate courts. In this instance, the law requires a petitioner to show “cause and actual prejudice” as to why the error was not raised and that the error negatively affected the petitioner.¹⁶⁷ A petitioner who did not object at trial must demonstrate both “adequate cause” for the apparent waiver of the point and “actual prejudice” resulting from the error.¹⁶⁸

These procedural hurdles, the statute of limitations and the exhaustion doctrine, are not designed to discourage military petitioners, but to “limit access to review on the merits of a constitutional claim.”¹⁶⁹ In the context of military criminal prosecutions, constitutional claims appropriate for habeas review can include a prosecutor’s failure to disclose important exculpatory or mitigating evidence, or a prosecutor’s failure to produce in response to a defense request information favorable to the defense, or material to the preparation of the

¹⁶⁰ *Rasul v. Bush*, 542 U.S. 466 (2004); *see also Padilla*, 542 U.S. at 434; *Rooney v. Secretary of the Army*, 405 F.3d 1029 (D.C. Cir. 2005).

¹⁶¹ 340 U.S. 128 (1950).

¹⁶² *Noyd v. Bond*, 395 U.S. 683, 693 (1969).

¹⁶³ *Rose v. Lundy*, 455 U.S. 509 (1982).

¹⁶⁴ *See Picard v. Connor*, 404 U.S. 270, 276 (1971).

¹⁶⁵ *See Thomas v. United States Disciplinary Barracks*, 625 F.3d 667 (10th Cir. 2010).

¹⁶⁶ *See Smith v. Digmon*, 434 U.S. 332 (1978).

¹⁶⁷ *Smith v. Murray*, 477 U.S. 527 (1986).

¹⁶⁸ *See Wolf v. United States*, 737 F.2d 877 (10th Cir. 1984).

¹⁶⁹ *Daniels v. United States*, 532 U.S. 374, 381 (2001).

defense.¹⁷⁰ Another constitutional claim appropriate for habeas review can include defense counsel's failure to provide effective assistance of counsel at trial.¹⁷¹

XI. THE STATEMENT OF FACTS IN A HABEAS PETITION

The statement of facts is where petitioner's counsel should introduce the petitioner to the district judge and clearly and exhaustively identify each and every constitutionally-based mistake that occurred at the trial and appellate levels. Once the universe of errors has been identified, the petitioner and counsel should apply the law to the facts to determine if the convictions and sentence comport with due process. The factual statements should also concisely present the arguments raised at trial and in the direct appeal process. The statement of facts should also demonstrate to the district court the legal errors committed in the direct appeal process not as argument, but as facts, in the form of describing the trial and direct appeal courts' holdings and rationales. Employing the use of headings like "Ground One – Violation of the Fifth Amendment" or "Ground Two – Violation of the Sixth Amendment" is appropriate.

XII. THE SCOPE OF REVIEW IS NARROW BUT NOT FORECLOSED

Federal district courts have jurisdiction to review habeas petitions challenging military convictions pursuant to 28 U.S.C. § 2241. The scope of the district court's review of military convictions, however, is narrow.¹⁷² Review is ordinarily limited to claims that were not given "full and fair consideration" by the military court.¹⁷³ While determinations made in military proceedings are final and binding on all courts,¹⁷⁴ the federal district courts' jurisdiction over a petition for habeas from a military prisoner is not displaced.¹⁷⁵ Where constitutional protections were not observed at the trial court level or during direct appeal, the federal habeas court is empowered to address those claims.¹⁷⁶

¹⁷⁰ See RCMs 701(a)(6) and (a)(2); see also *Brady v. Maryland*, 363 U.S. 83 (1963) (holding Fifth Amendment due process requires a prosecutor to disclose material exculpatory and/or mitigation evidence).

¹⁷¹ See *Strickland v. Washington*, 466 U.S. 668 (1984) (finding a Sixth Amendment violation where counsel's performance was unreasonably deficient).

¹⁷² *Burns*, 346 U.S. at 139–40.

¹⁷³ *Id.* at 142; *Broussard v. Patton*, 466 F.2d 816, 818 (9th Cir. 1972); *Watson v. McCotter*, 782 F.2d 143, 145 (10th Cir. 1986).

¹⁷⁴ 10 U.S.C. § 876.

¹⁷⁵ *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).

¹⁷⁶ See, e.g., *Burns* at 139 (explaining that federal civil courts have jurisdiction over habeas petitions filed alleging the proceedings "denied them basic rights guaranteed by the Constitution"); *Broussard*, 466 F.2d at 818 (asserting habeas is available to vindicate constitutional rights); *Kauffman v. Secretary of the Air Force*, 415 F.2d 991, 997 (9th Cir. 1969) (adopting a standard of review for military habeas petitions consistent with the standard imposed on habeas petitions stemming from state convictions); see also *Allen v. U.S. Air Force*, 603 F.3d 423, 433 n.4 (8th Cir. 2010) ("*Burns* and its progeny appear only to deal with claims of constitutional violations, not violations of military procedural rules."); *Dodson v. Zelez*, 917 F.2d 1250, 1252 (10th Cir. 1990) (holding federal jurisdiction to review court-martial proceedings requires "[t]he asserted error . . . be of substantial constitutional dimension.").

Four questions are examined to determine whether a federal habeas court should decide in favor of a constitutional challenge to a court-martial conviction: (1) whether the asserted error is of substantial constitutional dimension; (2) whether the issue is one of law rather than one of disputed fact previously determined by a military tribunal; (3) whether military considerations warrant different treatment of the constitutional claim(s); and (4) whether the military courts gave adequate consideration to the issues involved and applied proper legal standards.¹⁷⁷

These questions and their answers provide a four factor framework to determine the extent of federal review based on the *Burns* Court's guidance. Providing its rationale in support of the four analytical factors, the *Burns* Court reasoned:

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 dispensing 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.¹⁷⁸

As such, the *Burns* Court held that where military courts have “manifestly refused to consider [a habeas petitioner’s] claims,” federal district courts may review such claims *de novo*.¹⁷⁹ And, in determining fairness, the district court must examine whether the constitutional rulings of a military court conform to prevailing Supreme Court standards.¹⁸⁰

XIII. CONSTITUTIONAL CLAIMS FOR HABEAS RELIEF

In drafting the initial petition for habeas relief, the facts should be pled with specificity, and the specific Constitutional violations should be identified clearly.¹⁸¹ The Petition should state each and every ground that supports the claims that the petitioner is being held in violation of the Constitution or laws of the United States. For example, “Ground One: Violation of the Fifth Amendment – Prosecutorial Misconduct,” followed by specific, supporting facts. Or, “Ground Two: Violation of the Sixth Amendment – Counsel Did Not Interview A Purported Victim.” A military petitioner must show that the military appeal involved a “manifest refusal to consider claims,” or the appellate review was “inadequate” or “not a fair consideration of the claims.”¹⁸² Because a federal habeas case is not a criminal case but a civil action, the petitioner bears the burden of proof, and must establish every fact necessary to support a

¹⁷⁷ Calley v. Callaway, 519 F.2d 184, 203 (5th Cir. 1975); Mendrano v. Smith, 797 F. 2d 1538, 1542 n.6 (10th Cir. 1986); Monk v. Zelez, 901 F.2d 885, 888 (10th Cir. 1990).

¹⁷⁸ *Burns*, at 142.

¹⁷⁹ *Id.*

¹⁸⁰ *Kauffmann*, 415 F.2d at 997. For a discussion of military habeas corpus claims in the context of death penalty cases, see Dwight J. Sullivan, *Article: The Last Line of Defense: Federal Habeas Review of Military Death Penalty Cases*, 144 MIL. L. REV. 1 (1994).

¹⁸¹ Habeas Rule 2(c)(1) and (2).

¹⁸² *Burns*, at 142.

Constitutional violation by a preponderance of the evidence, *i.e.*, that the fact is more likely than not to have occurred.¹⁸³

A. Fifth Amendment Claims

An example under the Fifth Amendment is a claimed deprivation of Due Process which resulted in fundamental unfairness brought pursuant to *Brady*.¹⁸⁴ For a *Brady* claim to succeed, the prosecution must have failed to disclose the evidence before it was too late for use by the defense. Additionally, the evidence must not have been otherwise available to the defendant through the exercise of due diligence.¹⁸⁵

The Fifth Amendment to the U.S. Constitution holds the federal government to a standard that requires no one be “deprived of life, liberty or property without due process of law.”¹⁸⁶ An equal protection argument under the Fifth Amendment might be fashioned around the fact that murderers, rapists, drug dealers and burglars convicted in civilian courts—felons one and all—get complete habeas protections in Article III courts while soldiers, Sailors, Airmen, Marines, and Coastguardsmen adjudged and reviewed by Article I courts receive “narrow review” by Article III courts.¹⁸⁷ Even unlawful enemy combatants get full habeas review.¹⁸⁸

B. Sixth Amendment Claims

An example under the Sixth Amendment is an ineffective assistance of counsel claim brought pursuant to *Strickland v. Washington*.¹⁸⁹ To prevail, the petitioner must establish two elements. “First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.”¹⁹⁰

As a practical matter, a petitioner must show the district judge what happened at the trial to demonstrate how counsel’s performance was unreasonable, usually through an expert.¹⁹¹ Then, the petitioner must show what should have occurred at trial and how competent counsel could have produced a more favorable outcome.¹⁹² Each deficiency in the counsel’s performance

¹⁸³ *Castaneda v. Partida*, 430 U.S. 482, 494 (1977); *Johnson v. Zerbst*, 304 U.S. 458 (1938) (discussing preponderance of evidence standard applicable to constitutional claims in federal habeas petition);.

¹⁸⁴ *Brady v. Maryland*, 373 U.S. 83, 84 (where a prosecutor did not disclose or produce favorable evidence bearing on guilt, innocence, or punishment).

¹⁸⁵ *United States v. Earnest*, 129 F.3d 906, 910 (7th Cir. 1997).

¹⁸⁶ U.S. Const. amend. V.

¹⁸⁷ *Burns*, 346 U.S. at 139–40.

¹⁸⁸ *Boumediene v. Bush*, 553 U.S. 723 (2008) (where the Supreme Court heard a traditional habeas review regarding whether the United States was legally and factually authorized to hold and detain individuals at Guantanamo Bay, Cuba).

¹⁸⁹ 466 U.S. 668 (1984).

¹⁹⁰ *Strickland*, 466 U.S. at 687.

¹⁹¹ *Id.*

¹⁹² *United States ex rel. Cross v. DeRobertis*, 811 F.2d 1108, 1016 (7th Cir. 1987) (finding a failure of counsel to investigate, and that petitioner must make a

should be set forth specifically. Within the larger category of ineffective assistance of counsel, more specific claims are also potentially available. For example, at a bare minimum, defense counsel must “interview potential witnesses and . . . make an independent investigation of the facts and circumstances of the case.”¹⁹³ In *Hargrave-Thomas v. Yukins*, defense counsel admitted that he did not interview any witnesses or conduct any other type of investigation before Petitioner’s trial for first degree murder.¹⁹⁴ Similarly, in *Soffar v. Dretke*, defense counsel failed to interview the only known eyewitness to a felony murder.¹⁹⁵ In *Turner v. Duncan*, counsel delivered only minimal efforts to prepare.¹⁹⁶

Where defense counsel fails to visit the crime scene, for example, habeas might be granted under the Sixth Amendment for ineffective assistance of counsel at trial. This is true when counsel’s actual knowledge of the crime scene would be helpful in preparing or formulating a defense.¹⁹⁷ For example, in *House v. Balkcom*, the Petitioner claimed that there was no investigation, no interviewing of witnesses, no preparation of a defense, no discovery, no visiting of the crime scene, and no trial preparation.¹⁹⁸ The court found that knowledge of the crime scene may have helped defense counsel in the preparation of the defense, and certainly would have informed the direct examination of the Petitioner himself at trial.¹⁹⁹

A Sixth Amendment claim under habeas may be viable where defense counsel failed to conduct meaningful discovery. In *Kimmelman v. Morrison*, the Supreme Court held that counsel’s failure to conduct discovery on the mistaken belief that the prosecution had an obligation to turn over inculpatory evidence resulted in deficient performance.²⁰⁰ Likewise, a habeas petition was granted where defense counsel was aware of police reports where witnesses made comments favorable to the accused, as the names and addresses of the witnesses were available to defense counsel, yet he made no effort to locate or interview them.²⁰¹

comprehensive showing of “what information would have been obtained from an investigation and whether such information, assuming its admissibility in court, would have produced a different result.”)

¹⁹³ *Bryant v. Scott*, 28 F.3d 1411, 1415 (5th Cir. 1994).

¹⁹⁴ 236 F.Supp.2d 750 (E.D. Mich. 2002).

¹⁹⁵ 368 F.3d 441 (5th Cir. 2004).

¹⁹⁶ 158 F.3d 449 (9th Cir. 1998).

¹⁹⁷ An historical example of this is the Battle of Waterloo. One might glean an understanding of the rigors endured by Wellington’s Infantry Square simply reading about it; but actually, walking up the hillock that Marshal Ney’s Cavalry had to ride provides a much clearer picture than mere words can describe. This is why the preeminent Napoleonic scholars repeatedly visit the battlefield. In March 1995, author Bolgiano, as a member 3D Infantry Division’s battle staff, went on a walking tour of the Waterloo battlefield led by John Keegan author of *The Mask of Command* and *The Face of Battle*. Keegan was a lecturer and protege of David Chandler at the war studies department at the Royal Military Academy, Sandhurst. Keegan and the staff walked the entire battlefield, including the hillock described.

¹⁹⁸ 725 F.2d 608 (11th Cir. 1984).

¹⁹⁹ See also *Harris v. Reed*, 894 F.2d 871 (7th Cir. 1990); *United States v. Gray*, 878 F.2d 702 (3rd Cir. 1989); *Wade v. Armontrout*, 798 F.2d 304 (8th Cir. 1986).

²⁰⁰ 477 U.S. 365 (1986).

²⁰¹ *Sullivan v. Fairman*, 819 F.2d 1382 (7th Cir. 1987).

C. Suspension Clause Claims

Article I, Section 9 of the Constitution may form the basis of an actual innocence claim. The Supreme Court in *Boumediene*, held that the Suspension Clause found in the habeas grant of judicial review in Article I not only extended habeas protections to noncitizen detainees at Guantanamo Bay, but also provided a separate and distinct basis for traditional habeas review to focus only on whether the detention was legally and factually authorized.²⁰² The Supreme Court explained:

The Clause protects the rights of the detained by a means consistent with the essential design of the Constitution. It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the "delicate balance of governance" that is itself the surest safeguard of liberty. See *Hamdi*, 542 U.S., at 536, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (plurality opinion). The Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account. See *Preiser v. Rodriguez*, 411 U.S. 475, 484, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973) ("[T]he essence of habeas is an attack by a person in custody upon the legality of that custody[.]"); cf. *In re Jackson*, 15 Mich. 417, 439-440 (1867) (Cooley, J., concurring) ("The important fact to be observed in regard to the mode of procedure upon this [habeas] writ is, that it is directed to, and served upon, not the person confined, but his jailer"). The separation-of-powers doctrine, and the history that influenced its design, therefore must inform the reach and purpose of the Suspension Clause.²⁰³

The Suspension Clause refers to the only common law writ mentioned in the Constitution. Article I, Section 9 provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."²⁰⁴ The Clause refers to preserving an existing writ under the English Common Law which is why it was not discussed extensively at the Constitutional Convention. Scholars explain, "[t]he Suspension Clause carried the writ of habeas corpus out of English practice and into American law with little additional jurisprudential baggage."²⁰⁵

Understanding the Suspension Clause as affirmatively guaranteeing a right to habeas process to independently examine the authorization for a detention helps reinforce the point that Article III judges can and should review a military prisoner's Constitutional claims.²⁰⁶ Accordingly, it may be provident for military prisoner to base his claims not only on Fifth Amendment Due Process, but also Article I's Suspension Clause.²⁰⁷

²⁰² 553 U.S. at 798.

²⁰³ *Boumediene*, 553 U.S. at 746.

²⁰⁴ U.S. Const. art. 1, § 9, cl. 2.

²⁰⁵ Paul Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 583, 586-588 (2008).

²⁰⁶ Brandon L. Garrett, *Habeas and Due Process*, 98 CORNELL L. REV. 47 (2012).

²⁰⁷ *Id.*

XIII. ACTION THE DISTRICT COURT WILL TAKE UPON RECEIPT OF THE HABEAS PETITION

Upon receipt of a petition, the clerk's office will assign it to a district court judge who is required to review the petition promptly. If the judge believes there are no grounds for relief, he is authorized to dismiss the petition and direct the clerk to notify the petitioner.²⁰⁸ If, however, the judge concludes that there could be relief, the court must order the respondent to file an answer, motion, or other response within a fixed time period, or take other action the judge may order.²⁰⁹

As discussed above, the proper respondent to a habeas petition is the person who has the petitioner in custody, and is called the "respondent."²¹⁰ Because the respondent is sued in his or her capacity as a federal official, rather than his or her individual capacity, the U.S. Department of Justice attorneys represent the respondent in the habeas action.²¹¹ The respondent is not required to answer the petition unless the judge orders the United States to file an answer or other motion.²¹² If the Judge directs the respondent to answer, the contents ordinarily address the allegations in the petition and include what transcripts of pretrial, trial, sentencing, and post-conviction proceedings are available and when they can be furnished to the court.²¹³ The respondent usually appends to the answer copies of the appellate briefs previously filed before the military courts, in addition to orders and decisions of those courts.²¹⁴ Once the respondent has answered, a petitioner has the opportunity to file a reply within a time prescribed by the judge.²¹⁵

XV. THE DISCOVERY PROCESS

A judge may authorize a party to conduct discovery under the Federal Rules of Civil Procedure (Fed. R. Civ. P.) and may limit the extent of discovery.²¹⁶ In *Harris*, the case on which Habeas Rule 6 is based, the Supreme Court noted that a judge has a duty to order discovery when a petitioner's specific allegations suggest that full development of the facts may enable him to demonstrate a right to relief.²¹⁷ Habeas Rule 6 also authorizes the judge to order discovery to allow a petitioner to discover evidence to make a *prima facie* claim of entitlement to relief, that is, the petition states a claim on its face, or has

²⁰⁸ *Hensley*, 411 U.S. at 351.

²⁰⁹ *Id.*

²¹⁰ Habeas Rules, *supra* note R. 2.

²¹¹ *See, e.g., Herrmann v. Secretary of the Army*, United States District Court for the District of Arizona, Case No. 2:18-cv-04194 ("The United States Army Litigation Division, 9275 Gunston Road, Fort Belvoir, Virginia 22060 and The United States Attorney's Office for the District of Arizona, Two Renaissance Square, 40 North Central Avenue, Suite 1800, Phoenix, Arizona 85004 represent the Respondents.").

²¹² Habeas Rules, *supra* note 132, at Rule 5; *see, e.g., Mayle*, 545 U.S. at 663.

²¹³ *See Sizemore v. District Ct.*, 735 F.2d 204 (6th Cir. 1984).

²¹⁴ Habeas Rule 5.

²¹⁵ Habeas Rules, *supra* note 132, at Rule 5.

²¹⁶ *Herrera v. Collins*, 506 U.S. 390, 444 (1993) (citing *Harris v. Nelson*, 394 U.S. 286, 299–300 (1969)).

²¹⁷ 394 U.S. at 299; *see also Wolfe v. Clarke*, 691 F.3d 410, 422 (4th Cir. 2012) (with the district court having "appropriately found that Wolfe had demonstrated good cause for discovery); *Moore v. Gibson*, 195 F.3d 1152, 1164–65 (10th Cir. 1999), *cert. denied*, 530 U.S. 1208 (2000) (district court abused its discretion in denying discovery).

shown sufficient evidence to indicate an entitlement to relief. In the context of federal habeas for military prisoners, discovery can be used to help a petitioner discover evidence to strengthen his claim.²¹⁸

The drafters of Habeas Rule 6 envisioned discovery would be granted “liberally.”²¹⁹ The Committee Note also confirms that discovery is available not only to explore a petitioner’s factual allegations but also to refute factual defenses and to uncover factual information especially available to the prosecution.²²⁰

Another use of discovery in the habeas context is to dispense with the need for an evidentiary hearing in the first place. Evidence assembled during discovery can be a double-edged sword: It can prove that the petitioner is clearly entitled to relief, or, to the contrary, that he is not entitled to relief. Either way, discovery is appropriate to potentially resolve the claims without having to conduct an evidentiary hearing.²²¹ Where a judge denies discovery, depending on the facts of the case, the denial can be prejudicial legal error appropriate for appeal to the United States Court of Appeals.²²²

A. Discovery Tools

Generally, discovery includes four main tools: interrogatories, requests to admit, production of documents, and depositions.²²³ A party requesting discovery must provide reasons for the request to the judge to meet the “good cause” standard.²²⁴ A motion for discovery must include proposed interrogatories, requests to admit, and specification of documents sought, connecting the requested discovery to the claims.²²⁵ It is therefore important to think about what information from the prosecution would be helpful to prove the claims. For example, if the prosecution withheld exculpatory or mitigating evidence in its possession, then production of that evidence to the petitioner and the judge would be relevant and necessary to show that the petitioner was deprived of due process²²⁶.

1. Proposed Interrogatories

The request for discovery must also include any proposed interrogatories, brought pursuant to Fed. R. Civ. P. 33, which are written questions that must be answered in writing and signed by the both the opposing

²¹⁸ *Dickenson v. Wainright*, 683 F.2d 348, 352 (11th Cir. 1982) (district court may use discovery or evidentiary hearing to “test substance of petitioner’s allegations.”).

²¹⁹ See ADVISORY COMMITTEE NOTE TO FORMER RULE 9(A) OF THE RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS.

²²⁰ See *Payne v. Bell*, 89 F.Supp. 2d 967, 970 (W.D. Tenn. 2000) (“[a] habeas petitioner may seek discovery under Rule 6(a) in order to develop those claims which are properly before the court, to obtain a factual basis on which to excuse procedural default, or to determine whether to request an evidentiary hearing.”).

²²¹ See *Matta-Ballestros v. Henman*, 896 F.2d 255, 258–59 (7th Cir. 1990) (evidentiary hearing unnecessary because discovery placed all facts essential to consideration of the claim before the court).

²²² *Bracy v. Gramley*, 520 U.S. 899, 902 (1997) (“given the facts of this particular case, it [was] an abuse of discretion not to permit any discovery.”).

²²³ Fed. R. Civ. P. 30–31, 33–34, 36.

²²⁴ See *Collins*, 506 U.S. at 444.

²²⁵ *Supra* note 203.

²²⁶ *Brady*, 373 U.S. at 87.

party and their attorney.²²⁷ For example, an interrogatory might read: “Please describe the Army’s process of using biometrics to verify identities and affiliations of local-nationals in Afghanistan between January 1, 2011 and January 1, 2012.”

As part of the proposed interrogatories, a petitioner should define specific terms and phrases to be sure the respondent can understand the question and prepare a complete response.²²⁸ For example, a petitioner might specify: “As used in these interrogatories, the term ‘biometrics’ is defined as the Army explains it in the *U.S. Army Commander’s Guide to Biometrics in Afghanistan*, attached to these interrogatories.”

2. Requests for the Production of Documents

Document requests and requests for electronically-stored information can be sought pursuant to Fed. R. Civ. P. 34 if authorized by the judge. An example might be:

Please produce any and all documents or electronically-stored information in the Army’s possession, custody, or control relating to the following individuals and their respective biometric enrollment numbers. This request includes, but is not limited to, biometric records related to whether X, Y, and Z individuals left their fingerprints or skin on improvised explosive devices in Afghanistan.

3. Requests for Admission

Requests for admission brought pursuant to Fed. R. Civ. P. 36 are another discovery tool and are designed to narrow the facts.²²⁹ An example might be, “admit that the prosecution did not disclose to the defense prior to trial an Army report dated August 2, 2012 that concluded First Lieutenant Lorance’s platoon was being ‘scouted for an impending attack/ambush’ and that ‘at least one insurgent killed confirmed.’” There are two main goals in drafting a request to admit: (1) ensuring the request will be persuasive if read to a jury or judge; and (2) drafting the request in a manner that will avoid written objections.

4. Depositions

Generally, interrogatories, document requests, and requests to admit are used to gather relevant evidence for subsequent use in depositions sought pursuant to Fed. R. Civ. P. 30 and authorized by the judge pursuant to Habeas Rule 6. A motion to depose should name the subject matters on which the applicant seeks to question.²³⁰ Thus, it is important to identify who should be deposed and why.²³¹ Typically, depositions are taken in a conference room over the course of a single day, not to exceed seven hours, where the person answering the questions (known as the deponent) is placed under oath to answer a variety of questions.²³² Usually, the deposition is recorded both on video and by a court reporter, who later prepares a written transcript of the deposition.²³³ If the respondent is granted leave to take a deposition, the judge may require the

²²⁷ See Fed. R. Civ. P. 33.

²²⁸ Fed. R. Civ. P. 33.

²²⁹ Fed. R. Civ. P. 36.

²³⁰ Fed. R. Civ. P. 27(a)(1)(B).

²³¹ Fed. R. Civ. P. 30(b)(1).

²³² *Id.* R. 30(d)(1).

²³³ Fed. R. Civ. P. 30.

respondent to pay the travel expenses, subsistence expenses, and fees of the petitioner's attorney to attend the deposition, although this is sometimes waived in cases of fiscal need or for equitable reasons.²³⁴

B. Petitioner's Motion for Discovery

These discovery tools are used to secure relevant and necessary evidence to support a petitioner's claims and assist the court with making an informed legal decision on the merits of the petition's claims. A motion for discovery should be filed together with the original petition to convey the legitimacy of the claims, or at least directly after the respondent answers, to maximize the chance that the petition will not be dismissed. The discovery motion should identify each claim with which the discovery request is associated and explain why factual development is needed.

For example, in a claim that due process was violated, a petitioner might explain in his discovery request: "The prosecution had in its possession biometric enrollment and IED event records matching the fingerprints and DNA of victims held out as civilians when the suppressed evidence proved they were terrorist bombmakers. The suppressed evidence was directly admissible to rebut the prosecution's theory that the purported murder victims were civilians, and as mitigation on sentencing."

Indeed, the petitioner in *Clemons v. Bowersox* adequately supported requests for depositions of prosecutors and police officers and production of documents by proffering "some evidence tending to support his allegations."²³⁵ In support of a Fifth Amendment due process claim alleging that the prosecution had access to exonerating evidence but failed to examine or disclose it, a petitioner's deposition request can be strengthened by demonstrating that the evidence existed and was readily accessible to the police and prosecutors.²³⁶ Once a judge orders discovery, be it interrogatories, requests for admission, production of documents, and/or depositions, Federal Rules of Civil Procedure 26–37 govern the conduct of those activities, such as time periods to respond, objections, and forms of responses.

C. Petitioner's Motion to Expand the Record

Petitioners can also file, pursuant to Habeas Rule 7, a "motion to expand the record," which is designed to simplify the burden of the fact development process.²³⁷ When a court grants a motion to expand the record, the parties can admit and the court can consider virtually all the evidence relevant to the petition, without holding an evidentiary hearing.²³⁸ The traditional evidentiary rules of hearsay and authentication are abandoned.²³⁹

Supporting affidavits that explain the relevance of the evidence being proffered are often appropriate. Materials that may be required include letters,

²³⁴ U Habeas Rules, *supra* note 132, at Rule 6(c).

²³⁵ No. 4:97CV2344 (E.D. Mo. Aug. 10, 1988).

²³⁶ *See, e.g.,* *Kyles v. Whitley*, 514 U.S. 419, 433–34, 437–40 (1995) (noting that prosecution must disclose evidence requested by defense even if it is held by police investigators).

²³⁷ *United States ex rel. Simmons v. Gramley*, 915 F.2d 1128, 1139 (7th Cir. 1990) (finding that expansion of the record was designed to avoid evidentiary hearings).

²³⁸ Habeas Rules, *supra* note 132, at Rule 7(a).

²³⁹ Habeas Rules, *supra* note 132, at Rule 7–8.

expert reports, affidavits, declarations, documents, exhibits, and materials likely to form a comprehensive record upon which the judge can evaluate the merits of the specific claims.²⁴⁰

In other proceedings where the Rules of Evidence apply, an affidavit, declaration, or report may be prohibited as hearsay, that is, out of court statements offered for their truth.²⁴¹ However, in habeas proceedings, it is altogether appropriate for these types of documents to be admitted for their truth and to assist the court in rendering a fair and informed judgment. A petitioner should file a motion to admit evidence pursuant to Rule 7, include a memorandum of law discussing the rule and the relevance of the proffered materials, attach the exhibits, and not only file them with the court, but also serve them upon the opponent.²⁴² Still, where factual issues remain after discovery and expansion of the record (for example, where a significant question rests on the credibility of a witness), the judge should order an evidentiary hearing to resolve those issues.²⁴³ Furthermore, pursuant to Rule 12 and Fed. R. Civ. P. 45, subpoenas are available to compel witness availability, with nationwide service.²⁴⁴

Discovery may generate information establishing that the petitioner's claim is so clearly meritorious that relief must be granted without a hearing or that the claim is so clearly without merit that it must be dismissed without further proceedings.²⁴⁵ Having a discovery plan in place prior to filing the petition helps streamline the process. At this point, the judge must review the answer, any transcripts and records of military court proceedings, and any materials submitted, and determine whether an evidentiary hearing is warranted.²⁴⁶

XIV. THE EVIDENTIARY HEARING

Where a petition withstands motions to dismiss or government defenses, the district judge may authorize and conduct an evidentiary hearing.²⁴⁷ The Supreme Court held in *Townsend v. Sain*, that a federal judge must resolve any factual dispute material to a claim and that resolution of factual disputes requires an evidentiary hearing in most cases.²⁴⁸

A district judge is authorized to grant habeas relief without holding an evidentiary hearing.²⁴⁹ However, federal policy favors hearings, because, “detention . . . obtained [in violation of the Constitution] is intolerable” and “the opportunity to redress, which presupposes the opportunity to be heard, to argue

²⁴⁰ *Id.* at Rule 7(b).

²⁴¹ *See, e.g.*, Fed. R. Evid. 801.

²⁴² Habeas Rules, *supra* note 132, at Rule 7(c).

²⁴³ *See Raines v. United States*, 423 F.2d 526 (4th Cir. 1970).

²⁴⁴ Fed. R. Civ. P. 45 (“A subpoena may be served at any place within the United States.”); Habeas Rules, *supra* note 132, at Rule 12.

²⁴⁵ *See Blackledge v. Allison*, 431 U.S. 63, 72–73 (1977).

²⁴⁶ Habeas Rules, *supra* note 132, at Rule 8(a).

²⁴⁷ *See* Habeas Rule 8; *see also* 28 U.S.C. § 2243 (2012) (“a day shall be set for hearing” after the government answers); 28 U.S.C. § 2254(d) (2012) (“evidentiary hearing in the federal court”).

²⁴⁸ 372 U.S. 293, 313 (1963).

²⁴⁹ 28 U.S.C. § 2243 (Court is authorized to grant relief as law and justice require).

and present evidence, must never be totally foreclosed.²⁵⁰ It has been stated that any federal hearing is likely to be the “main event.”²⁵¹

Although the Federal Rules of Evidence are relaxed for purposes of expanding the record, the actual hearing proceeds as a federal bench trial, that is, judge alone.²⁵² The level of preparation—due diligence, investigation, evidence development, legal research, witness interviews, witness preparation, and analysis of the sufficiency of the evidence to support the claims—should be to the same degree as the underlying trial.

Another important aspect of preparation for a habeas hearing in federal court concerns preparation of the Petitioner for his testimony. The basic tenant of a habeas hearing is to direct the confining officer to “produce the body.”²⁵³ Accordingly, the court will direct the confinement facility to produce the military prisoner for attendance and participation in an evidentiary hearing.²⁵⁴

A petitioner should not be surprised if the opposition seeks to conduct his deposition prior to a hearing during discovery, which is permissible.²⁵⁵ A petitioner should be prepared to speak honestly and intelligently about the claims. This is especially so where claims involved ineffective assistance of counsel at trial under the Sixth Amendment because petitioner’s testimony is often critical to explain to the court the issues concerning deficient defense counsel preparation and/or performance.²⁵⁶ Indeed, unlike a court-martial or civilian criminal trial, a failure to testify, or to invoke the general protections of the Fifth Amendment’s right not to incriminate himself, can count against a petitioner.²⁵⁷

Not every habeas petition will be heard before a district judge.²⁵⁸ A district judge may, pursuant to 28 U.S.C. § 636(b), refer the petition to a federal magistrate judge to conduct hearings and to file proposed findings of fact and recommendations for disposition.²⁵⁹ When they are filed, the clerk must promptly serve copies of the proposed findings and recommendations on all parties.²⁶⁰ Within 14 days after being served, a party may file objections as provided by local court rule.²⁶¹ The district judge must determine *de novo* any proposed finding or recommendation to which objection is made.²⁶² The district judge may accept, reject, or modify any proposed finding or recommendation.²⁶³

²⁵⁰ *Townsend*, 372 U.S. at 312.

²⁵¹ *Granberry v. Greer*, 481 U.S. 129, 132 (1987).

²⁵² Habeas Rules, *supra* note 132, at Rule 4; *Id.* at Rule 8.

²⁵³ 28 U.S.C § 2243 (2012).

²⁵⁴ *Johnson v. Eisentrager*, 339 U.S. 763, 778 (1950) (citing to *Wainwright v. Sykes*, 433 U.S. 72, 90, 115 (1977)).

²⁵⁵ *Bean v. Calderon*, 166 F.R.D. 452, 457 (E.D. Cal. 1996) (granting prosecution’s motion to take habeas petitioner’s deposition on matters related to habeas claims).

²⁵⁶ *See In re Lott*, 424 F.3d 446 (6th Cir. 2005).

²⁵⁷ *Machado v. Commanding Officer*, 860 F.2d 542, 544–45 (2nd Cir. 1988) (petitioner’s invocation of Fifth Amendment as a basis for refusing to testify permits the judge to draw appropriate inferences against the petitioner).

²⁵⁸ 28 U.S.C. § 636(b)(1)(A) (2012).

²⁵⁹ Habeas Rules, *supra* note 132, at Rule 8(b).

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

XVII. THE UNITED STATES DISTRICT COURT ISSUES A DECISION

Where the court concludes that a Constitutional error occurred, it is not ordinarily the end of the analysis. Courts will then determine whether the error was harmless.²⁶⁴ The Supreme Court announced the test for harmless error in federal habeas cases as follows: “the standard for determining whether habeas relief must be granted is whether . . . the error ‘had substantial and injurious effect of influence in determining the jury’s verdict.’”²⁶⁵

An example of a harmful Constitutional error under the Fifth Amendment might involve the following: had the jury known that the purported victims were enemy bombmakers and not civilians as the prosecution held them out to be, they would have rendered a different decision. An example of a harmful Constitutional error under the Sixth Amendment could involve the following: had the jury known the witnesses against the accused were given immunity and ordered to cooperate, the jury would have rendered a different decision. The federal court will then issue a written order and opinion stating its reasons for granting or denying a petition for a writ of habeas.²⁶⁶ Where a petitioner convinces the court by a preponderance of the evidence that he was court-martialed and sentenced in violation of the Constitution, there are several options facing the district court. A common form of relief is a conditional release order, which only requires release from incarceration if a retrial does not happen within a time specified in the court’s order.²⁶⁷ Where the prosecution fails to retry a habeas petitioner, the court may enter an order forbidding re-prosecution.²⁶⁸ Furthermore, the court may also expunge criminal records²⁶⁹ and/or order an unconditional release.²⁷⁰

Where a military petitioner is not satisfied with a district judge’s decision in a habeas case, he may seek to appeal to the Court of Appeals.²⁷¹ Federal Rule of Appellate Procedure 4(a) governs the time to file an appeal.²⁷² A timely notice of appeal must be filed even though a federal military prisoner does not need a certificate of appealability.²⁷³ Where an applicant is not

²⁶⁴ See *Arizona v. Fulminante*, 499 U.S. 279 (1991).

²⁶⁵ *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Koteakos v. United States*, 328 U.S. 750, 776 (1946)); accord *Fry v. Pliler*, 551 U.S. 112, 116 (2007); *O’Neal v. McAninch*, 513 U.S. 432, 435 (1995).

²⁶⁶ Fed. R. Civ. P. 58(a).

²⁶⁷ *Wilkinson v. Dotson*, 544 U.S. 74, 87 (2005) (“Conditional writs enable habeas courts to give States time to replace an invalid judgment with a valid one, and the consequence when they fail to do so is always release”); see also *Parke v. Raley*, 506 U.S. 20 (1992).

²⁶⁸ *Capps v. Sullivan*, 13 F.3d 350 (10th Cir. 1993) (district court possesses authority to bar retrial).

²⁶⁹ See, e.g., *Satterlee v. Wolfenbarger*, 453 F.3d 362, 370 (6th Cir. 2006) (“habeas courts have the power to order expungement of the record of a conviction.”).

²⁷⁰ *Bowen v. Maynard*, 799 F.2d 593 (10th Cir. 1993).

²⁷¹ Fed. R. App. P. 4.

²⁷² Fed. R. App. P. 4(a). In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

²⁷³ See *Eldridge v. Berkebile*, 791 F.3d 1239, 1241 (10th Cir. 2015); see also *Forde v. U.S. Parole Comm’n*, 114 F.3d 878, 879 (9th Cir. 1997).

successful before the relevant Court of Appeals, he may seek review in the Supreme Court.²⁷⁴

XVIII. FULL AND FAIR CONSIDERATION OF MILITARY CONSTITUTIONAL CLAIMS

As discussed more fully above, federal civilian court review of military habeas petitions is narrow, but not foreclosed.²⁷⁵ Review of the relevant decisions suggests that the main hurdle a military prisoner faces is meeting and defeating the “full and fair consideration” of the claims advanced by the petitioner, which often leads to denial.²⁷⁶ The “full and fair consideration” standard may be difficult to define.²⁷⁷ What is clear, is that district and appellate courts grant substantial deference to the decisions of the military courts.²⁷⁸

This seems somewhat paradoxical, as a petitioner must have raised his claims before the military courts under the exhaustion doctrine, but upon habeas review, stands to have a district judge deny his request for relief on the grounds that the issue was briefed to and considered by military appellate courts. In any event, an issue is ordinarily deemed to have received full and fair consideration where it was brought before the military court and was disposed of by that court, even if summarily.²⁷⁹

However, some recent decisions coming from the Army Court and the CAAF suggest that federal district judges and judges on the courts of appeals should take a closer look at the Constitutional violations on the question of whether a military accused truly received “full and fair consideration.”²⁸⁰ That is, where there are clear violations of Constitutional protections and individual liberties, the protection of which are the fundamental reason for habeas in the first place. An Article III district judge should indeed determine if the Article I military courts correctly applied the Constitution to protect against unlawful confinement when the result of a fundamentally unfair process which denied rights guaranteed by the Constitution.²⁸¹ Indeed, the Supreme Court in *Burns*

²⁷⁴ 28 U.S.C. § 1259(1).

²⁷⁵ *Lips*, 997 F.2d at 810–11.

²⁷⁶ *See, e.g., id.*

²⁷⁷ *See, e.g., Watson v. McCotter*, 782 F.2d 143, 145 (10th Cir. 1986) (noting that while the Tenth Circuit has “applied the ‘full and fair consideration’ standard, [it has] never attempted to define it precisely.”).

²⁷⁸ *Id.*

²⁷⁹ *Watson*, 782 F.2d at 145.

²⁸⁰ *See, e.g., United States v. Herrmann*, 76 M.J. 304, 305 (App. Armed Forces 2017), *reconsideration denied*, (App. Armed Forces July 13, 2017), and *cert. denied*, 138 S. Ct. 487 (2017) (whether the Court of Appeals erred when it applied one definition of “likely to produce death or grievous bodily harm” to reverse an HIV-positive airman’s conviction for failing to inform sexual partners of his HIV status where the chances of transmission were 1:500, but applied an altogether different definition of the same statutory language to affirm the conviction of an Army Special Forces parachute rigger who failed to properly inspect 14 reserve parachutes where the chances of harm were far less than 1:500); *see also United States v. Page*, ARMY 20150505, 2017 WL 4124856 (Army Crim. App. Sept. 14, 2017), *review denied*, 77 M.J. 266 (App. Armed Forces 2018) (Army Court found defense counsel’s assistance reasonable where defense counsel was aware of 12 witnesses who would have testified that accused had no intent to kill but failed to call them).

²⁸¹ *Burns*, 346 U.S. at 142.

interpreted the habeas statute to authorize district judges reviewing a military habeas petition to determine if military review was legally adequate or inadequate to resolve Constitutional claims.²⁸²

XIX. FULL AND FAIR CONSIDERATION DOES NOT FORECLOSE FEDERAL HABEAS REVIEW OF A MILITARY PETITIONER’S CONSTITUTIONAL CLAIMS

The Tenth Circuit has jurisdiction over the habeas writs filed on behalf of military prisoners confined at the United States Disciplinary Barracks.²⁸³ The Tenth Circuit often relies on *Watson* to deny habeas relief upon the conclusion that the claims were fully and fairly reviewed within the military process.²⁸⁴ *Watson* remains good law in the Tenth Circuit and provides the civilian court with sufficient authority to determine if the process by which the military convicted and sentenced a prisoner complied with the Constitutional and federal law. As the Tenth Circuit reasoned:

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. *See, e.g., Kehrli v. Sprinkle*, 524 F.2d 328, 331 (10th Cir. 1975); *King v. Moseley*, 430 F.2d 732, 735 (10th Cir. 1970); *Kennedy v. Commandant*, 377 F.2d 339, 342 (10th Cir. 1967). 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.

We will entertain military prisoners' claims if they were raised in the military courts and those courts refused to consider them. *See Burns*, 346 U.S. at 142; *Dickenson v. Davis*, 245 F.2d 317, 320 (10th Cir. 1957). We will not review petitioners' claims on the merits if they were not raised at all in the military courts, *see, e.g., McKinney v. Warden*, 273 F.2d 643, 644 (10th Cir. 1959); *Suttles v. Davis*, 215 F.2d 760, 763 (10th Cir. 1954). When an issue is briefed and argued before a military board of review, we have held that the military tribunal has given the claim fair consideration, even though its opinion summarily disposed of the issue with the mere statement that it did not consider the issue meritorious or requiring discussion.²⁸⁵

The Constitutional problem occurs when, as in the *Lorange* case, the military’s “full and fair consideration” is fatally flawed by its misstatement of facts and failure to rationally apply the Constitution. The question then becomes how to adequately alert the habeas court to such anomalies in a manner sufficient to cause the habeas court to open discovery, expand the record, and/or conduct an evidentiary hearing to grant the relief contemplated by the Great Writ. The Supreme Court’s seminal opinion in *Burns* provides the answers.²⁸⁶

²⁸² *Id.*

²⁸³ *Lips*, 997 F.2d at 811–12.

²⁸⁴ 782 F.2d at 145.

²⁸⁵ *See King*, 430 F.2d at 735.

²⁸⁶ *Burns*, 346 U.S. at 142.

XX. BURNS: WHERE MILITARY REVIEW WAS INADEQUATE TO RESOLVE CONSTITUTIONAL CLAIMS, FEDERAL COURT REVIEW IS PROPER NOTWITHSTANDING DEFERENCE TO MILITARY AUTHORITIES

In *Burns*, the Supreme Court explained that civilian federal courts narrowly review habeas petitions from military prisoners in part “because the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty,” and that federal courts have “had no role in [military law] development.”²⁸⁷ Military law was designed to further good order and discipline and was not truly intended to become a body of expansive jurisprudence.²⁸⁸ “The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and, thereby, strengthen the national security of the United States.”²⁸⁹

In this context, it can be argued that the legality of an officer ordering a soldier to attack an enemy machine gun position is an overriding demand of discipline and duty compelling civilian court deference to military decisions. However, that type of “separate sovereign” distinction based on the uniqueness of the military and its needs to accomplish the mission is not the situation presented in which Constitutional rights in a federal criminal trial are at issue. No military mission or national security decision is compromised in this setting by probing whether or not a military prisoner was afforded Constitutional protections, especially in an unclassified case.

Stated differently, whether a prosecutor and his investigators complied with the Fifth Amendment’s Due Process obligations, or a defense counsel fulfilled his duties under the Sixth Amendment’s standard for effective assistance of counsel at trial, have nothing to do with the unique nature of the military as a distinct society which forms a large part of the basis for civilian judicial deference. Put simply, the reason for civilian deference to the military justice process is not valid when the habeas claims involve application of the Constitution. Moreover, ensuring fairness and Constitutional protections in court-martial proceedings enhances rather than detracts from the military’s objective of serving good order and discipline.

The Fifth and Sixth Amendments apply equally in both the military and civilian settings, unaffected by the military’s unique position in American society.²⁹⁰ The Supreme Court has had a direct and substantial role in developing and supervising the interpretation and application of the Fifth and

²⁸⁷ *Id.* at 141.

²⁸⁸ Edmund M. Morgan, *The Background of The Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1953).

²⁸⁹ Part I-1, MANUAL FOR COURTS-MARTIAL (MCM), United States (2016 Edition).

²⁹⁰ *United States v. Williams*, 50 M.J. 436, 440 (App. Armed Forces 1999) (citing *Brady v. Maryland*, 363 U.S. 83 (1963)); *United States v. Jackson*, 59 M.J. 330, 334 (App. Armed Forces 2004) (discovery is not limited to matters within the scope of trial counsel’s personal knowledge); *United States v. Gooch*, 69 M.J. 353 (App. Armed Forces 2011) (the Sixth Amendment guarantees an accused the effective assistance of counsel at trial).

Sixth Amendments in federal criminal prosecutions.²⁹¹ The same is true for the Suspension Clause. Consequently, judicial restraint based on the particularities of the military society does not apply when the application of the Constitution's protections in a criminal prosecution are the habeas claims brought by military prisoners.

Testing Constitutional claims is not an expansion of the existing Congressional military justice construct or relevant Supreme Court case law. It is validation of the existing Article I and Article III authority to address the merits of a military petitioner's Constitutional claims, even if a brief were filed and a decision issued as part of the direct appeal process. The Supreme Court in *Burns* seemingly recognizes procedural claims or claims seeking to retry the case may be appropriately resolved by habeas district judges as fully and fairly considered by the military.²⁹² However, where Constitutional guarantees were disregarded, the military process can be seen as inadequate to resolve those claims that are appropriate for Article III habeas review.

XXI. *BURNS*: FEDERAL COURT'S MUST DELVE INTO THE SUBSTANCE OF A MILITARY PETITIONER'S CONSTITUTIONAL CLAIMS

The petitioners in *Burns* claimed they were imprisoned and sentenced as a result of proceedings that denied them their basic rights guaranteed by the Constitution.²⁹³ The Supreme Court intimated that if that were indeed the case, civilian habeas review of the merits of those claims is understandably appropriate.²⁹⁴ But the obstacle to habeas relief in *Burns* was that the petitioners "sought 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."²⁹⁵ On this premise, the Supreme Court based its denial of habeas relief noting that "when a military decision has dealt fully and fairly with an allegation raised in that application, it is not open to a federal civil court to grant the writ simply to reevaluate the evidence."²⁹⁶

By contrast, where military prisoners base their petitions on the deprivation of fundamental Constitutional protections, a district court is rightly positioned to review the denial of basic rights guaranteed by the Constitution.²⁹⁷

Indeed, the Supreme Court seemingly expects district judges to probe into basic Constitutional protections as part of habeas review of military cases:

For 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 dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have

²⁹¹ See, e.g., *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."); *Strickland v. Washington*, 466 U.S. 668 (1984) (standard for effective assistance of counsel at trial in a criminal case).

²⁹² 346 U.S. at 142.

²⁹³ 346 U.S. at 142.

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 146.

²⁹⁶ *Id.* at 142.

²⁹⁷ *Marbury v. Madison*, 5 U.S. 137 (1803) (explaining the concept of judicial review).

long been recognized and honored by the military courts as well as the civil courts.²⁹⁸

It is for these precedential and binding reasons that the Tenth Circuit's opinion in *Burke v. Nelson* appears to be wrongly decided.²⁹⁹ Proceeding *pro se*, Burke claimed that his Fifth Amendment rights were violated when statements from a civilian custodial police interrogation during a murder investigation were admitted against him at court-martial.³⁰⁰ Rather than evaluate the merits of Burke's Constitutional claim, the Tenth Circuit based its' affirmance of the District Court's denial of habeas relief upon the finding it had no authority to probe the claim for Constitutional muster.³⁰¹ The Tenth Circuit reasoned:

We have no authority to delve into the substance of this claim. As mentioned, when it comes to court-martial rulings on constitutional claims, our review is sharply limited: so long as the claim was briefed and argued before a military court, we must deny the claim. *Watson*, 782 F.2d at 145. And here Burke made his Fifth Amendment argument before the convening authority of his court-martial, which received briefs, heard argument, and then found for the United States. Burke also briefed his Fifth Amendment claim in his appeal to the Army Court and that court heard arguments on the matter. The court then denied the claim in a written opinion. Burke briefed the issue again in his Petition for Grant of Review to the CAAF, which summarily denied the Petition. Those multiple layers of substantive military court review are more than adequate to foreclose our own review. *See id.* We conclude that Burke's Fifth Amendment claim has already been fully and fairly considered and so deny it.³⁰²

Although resolved in an unpublished and nonprecedential decision, the Tenth Circuit's reasoning in *Burke* reveals inconsistent views currently underlying appellate jurisprudence as to just how far an Article III Court can go in reviewing a Constitutional claim raised by a military habeas petitioner upon completion of Article I review.³⁰³ *Burke* is wrongly decided for at least three reasons.

First, the convening authority of Burke's court-martial did not "receive briefs," "hear argument," or "[find] for the United States."³⁰⁴ The process wrongly characterized by the Tenth Circuit is governed by RCMs 1105 and 1106, is largely *ex parte*, no briefs are filed, the United States does not respond in brief, and the convening authority does not find for a party. Rather, it approves or disapproves of the findings and sentences adjudged at trial.³⁰⁵ Consequently, the Tenth Circuit conflated the court-martial approval process with an actual Article I legislative court review.

Second, neither Article I, Section 9 of the Constitution; the Due Process Clause; *Burns*; *Watson*; the Suspension Clause; nor 28 U.S.C. § 2241 requires the federal civilian judiciary to follow an Article I court's Constitutional

²⁹⁸ *Burns*, 346 U.S. at 142.

²⁹⁹ 684 Fed. App'x. 676 (10th Cir. 2017).

³⁰⁰ *Burke*, 676 Fed. App'x at 677.

³⁰¹ 676 Fed. App'x. at 680.

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ 676 Fed. App'x. at 680.

³⁰⁵ *See* Article 60, UCMJ; 10 U.S.C. § 860 (2012).

determinations lock-step. To the contrary, *Burns*, on which the Tenth Circuit's decision in *Watson* is based, specifically states that review is narrow, not foreclosed, and where "military review was legally inadequate to resolve the claims which they have urged upon the civil courts."³⁰⁶ A district court judge can surely probe into the sufficiency of those questions.³⁰⁷ Third, as the Tenth Circuit has done consistently, it should have ensured that consideration of Burke's Fifth Amendment claim by the Army Court was *fairly* considered, rather than apparently relying on the fact that a brief and a decision were issued to forestall Article III evaluation of the Constitutional habeas claim. For example, in *Lips*, the Tenth Circuit affirmed the District Court's denial of habeas relief but did so only after having evaluated the military Petitioner's claims and then finding that the Article I courts provided full and fair consideration.³⁰⁸

Protection of individuals against the erosion of their right to be free from wrongful restraints upon their liberty is, as the Supreme Court noted, the grand purpose of habeas,³⁰⁹ and stands as a meaningful and effective remedy for imprisonment in violation of the Constitution. Surely, men and women in uniform who have taken an oath to defend the Constitution should not lose the guaranty of a disinterested civilian jurist ensuring that they were treated in compliance with the individual liberties upon which the nation was founded.

After all, deference to military justice decisions involving the Constitution has a limit. Deference "is not synonymous with abdication, especially where issues of a constitutional dimension are raised."³¹⁰ In the end, the lives, reputations, and well-being of American combat veterans, who put their lives on the line in support of the Constitution, may reside in the federal judiciary's willingness to review constitutional issues within its habeas authority to ensure that military members were accorded the individual liberties that apply whether or not the individual accused of being a criminal is in the military.

XXII. CONCLUSION

Civilian deference to military decisions has its place, as articulated in well-intentioned case law. The challenge, though, arises when habeas—the very thing the Drafters thought so highly of that they brought it directly from English common law and placed it in the text of the American Constitution—is not used to its full potential, resulting in abuses of individual liberties and unlawful confinement.

As of this writing, there are military prisoners who fought the enemy and were not accorded full and fair determinations of their Constitutional rights by the military justice system. Were it not for habeas, they would have no hope but to be left to the will of the very authority that unlawfully placed them in

³⁰⁶ *Burns*, 346 U.S. at 146.

³⁰⁷ *Id.*

³⁰⁸ 997 F.2d at 811–12; *see also Watson*, 782 F.2d at 145 (Tenth Circuit affirmed District Court's denial of habeas, only after the Article III court evaluated *Watson's* Sixth Amendment ineffective assistance of counsel claim to determine if it were indeed accorded full and fair consideration by the Army Court).

³⁰⁹ *Cunningham*, 371 U.S. at 243.

³¹⁰ *Gunning v. Walker*, 663 F. Supp. 941, 943 (D. Conn. 1987) (citing *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981)); *see also Phillips v. United States*, 910 F. Supp. 101, 108 (E.D.N.Y. 1996).

confinement for their eventual freedom. The American Constitution says otherwise.

Lorance is the type of case where the military justice system was inadequate to fully and fairly resolve a service member's Constitutional claims. The facts reveal an unacceptable eagerness to affirm convictions, and an abdication of the responsibility to find truth through adherence to the basic Constitutional guarantees that have long been recognized and honored in both military and civilian courts.³¹¹ In short, *Lorance* demonstrates the enduring need for meaningful civilian habeas review to strike the proper balance between the military justice system's goal to maintain good order and discipline on the one hand, and protection of individual liberty from government overreaching on the other.

Where the Fifth and Sixth Amendments were relegated to the background by Article I legislative courts instead of given the prominence for which they were designed, an Article III district judge and/or appellate justices can be fairly seen as dutybound to probe into Constitutional claims to ensure that a full and fair appeal was had in the military justice system.

³¹¹ *Burns*, 346 U.S. at 142.