No.

IN THE
Supreme Court of the United States

LEON A. BROWN IV,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Court should overrule *Burns v. Wilson*, 346 U.S. 137 (1953), where its validity has been undermined by a circuit split in its application, the enactment of the Military Justice Act of 1983, and development of military jurisprudence over the last 70 years, and if so, what is the proper scope and standard of review of military habeas corpus cases in Article III courts?

II. Whether Article III courts have a duty to review newly discovered exculpatory evidence time barred from military court review under Article 73 of the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. § 873?

STATEMENT OF RELATED PROCEEDINGS

- *United States v. Brown*, General Court-Martial, Air Force Trial Judiciary. Judgment entered December 8, 2014.
- *United States v. Brown*, No. ACM 38864 (A.F. Ct. Crim. App). Judgment entered July 6, 2017.
- *United States v. Brown*, No. 18-0311/AF (C.A.A.F.) Judgment entered October 11, 2018.
- *Brown v. United States of America*, No. 2:19-CV-08507-MRW (C.D. Cal.) Judgment entered June 29, 2021 (Appendix B).
- *Brown v. United States of America*, No. 21-55727 (9th Cir.) Judgment entered Sept. 20, 2022 (Appendix A).

TABLE OF CONTENTS

APPENDIX INDEX

TABLE OF AUTHORITIES

Cases:

Statutes:

Other Statutory Authority:

Constitutional Provisions:

Rules:

Executive Orders:

Other Authorities:

PETITION FOR WRIT OF CERTIORARI

Petitioner Leon Brown IV, an inmate currently incarcerated at the Federal Correctional Institution in Lompoc, California, by and through his attorney Breana Frankel, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

- *Brown v. United States of America*, No. 2:19-CV-08507-MRW, U.S. District Court for the Central District of California. Judgment entered June 29, 2021 (Appendix B).
- *Brown v. United States of America*, No. 21-55727, U.S. Court of Appeals for the Ninth Circuit. Judgment entered Sept. 20, 2022 (Appendix A).

BASIS FOR JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered judgment on September 20, 2022. A timely filed petition for rehearing and rehearing en banc was denied by the Court of Appeals on November 15, 2022 (Appendix D). On January 20, 2023, an extension of time to file the petition for writ of certiorari was granted to and including April 14, 2023 in Application No. 22A650.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Art. I, § 9, cl. 2:

"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."

United States Constitution, Amendment V:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

United States Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

10 U.S.C. § 873 (1994) (amended 2016):

"At any time within two years after approval by the convening authority of a court-martial sentence, the accused may petition the Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court. If the accused's case is pending before a Court of Criminal Appeals or before the Court of Appeals for the Armed Forces, the Judge Advocate General shall refer the petition to the appropriate court for action. Otherwise the Judge Advocate General shall act upon the petition."

STATEMENT OF THE CASE

I. Military Procedural History

Petitioner Leon Brown IV was a captain in the United States Air Force, 742d Missile Squadron, Minot Air Force Base, North Dakota. On December 8, 2014, a military judge convicted him at a general court-martial, contrary to his pleas, of violating UCMJ Articles 92 (providing alcohol to minors); 112 (distributing marijuana and psilocybin, and using psilocybin);

120 (sexual assault); 133 (organizing a violent gang); and 134 (pandering and communicating threats). Petitioner was acquitted of 14 other charges and specifications and sentenced to 25 years of confinement. The convening authority approved the findings on July 24, 2015.

On June 6, 2017, the Air Force Court of Criminal Appeals ("AFCCA") affirmed the conviction on direct appeal. (SER-3-44.) On October 11, 2018, the United States Court of Appeals for the Armed Forces ("CAAF") denied review, 78 M.J. 162 (C.A.A.F. 2018). Petitioner filed an Article 73 petition for a new trial on July 24, 2017 based on newly discovered evidence, a post-trial declaration from witness Winona Keplin, who did not testify at trial. The AFCCA denied the petition on May 23, 2018. (SER-45-50.)

The statutory two-year deadline for presenting new evidence to the military courts expired on July 24, 2017. *See* 10 U.S.C. § 873.[1] Therefore, any new evidence discovered after July 24, 2017 could not be reviewed by the military courts, including evidence withheld for years by the government.

II. Relevant Factual Background

A. Exculpatory Evidence Withheld by the Government

Starting in January 2015, while his case was on direct appeal in the military courts, Petitioner made

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[1] The 1994 version of Article 73 applies to all cases "in which charges are referred to trial by court-martial before January 1, 2019." Exec. Order No. 13825, Sec. 3(a), (d), 83 Fed. Reg. 9889 (March 1, 2018).

multiple Freedom of Information Act ("FOIA") requests to the Air Force. 2-ER-122-125.

On May 19, 2016, the Pentagon responded that it was processing Petitioner's FOIA request. However, for the next two years, the Air Force failed to produce any records in response to Appellant's multiple letters and FOIA requests. 2-ER-126-142.

Petitioner did not receive the first set of records from the Air Force until June 2018, over a year after the two-year period for filing a petition for new trial in the military courts had expired. This first batch of records included prosecution witness Derrick Elliott's court-martial transcripts, which demonstrated that Elliott directly benefited at his sentencing for his cooperation in Petitioner's prosecution. 2-ER-145-171.

Reviewing those records, Petitioner learned for the first time that other trial witnesses, including Air Force personnel Jarrid Gable and Ethan Telford, had similarly benefited by cooperating in Petitioner's prosecution. Petitioner prepared another FOIA request in June 2018 to obtain the documents that the Air Force had failed to produce during its first FOIA response. 2-ER-133-134.

By May 2019, Petitioner had still not received any documents in response to his June 2018 FOIA request. Petitioner then filed a complaint with the Air Force Inspector General, stating that the Air Force was violating federal law and Air Force regulations. 2-ER-122-135. However, the Air Force did not respond to Petitioner's June 2018 request for nearly two more years, until March 26, 2020, after Petitioner had already filed his federal habeas petition. 2-ER-130-135.

Pursuant to these FOIA requests and post-trial investigative work, Petitioner obtained substantial exculpatory material which had been withheld by the government: (1) witness Derrick Elliott's arrest at a Walmart for theft and lying about his age, 2-ER-240-243; (2) plea and clemency records for confidential informants Derrick Elliott, Jarrid Gable, and Ethan Telford, showing that all three were granted leniency in their own courts-martial for their cooperation in Petitioner's prosecution, 2-ER-172-192; (3) impeachment material for star witness Kelsie Wallace, which showed that she had multiple police encounters, provided false testimony regarding where she lived at the time of the alleged crimes, and gave false statements to Air Force investigators, 2-ER-199-201, 207-217; (4) impeachment material for Michael Bowens, showing that he lied on multiple occasions, 2-ER-193-198; (5) exculpatory interviews of two witnesses conducted by Air Force Office of Special Investigations (AFOSI) agents, 2-ER-201-204; (6) photographs of Petitioner's residences, which contradicted key portions of Wallace's testimony, 2-ER-218-239, 264-268; and (7) documents demonstrating that Petitioner's right to counsel had attached prior to the illicit recording of his conversations in pretrial confinement. 2-ER-176-179, 272-288.

B. Evidence of Actual Innocence

Petitioner was convicted of sexual intercourse with minors GB and FT. GB testified at trial but FT did not. GB testified at trial that she did not remember some of the events, although she stated that she did not feel that she had sexual intercourse with Petitioner. 2-ER-

70-72. The only eyewitness to the alleged sexual assaults of GB and FT was Kelsie Wallace. 2-ER-54-63.

On July 21, 2017, GB provided a post-trial declaration,[2] in which she stated, consistent with her trial testimony, that she did not have sexual intercourse with Petitioner and that she went to sleep alone with her clothes on. GB stated that Wallace testified falsely that she observed GB in bed with Petitioner. GB stated that, if Appellant's attorney had asked her about the night in question, she would have denied having sex with Petitioner and testified that Wallace was not telling the truth at trial. 2-ER-252.

GB's declaration is consistent with her interview with military police on January 16, 2013, in which she stated that Petitioner "made no [sexual] advances towards her." 2-ER-261-263. GB's declaration is also corroborated by government witness Kayla Heenan, who testified that Petitioner and GB did not have sexual intercourse because she personally observed them throughout the night in question. 2-ER-73-75.

On July 9, 2018, Valorie Mattson, who was at Petitioner's house on the night of GB's alleged sexual assault, submitted a post-trial declaration stating that she observed Petitioner and GB "throughout the entire night [and] they were not alone together." 2-ER-254. Mattson stated that she gave this information to AFOSI agents on April 17, 2013. However, the government failed to disclose this information to the defense prior to trial. 2-ER-202-204.

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[2] The post-trial declarations of GB and other witnesses were mailed to appellate counsel. 2-ER-250-260.

On October 9, 2017, FT provided a post-trial declaration, in which she stated that she never had sexual intercourse with Petitioner. FT further stated that she was never pregnant nor had she ever had an abortion, contrary to Wallace's claim. FT stated that Wallace had testified falsely that she and Petitioner had sex because Wallace was angry at Petitioner and "asked [FT] if she would help [Wallace] cause problems for him with the military." 2-ER-257, 269-271.

On August 17, 2018, Breanna Quarne provided a post-trial declaration in which she stated that she would have testified that Appellant did not have sex with FT. Quarne further stated that AFOSI threatened to charge her criminally unless she cooperated in Appellant's prosecution. 2-ER-253.

On September 29, 2017 and October 7, 2017, Winona Keplin provided declarations stating that Petitioner did not have sexual intercourse with FT. 2-ER-199-200, 250-251.

III. Federal Habeas Proceedings

On October 2, 2019, Petitioner filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2241, in the United States District Court for the Central District of California. Petitioner's habeas claims included, *inter alia*: (1) an actual innocence "gateway" claim brought under *Schlup v. Delo*, 513 U.S. 298 (1995); (2) violation of *Brady v. Maryland*, 73 U.S. 83 (1963); and (3) violation of *Massiah v. United States*, 377 U.S. 201 (1964).

These claims could not have been reviewed by the military courts because the government withheld exculpatory evidence which substantiated them. More-

over, this evidence was not discovered until after July 24, 2017, when Petitioner's Article 73 statutory deadline had elapsed. Therefore, Article III court habeas review was Petitioner's only available judicial remedy.

The lower federal courts declined to conduct a *de novo* review of Petitioner's habeas claims and declined to answer whether the federal courts had jurisdiction to review Petitioner's newly discovered exculpatory evidence. The lower courts instead cited *Burns v. Wilson*, 346 U.S. 137, 142 (1953) (plurality opinion) for the proposition that "[t]he military courts fully and fairly considered Brown's habeas claims," despite the fact that such evidence was never before the military courts because the government withheld this evidence for years both before and after trial. App. A at 3.

REASONS FOR GRANTING THE WRIT

Granting a writ of certiorari is appropriate here for the following reasons:

(1) There is a conflict among the circuit courts in applying the *Burns* standard in military habeas cases. Supreme Court Rule 10(a).

(2) Because the Military Justice Act of 1983 and military jurisprudence developed in the last 70 years have undermined the continuing validity of *Burns*, determining the proper scope and standard of review in military habeas cases is a question of exceptional importance. Rule 10(a).

(3) The Ninth Circuit "has so far departed from the accepted and usual course of judicial proceedings … as to call for an exercise of this Court's supervisory power," by effectively concluding that the *Burns*

standard overrides established Supreme Court precedent for review of a military prisoner's gateway claim of innocence under *Schlup*, as well as claims brought under *Brady* and *Massiah*. Petitioner was denied the opportunity to establish his habeas claims under *Schlup*, *Brady*, and *Massiah* due to the court of appeals' application of *Burns*. Rule 10(a).

(4) Whether Article III courts have a duty to review newly discovered exculpatory evidence when time-barred from military court review under Article 73, UCMJ, is "an important question of federal law that has not been, but should be, settled by this Court …." Rule 10(b).

ARGUMENT

I. THE *BURNS* STANDARD FOR REVIEW OF MILITARY HABEAS CASES IS VAGUE AND CONFUSING, LEADING TO A CIRCUIT SPLIT IN ITS APPLICATION, AND SHOULD THEREFORE BE OVERRULED.

The Court should overrule *Burns v. Wilson*. The arbitrary distinction created in *Burns* between military and civilian defendants does not serve any historical or practical purpose. Nothing in either the Constitution or federal law expressly limits habeas corpus for the armed forces. U.S. Const. art. I, § 9, cl.2. Both the military and Congress have pushed to synthesize military and civilian law. The plurality opinion in *Burns* provides little guidance to lower federal courts, which are hopelessly split on its scope and application. The plurality opinion in *Burns v. Wilson* has never been revisited by this Court since it was decided 70 years ago. Article III courts have struggled with how to

apply the "full and fair" standard given the lack of guidance in *Burns* and this Court's continuing silence on the issue.

Applying AEDPA to military habeas cases would create a unified standard easily applicable to both civilian and military defendants and would afford equal constitutional protections to those who protect the Constitution. Contemporary policy considerations support applying the same standard to federal habeas review of military courts-martial as to state and federal convictions. The Ninth Circuit's rejection of Petitioner's habeas claims is a textbook example of the inadequacy of the *Burns* standard and the inability of the circuit courts to apply it equitably and consistently. Petitioner's case is an ideal vehicle to review and reject the *Burns* standard.

A. The *Burns* Plurality Opinion Is Gravely Flawed.

The Court's decision in *Burns* held that "when a military decision has dealt fully and fairly with an allegation raised in [an] application, it is not open to a federal civil court to grant the writ simply to reevaluate the evidence." 346 U.S. at 142. Rather, "it is the limited function of the civil courts to determine whether the military ha[d] given fair consideration to each of th[ose] claims." *Id.* at 144.

The Court in *Burns* neither defined what "full and fair" means nor gave any direction to lower courts as to how to apply it. Nor did the Court consider whether the *Burns* standard overrides the application of other Supreme Court precedent.

Furthermore, this Court has never revisited *Burns* in the 70 years since it was decided. In fact, the Court "has never explicitly applied *Burns* again, while several subsequent decisions of the Court cast doubt on the continued vitality of the 'full and fair' consideration test." Walter B. Huffman, et al., *Military Law: Criminal Justice & Administrative Process* § 12:11. For instance, "Justice Douglas' opinion for the Court in *U.S. v. Augenblick*, 393 U.S. 348, 351 (1969) implied that the question of the scope of review in military cases was left open in *Burns*." *Id.*

1. *Burns* Is Historically and Legally Inaccurate.

Burns was incorrect when it stated that the scope of review "has always been more narrow" for military convictions. 346 U.S. at 139. In support of this contention, the Court cited *Hiatt v. Brown*, 339 U.S. 103, 111 (1950). However, *Hiatt* merely held that the proper test was a jurisdictional inquiry. *Id.* (citing *In re Grimley*, 137 U.S. 147, 150 (1890)). It was not until *Hiatt* was decided in 1950 that the scope of civilian habeas review was deemed to be broader than that for military habeas corpus. *Cf. Whelchel v. McDonald*, 340 U.S. 122, 126-127 (1950); *Hiatt*, 339 U.S. at 111. Prior to the Court's decision in *Brown v. Allen*, 344 U.S. 443 (1953), decided just months before *Burns*, the scope of review for military and state habeas cases was exactly the same – a jurisdictional test.

Before 1867, only military defendants were entitled to a writ of habeas corpus; there was no such relief available for state convictions. In fact, federal habeas review has been available to military prisoners since the Judiciary Act of 1789, whereas it has only been

available for state convictions since the Habeas Corpus Act of 1867, which extended the same jurisdictional test to state prisoners as for federal and military defendants.

2. *Burns*' Validity Has Been Undermined by 70 Years of Legal Developments.

Development of the law over the last 70 years counsels in favor of overruling *Burns*. When *Burns* was decided, courts-martial were largely unreviewable by Article III courts. Since then, the law has been transformed by the passage of the Military Justice Act of 1983, including providing this Court with power to review decisions of the CAAF. Pub. L. No. 98-209, 97 Stat. 1405-06 (1983); 10 U.S.C. § 867a; 28 U.S.C. § 1259.

Thus, *Burns*' central proposition that courts-martial are "beyond the reach of review" by civil courts, *Whelchel*, 340 U.S. at 123-24, is now irreconcilable with the modern view that "[t]he non-Article III court-martial system stands on much the same footing as territorial and D.C. courts." *Ortiz v. United States*, 138 S. Ct. 2165, 2178-79 (2018). Accordingly, unlike in 1953 when *Burns* was decided, this Court now has the power to "review the decisions of the [CAAF] … [and] [i]n exercising appellate jurisdiction[,] … sit[s] as a supervising court, whose peculiar province it is to correct the errors of an inferior court." *Id.* at 2173-74 & n.4 (citations omitted).

Moreover, this Court has recognized that "[s]ince the adoption of the UCMJ, Congress has gradually changed the system of military justice so that it has

come to more closely resemble the civilian system." *Weiss v. U.S.*, 510 U.S. 163, 174 (1994); *see also Ortiz*, 138 S. Ct. at 2171. For example, in 1980, the President issued the Military Rules of Evidence, patterned after the Federal Rules of Evidence, to govern evidentiary issues in courts-martial. Further, in 1989, Congress increased the members of the United States Court of Military Appeals from three to five judges, and in 1994, it renamed the Court of Military Appeals the "Court of Appeals for the Armed Forces" and changed the name of the Courts of Military Review to "Courts of Criminal Appeals." More recently, Congress enacted the Military Justice Act of 2016, which was intended to align courts-martial procedures with those used in the federal courts. *See* Military Justice Act of 2016, § 5542, 130 Stat. 2967 to 2968; Executive Order No. 13825, 2018 Amendments to the Manual for Courts-Martial, 83 Fed. Reg. 9889 to 9891 (Mar. 8, 2018).

B. *Burns*' Lack of Clarity and the Court's Failure to Revisit the Opinion in the 70 Years Since It Was Decided Has Led to a Circuit Court Split.

Burns has been roundly criticized by Article III and military courts alike for its lack of a clear and easily applicable standard:

"[W]e note that considerable confusion has surrounded the 'full and fair consideration' standard enunciated in *Burns*. Its validity has been questioned and criticized by both courts and commentators since it was first announced." *Allen v. VanCantfort*, 436 F.2d 625, 629-30 (1st Cir. 1971).

"The degree to which a federal habeas court may consider claims or errors committed in a military trial has long been the subject of controversy and remains unclear. Nearly 50 years after it was decided, . . . the rule that emerged from *Burns* is far from clear in all respects . . . [l]ower courts have had difficulty in applying the *Burns* 'full and fair' test." *Brosius v. Warden*, 278 F.3d 239, 242-44 (3d Cir. 2002).

"Federal courts have interpreted *Burns* with considerable disagreement. . . . Other circuits are divided on the proper scope of review." *Calley v. Callaway*, 519 F.2d 184, 198 & n.21 (5th Cir. 1975) (en banc). "[T]here 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* . . ." *Watson v. McCotter*, 782 F.2d 143, 144 (10th Cir. 1986). "The Supreme Court has never clarified the standard of full and fair consideration, and it has meant many things to many courts." *Kauffman v. Secretary of the Air Force*, 415 F.2d 991, 997 (D.C. Cir. 1969).

"It appears that Article III courts have not been able to develop a consistent standard for collateral review of courts-martial under 28 U.S.C. § 2241." *Loving v. United States*, 64 M.J. 132, 144 (C.A.A.F. 2006); *see also* Hearings on S. 2521 (Military Justice Act of 1982) by U.S. Senate Committee on Armed Services, 97th Cong., 2d Sess. at 39 (1982) (William H. Taft IV, Department of Defense General Counsel) (explaining that "options for mounting collateral attack" are "complicated by the procedural aspects" and that "treatment of the case may vary not only among the courts of appeal but also within particular circuits").

The circuit courts have been unable to agree on a consistent, fair, and workable standard when applying *Burns* to a military defendant's constitutional claims.

First, "lower courts have been unable to reach a consensus" regarding "how much" review a military court must engage in, and whether a military court may summarily dispose of a claim or must provide a record of review. John K. Chapman, Note, *Reforming Federal Habeas Review of Military Convictions: Why AEDPA Would Improve the Scope and Standard of Review*, 57 Vand. L. Rev. 1387, 1399 (May 2004). *Compare Swisher v. United States*, 237 F. Supp. 921, 928 (W.D. Mo. 1965) (noting "if a claim had not been presented to the military authorities it cannot be said that such a claim could have been 'fully and fairly' dealt with by them") and *Hatheway v. Secretary of Army*, 641 F.2d 1376, 1380 n.4 (9th Cir. 1981) ("It is difficult to determine whether Hatheway's constitutional arguments received full and fair consideration because none of the military courts articulated its analysis of them.") *with Watson*, 782 F.2d at 145 ("When an issue is briefed and argued before a military [court], we have held that the military tribunal has given the claim fair consideration, even though its opinion summarily disposed of the issue" without discussion.).

Second, the circuit courts are split in their interpretation and application of the *Burns* standard when reviewing military cases on habeas review:

Some circuits, such as the D.C. Circuit, essentially treat military cases like state habeas cases. *See, e.g., Kauffman*, 415 F.2d at 997 ("We think it is the better view that the principal opinion in *Burns* did not apply

a standard of review different from that currently imposed in habeas corpus review of state convictions . . . We hold that the test of fairness requires that military rulings on constitutional issues conform to Supreme Court standards.").

Other circuits, notably the Federal Circuit, will not review factual issues "fully and fairly" considered by the military but will review legal determinations *de novo*. *See, e.g., Bowling v. U.S.*, 713 F.2d 1558 (Fed. Cir. 1983); *McDonald v. U.S.*, 531 F.2d 490 (Ct. Cl. 1976) (per curiam).

On the other hand, the Fifth and Tenth Circuits interpret *Burns* as establishing a scope of review that is narrower than that for state habeas. Both circuits use the four-prong balancing test first articulated in *Calley* strictly to questions of law and "errors of substantial constitutional dimension." *Calley*, 519 F.2d at 199; *Dodson v. Zelez*, 917 F.2d 1250, 1252 (10th Cir. 1990).

The Third Circuit has largely abandoned the *Burns* standard altogether and instead applies AEDPA to military convictions. *Brosius*, 278 F.3d at 245 ("[O]ur inquiry in a military habeas case may not go further than our inquiry in a state habeas case. . . Thus, we will assume . . . that we may review determinations made by the military courts . . . as if they were determinations made by state courts.").

Still other circuits, such as the First, Fourth and Eighth appear to review military habeas claims on the merits. *See, e.g., Allen,* 436 F.2d at 630 & n.2. ("We deem it appropriate to . . . review briefly petitioner's claims on the merits."); *Ward v. United States*, 982

F.3d 906, 913 (4th Cir. 2020) (reviewing habeas claims on the merits but ultimately denying relief); *Swisher v. United States*, 354 F.2d 472, 475 (8th Cir. 1966) (same).

C. The Ninth Circuit's Decision in Petitioner's Case Perfectly Illustrates *Burns*' Deficiencies.

This split in the circuit courts in applying the *Burns* standard has created unfair and disparate treatment of military prisoners, with some servicemembers receiving more in-depth review of their claims than others based arbitrarily upon their location of confinement.

In particular, the Ninth Circuit's application of *Burns* in Petitioner's case led to an illogical and unfair result. First, the Ninth Circuit erroneously concluded that the military courts gave "full and fair" consideration to Petitioner's newly discovered evidence of innocence, despite the fact that this exculpatory material was never before those courts. Second, the Ninth Circuit seemingly concluded that the *Burns* standard supersedes established Supreme Court precedent for review of a military prisoner's gateway claim of innocence under *Schlup*, as well as claims brought under *Brady* and *Massiah*, and therefore did not fully address these constitutional claims.

If the Ninth Circuit had instead applied AEDPA to Petitioner's claims of constitutional error, as it would have done if Petitioner had been a civilian defendant, it would have concluded that Petitioner is entitled to habeas relief.

1. The Ninth Circuit's Application of the "Full and Fair" Standard to Petitioner's Claims Resulted in Legal Error.

The Ninth Circuit's conclusion that "[t]he military courts fully and fairly considered Brown's habeas claims," App. A at 3, is factually and legally incorrect. The Ninth Circuit failed to acknowledge that the military courts did not review any of the exculpatory evidence Petitioner presented on federal habeas because this evidence was obtained after the Article 73 two-year deadline for petitioning for a new trial had elapsed. *See Roberts v. United States*, 77 M.J. 615, 616-17 & n.3 (Army Ct. Crim. App. 2018) (military court lacked jurisdiction to consider petition for extraordinary relief based on new evidence of which petitioner was unaware at trial because it lacked authority under Article 73, UCMJ, to grant equitable tolling of the two-year limitation on new evidence).

Thus, the military courts did not "fully and fairly consider" Petitioner's claims because those courts had lost jurisdiction to review any of the evidence Petitioner obtained after July 24, 2017. This newly acquired evidence, which Petitioner presented in the first instance in the district court, demonstrated Petitioner's innocence of the most serious charges of sexual assault, including declarations from the alleged victims, GB and FT, that they never had sexual intercourse with Petitioner, supported by the declarations of disinterested witnesses Valorie Mattson, Breanna Quarne, and Winona Keplin, who stated that Petitioner was never alone with either victim on the nights in question. 2-ER-250-254, 257. The evidence acquired

after July 24, 2017 also included crucial exculpatory and impeachment material that the government withheld in violation of *Brady v. Maryland*. The primary reason the military courts did not review this exculpatory evidence on direct appeal was due to the government's withholding of the evidence for years after trial, not to any fault or delay on Petitioner's part.

Only where an issue has been "briefed and argued" before a military court and disposed of, "even summarily," can a federal habeas court conclude that the claim was given "full and fair" consideration. *Watson*, 782 F.2d at 145. Here, a review of Petitioner's petition for new trial and decisions of the military appellate courts demonstrates that this newly discovered exculpatory evidence was never "briefed and argued" before the military courts because Petitioner was unaware of its very existence while his case was pending on appeal. *See* 2-ER-143-144 (Appellant's petition for new trial); SER-3-50 (military court of appeals decisions).

Thus, the Ninth Circuit's application of *Burns* in Petitioner's case led to an absurd result, in which the Ninth Circuit inexplicably concluded that the military courts "fully and fairly" reviewed Petitioner's newly discovered material when in fact those courts never even had this evidence before them.

If the Ninth Circuit had instead applied AEDPA to review Petitioner's newly acquired evidence of innocence, it would easily have concluded that this evidence had never been presented to the lower courts on direct appeal, due largely to governmental misconduct, and that it could therefore review Petitioner's constitutional claims on habeas corpus.

2. The Ninth Circuit's Application of *Burns* to Petitioner's Constitutional Claims Demonstrates Why *Burns* Should Be Overruled.

a. *Schlup v. Delo*

As noted, Petitioner presented substantial newly acquired evidence proving his innocence of the most serious charges of sexual assault, including declarations from the alleged victims, GB and FT, that they never had sexual intercourse with Petitioner, supported by the declarations of disinterested witnesses Valorie Mattson, Breanna Quarne, and Winona Keplin, who stated that Petitioner was never alone with either victim on the nights in question. 2-ER-250-254, 257. The declarants had no motive to fabricate and none of the declarations were recantations. Petitioner argued in the Article III courts that this evidence stated a "gateway" innocence claim pursuant to *Schlup*.

However, rather than assessing Petitioner's gateway innocence claim, the Ninth Circuit seemingly concluded that *Burns* supersedes *Schlup* and instead used *Burns* to defer to the AFCCA's contention that there was sufficient evidence at trial to support Petitioner's guilt of the sexual assaults of FT and GB. App. A at 3-4 (citing SER-6). In deciding these claims, the AFCCA applied *Jackson v. Virginia*, 443 U.S. 538 (1979), which this Court has explicitly stated is not equivalent to *Schlup*. *See House v. Bell*, 547 U.S. 518, 538 (2006) (noting that "the gateway actual-innocence standard is by no means equivalent to the standard of *Jackson* . . . which governs insufficient evidence").

Under the proper *Schlup* standard, Petitioner only needed to show that it was "more likely than not that no reasonable juror hearing all of the now-available evidence would vote to convict [Petitioner] beyond a reasonable doubt." *Carriger v. Stewart*, 132 F.3d 463, 478 (9th Cir. 1997) (en banc). Here, considering the newly presented declarations from the alleged victims, GB and FT, that they never had sexual intercourse with Petitioner, supported by the declarations of disinterested witnesses Mattson, Quarne, and Keplin, who stated that Petitioner was never alone with either victim, he clearly met the *Schlup* standard.

Moreover, "the *Schlup* standard does not require absolute certainty about the petitioner's guilt or innocence." *House*, 547 U.S. at 538. Rather, a petitioner's burden is to demonstrate that "in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt." *Id.* However, the Ninth Circuit erroneously concluded that Petitioner was required to "affirmatively prove" his innocence, and exclusively relied upon the evidence and witnesses adduced at trial. App. A at 3-4. Under a proper application of *Schlup*, a "petitioner's showing of innocence is not insufficient solely because the trial record contained sufficient evidence to support the jury's verdict." 513 U.S. at 331.

Thus, the Ninth Circuit seemingly concluded that *Burns* superseded this Court's more recent decision in *Schlup* and therefore failed to properly assess whether Petitioner had met his burden under *Schlup*. Furthermore, because the Ninth Circuit applied *Burns* and deferred to the military courts' inapposite application of *Jackson*, it failed to consider how Petitioner's

exculpatory *Brady* material had undermined the credibility of government witnesses presented at trial. *See Schlup*, 513 U.S. at 330 (the *Jackson* standard does not allow reassessment of the credibility of witnesses whereas the *Schlup* standard "may indeed call into question the credibility of the witnesses presented at trial"), *compare to* App. A at 3-4 (citing the AFCCA's application of *Jackson*).

If the Ninth Circuit had instead applied AEDPA to Petitioner's claims, it would have concluded that Petitioner's newly acquired evidence meets the *Schlup* standard for stating a gateway claim of innocence, thus entitling Petitioner to consideration of his constitutional claims under *Brady* and *Massiah*.

b. *Brady v. Maryland*

The Air Force withheld crucial exculpatory evidence from the defense in violation of *Brady v. Maryland* and FOIA. As noted, the evidence withheld by the government was substantial: (1) witness Derrick Elliott's arrest at a Walmart for theft and lying about his age, 2-ER-240-243; (2) plea and clemency records for confidential informants Derrick Elliott, Jarrid Gable, and Ethan Telford, showing that all three were granted leniency in their own courts-martial for their cooperation in Petitioner's prosecution, 2-ER-172-192; (3) impeachment material for star witness Kelsie Wallace, which showed that she had multiple police encounters, provided false testimony regarding where she lived at the time of the alleged crimes, and gave false statements to Air Force investigators, 2-ER-199-201, 207-217; (4) impeachment material for Michael Bowens, showing that he lied on multiple occasions, 2-ER-193-198; (5) exculpatory interviews of two

witnesses conducted by AFOSI agents, 2-ER-201-204; (6) photographs of Petitioner's residences, which contradicted key portions of Wallace's testimony, 2-ER-218-239, 264-268; and (7) documents demonstrating that Petitioner's right to counsel had attached prior to the illicit recording of his conversations in pretrial confinement. 2-ER-176-179, 272-288.

The only evidence Petitioner was able to present on direct appeal to the military courts was the evidence of Elliott's Walmart arrest. 2-ER-240-243. The rest of this material was not turned over to Petitioner until years after the two-year Article 73 deadline for filing a petition for new trial in the military courts had elapsed. The military courts determined that, although the Air Force should have turned over the evidence of the Walmart arrest to the defense, any error was "harmless." SER-25-30.

Petitioner presented this exculpatory material to the Article III courts in his habeas petition. However, rather than reviewing all of the exculpatory material collectively, as required by *Kyles v. Whitley*, 514 U.S. 419, 436 (1995), the Ninth Circuit instead applied *Burns* and deferred to the AFCCA's conclusion that the withholding of Elliott's Walmart arrest was harmless. App. A at 6-7.

Similarly, the Ninth Circuit assessed the cooperation agreements and clemency requests by Elliott, Gable, and Telford in isolation and not collectively with the other evidence withheld by the government. App. A at 7. Moreover, the Ninth Circuit's conclusion that the cooperation agreements were immaterial and cumulative is contrary to both this Court's and the Ninth Circuit's own precedent. The Ninth Circuit's

contention that the cooperation and clemency materials "made no difference is severely undercut by the prosecutor's strenuous vouching for [Elliott's, Gable's, and Bowens'] truthfulness in closing argument." *Carriger*, 132 F.3d at 482. *See* 2-ER-120 ("So, even though they may have had something to gain by testifying in this case, at least they thought that at the time, when somebody tried to tell a lie, they were honest and said 'no, that's not the way it is.'"); 2-ER-121 ("[A]nd they weren't willing to lie, even if they might get something out of it because they cared about the truth ….").

Furthermore, *Brady* requires prosecutors to disclose any benefits that are given to informants, "even where that deal resulted in minimal benefit to the informant." *Maxwell v. Roe*, 628 F.3d 486, 510 (9th Cir. 2010). Accordingly, even when, as here, "the jury ha[s] already heard a wealth of negative information" regarding a witness, including admitting to lying, "the government is [nevertheless] obligated to disclose 'all material information' casting a shadow on a government witness's credibility.'" *Carriger*, 132 F.3d at 481-82 (citations omitted). And when the undisclosed evidence, as here, provides a "new and different ground of impeachment," it is material under *Brady*. *Silva v. Brown*, 416 F.3d 980, 989 (9th Cir. 2005) (citations omitted).

The cumulative weight of this evidence meets the *Brady* materiality standard. In evaluating materiality, a court does not assess "whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at

434. The test of materiality "is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Id.* at 434-35; *see also Carriger*, 132 F.3d at 479 (noting that a "reasonable probability" does not require showing by a preponderance that the outcome would have been different). Evidence is material under *Brady* when there is a "reasonable probability that the withheld evidence would have altered at least one juror's assessment of the [case]." *Cone v. Bell*, 556 U.S. 449, 452 (2009). Rather than considering whether Petitioner received a fair trial in the absence of all the evidence withheld by the government, the Ninth Circuit instead improperly concluded that this evidence would not have altered the outcome, in conflict with both *Kyles* and *Carriger*. *See* App. A at 6-7.

The Ninth Circuit also ignored the substantial impeachment evidence withheld by the government. "When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility is a *Brady* violation." *Giglio v. United States*, 405 U.S. 150, 154 (1972). "We cannot overemphasize the importance of allowing a full and fair cross-examination of government witnesses whose testimony is important to the outcome of the case." *United States v. Brooke*, 4 F.3d 1480, 1489 (9th Cir. 1993).

Here, because the prosecution relied heavily upon eyewitness testimony, the impeachment evidence withheld by the government was critical to Petitioner's defense and therefore material under *Brady*.

This is particularly true with respect to the allegations of sexual assault of GB and FT, which relied almost entirely on Wallace's testimony as the only alleged eyewitness to sexual intercourse. The impeachment evidence withheld by the government undermined Petitioner's convictions, particularly in weakening the credibility of key witnesses Wallace, Hoeger, Elliott, Gable, and Bowens. Absent this *Brady* material, a court cannot state with confidence that Petitioner received a fair trial.

If the Ninth Circuit had instead applied AEDPA, rather than *Burns*, to Petitioner's *Brady* claims, it would have properly assessed the cumulative weight of the substantial evidence withheld by the government and concluded that Petitioner had stated a viable claim under *Brady*.

c. *Massiah v. United States*

Petitioner's conversations with confidential government informants while in pretrial confinement in February 2014 were secretly audiotaped, and portions of these conversations were entered into evidence at trial. In the federal courts, Petitioner argued that this illicit audiotaping violated his Sixth Amendment right to counsel, pursuant to *Massiah*. The government argued that there was no violation of Petitioner's Sixth Amendment right to counsel because Petitioner had not yet been charged with the crimes which were discussed on tape. Gov't Br. at 52-55.[3]

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[3] The references to the government's brief filed in the Ninth Circuit are to the CM/ECF pagination.

Petitioner did not raise this *Massiah* claim on direct appeal because the government withheld critical evidence, in violation of *Brady*, which demonstrated that his right to counsel had attached prior to the illicit audiotaping. Petitioner learned, years after direct appeal, that the Air Force withheld evidence demonstrating that his right to counsel attached on January 14, 2014, when the convening authority instituted adversary criminal proceedings. *See* 2-ER-31, 176-179, 190-192, 272-288, 308-309.

Under military law, "'the test for Sixth Amendment purposes is whether adversary judicial proceedings have been instituted against a subject,' even though charges had not yet been preferred." *United States v. Ankeny*, 28 M.J. 780, 783-84 (N.C.M.R. 1989) (quoting *United States v. Wattenbarger*, 21 M.J. 41, 44 (C.M.A. 1985)); *see also United States v. Swafford*, 2017 WL 6887849, at *4 (A.F. Ct. Crim. App. 2017); *United States v. Finch*, 64 M.J. 118, 129 & n.27 (C.A.A.F. 2006) (Gierke, C.J., dissenting) (citing *Wattenbarger* in observing that "a pre-preferral right to counsel" may attach "months prior to preferral of charges").

Petitioner presented documentary evidence to the Article III courts proving that the military justice system had determined, prior to the illicit audiotaping, to charge Petitioner with various crimes, including rape, even though some of the charges had not yet been formally preferred. The government then authorized confidential informants to interrogate Petitioner regarding these crimes, even though his right to counsel had already attached. The withheld evidence showed that Petitioner's right to counsel had attached prior to the

illicit audiotaping because the government's role by that point had "shift[ed] from investigation to accusation." *Moran v. Burbine*, 475 U.S. 412, 430 (1986).

The Ninth Circuit's review of Petitioner's *Massiah* claim exemplifies why the "full and fair" standard produces flawed outcomes. The Ninth Circuit erroneously concluded that this claim was procedurally defaulted. App. A at 5. Petitioner could not have presented his *Massiah* claim on direct appeal due to the government's withholding of the documentary evidence necessary to support this claim. Yet the Ninth Circuit refused to address the *Brady* evidence which supported Petitioner's *Massiah* claim. App. A at 5. The Ninth Circuit also declined to address whether military members even have a Sixth Amendment right to counsel. App. A at 5. Moreover, the Ninth Circuit's conclusion that the government ceased recording Petitioner's pretrial statements "before adversary judicial criminal proceedings began," App. A at 5, is factually incorrect and contrary to precedent binding on the military courts.

If the Ninth Circuit had instead applied AEDPA to Petitioner's *Massiah* claims, it would have properly assessed the *Brady* evidence withheld by the government and concluded that Petitioner's Sixth Amendment rights were violated by the use of governmental informants because his right to counsel had attached prior to the illicit audiotaping.

D. The Court Should Apply AEDPA to Review of Habeas Petitions by Military Servicemembers.

The arbitrary and unnecessary distinction between military and civilian habeas significantly harms the men and women of the military. There is no factual or legal justification for treating military and civilian defendants differently. Review of courts-martial by Article III courts vindicates constitutional liberties by protecting servicemembers from governmental overreach. It also deters the military and its courts from ignoring or trampling upon federally created constitutional rights and incentivizes military courts to conduct their proceedings consistent with established constitutional standards.

Petitioner offers as an alternative to *Burns* the approach taken in *Brosius*, in which the Third Circuit simply applied the AEDPA standard for review of state civilian convictions to a military defendant. S*ee also Fell v. Zenk*, 139 Fed. Appx. 391, 393 (3d Cir. 2005) (assuming "for the sake of argument, [] 28 U.S.C. § 2254(d) applies"). The CAAF has similarly approved of applying AEDPA to military cases. *See Loving*, 64 M.J. at 144-45 & n.92. The benefits to using AEDPA are that federal courts are familiar with the standard, having applied it in thousands of habeas cases since AEDPA's passage in 1996, and this Court has provided extensive guidance on its application and scope.

Applying AEDPA would balance the rights and concerns of both the military and its servicemen and women. The AEDPA standard would safeguard the constitutional rights of servicemembers, particularly

in allowing review of military factual determinations, while simultaneously recognizing the special needs of the military by subjecting military legal determinations to AEDPA's deferential standard of review. *See* Chapman, 57 Vand. L. Rev. at 1426-27.

Additionally, applying AEDPA to habeas petitions brought by military defendants would avoid *Burns*' innumerable downsides. Unlike *Burns*, which has been extensively criticized for its lack of clearly defined parameters, AEDPA is an easily applicable standard, i.e., a federal court cannot grant habeas relief unless a state court's decision is "contrary to," or involves an "unreasonable application" of, firmly established Supreme Court precedent. 28 U.S.C. § 2254(d)(1)-(2). Further, whereas the Supreme Court has never revisited *Burns* since it was decided 70 years ago, the Court has provided extensive and timely guidance regarding AEDPA's scope and standard of review. Because Article III courts are comfortable with applying AEDPA to the thousands of civilian habeas cases brought each year, they would be equally able to apply this same standard to military court determinations.

Another advantage to AEDPA is that its deferential standard of review would recognize and safeguard the special needs of the military. *See* Chapman, 57 Vand. L. Rev. at 1426 ("By applying this highly deferential standard of review to military legal determinations, a reviewing federal court would have to defer to the legal determinations of the military courts in all but the most egregious circumstances.").

Finally, applying AEDPA to military cases would protect and strengthen the constitutional rights of our military servicemembers. There is no historical,

practical, or policy-driven reason for disparate treatment of criminal defendants based solely upon their status as a civilian or servicemember. It is unjust and unmerited to ask the men and women who protect our nation to forfeit their fundamental constitutional protections. Adopting AEDPA to review military defendants' habeas claims would strike the perfect balance between deferring to the military's special needs and expertise and honoring the constitutional rights of those who protect and defend our country.

II. THE COURT SHOULD HOLD THAT ARTICLE III COURTS HAVE A DUTY TO REVIEW NEWLY DISCOVERED EXCULPATORY EVIDENCE TIME BARRED FROM MILITARY COURT REVIEW.

This Court should affirm that Article III courts may review exculpatory evidence acquired after the time for filing a petition for new trial in the military courts expires. The failure to review newly acquired evidence would incentivize military prosecutors to withhold material exculpatory evidence until after the two-year Article 73 statutory deadline had expired. Furthermore, the Court should confirm that a petition for writ of habeas corpus is the exclusive remedy for an incarcerated military defendant and that there is no other extraordinary relief available under the All Writs Act, 28 U.S.C. § 1651(a).

Under the law applicable at the time of Petitioner's conviction in 2014, an Article 73 petition for new trial based upon newly discovered evidence was permitted

only within two years of convening authority action.[4] Because the convening authority approved Petitioner's sentence on July 24, 2015, no newly discovered exculpatory evidence discovered after July 24, 2017 could be presented to the military courts.

The Ninth Circuit refused to consider whether habeas corpus in an Article III court is the proper remedy for review of newly discovered evidence time-barred from review under Article 73. This Court should confirm that federal habeas corpus review is available for newly discovered evidence. Otherwise, the government would be empowered to withhold material evidence for years after trial, knowing that neither a military nor Article III court would have the mandate to review it, as happened in Petitioner's case.

A. Legal and Factual Background

Under Article 73, UCMJ, a defendant may not present new evidence to a military court more than two years after convening authority action. 10 U.S.C. § 873. Military courts have consistently held that their courts do not have jurisdiction after court-martial proceedings are final under Article 76, UCMJ. *Jordan v. United States*, 80 M.J. 605, 612 (N-M. Ct. Crim. App. 2020); *Chapman v. United States*, 75 M.J. 598, 600 (A.F. Ct. Crim. App. 2016); *Gray v. Belcher*, 70 M.J. 646, 647 (Army Ct. Crim. App. 2012). Furthermore, a petition for *coram nobis* is unavailable where a

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[4] The Military Justice Act of 2016, which went into effect on January 1, 2019, amended 10 U.S.C. § 873 to increase the time for filing an Article 73 petition from two to three years. However, because the MJA's provisions are not retroactive, it does not affect the two-year deadline applicable in Petitioner's case.

petitioner is still in confinement. *See, e.g., Jordan*, 80 M.J. at 613; *Chapman*, 75 M.J. at 601-02; *Gray*, 70 M.J. at 647-48 & n.3; *In re Dorrbecker*, 2021 CCA LEXIS 41 at n.2 (N-M. Ct. Crim. App. 2021). The only exception to Article 76 finality is Article III court collateral review. *Schlesinger v. Councilman*, 420 U.S. 738, 749-51 (1975).

Once an Article 73 petition for a new trial is exhausted, there is "no relief left to seek within the court-martial system." *United States v. Denedo*, 556 U.S. 904, 920 & n.1 (2009) (Roberts, C.J., concurring). This Court has previously held that a petitioner cannot properly be required to exhaust a remedy which does not exist within the military courts, due to their lack of statutory authority. *Parisi v. Davidson*, 405 U.S. 34, 44-45 (1972). Accordingly, "in the absence of a military remedy, a petitioner may seek relief from an Article III court." *Denedo v. United States*, 66 M.J. 114, 141 (C.A.A.F. 2008) (Ryan, J., dissenting).

More importantly, there is no equitable tolling of the two-year deadline. *Roberts*, 77 M.J. at 616-17 & n.3; *United States v. Niles*, 52 M.J. 716, 719-20 (Army Ct. Crim. App. 2000). This is because such petitions for extraordinary relief must be "in aid of" the military court's strictly circumscribed jurisdiction. *Clinton v. Goldsmith*, 526 U.S. 529, 534-36 (1999) (holding that the All Writs Act, 28 U.S.C. § 1651(a), does not enlarge the military court's limited jurisdiction).

Here, the convening authority approved Petitioner's sentence on July 24, 2015. Nearly all of the exculpatory evidence Petitioner presented on federal habeas – eyewitness declarations and *Brady* material withheld by the government – was discovered after

July 24, 2017, and thus could not be presented on direct appeal. Nor could Petitioner file a petition for *coram nobis* in the military courts because he is still incarcerated.

Nevertheless, the district court erroneously rejected the majority of Petitioner's *Brady* claims on the ground that Petitioner could have, but failed to, present this evidence to the military courts via a *coram nobis* petition, and therefore the claims were unexhausted and procedurally defaulted. (App. B at 23-24.)

In the Ninth Circuit, the government essentially conceded that the district court's determination that Petitioner could have filed a petition for *coram nobis* in the military courts was erroneous. Gov't. Br. at 46, n.18. The government then argued for the first time in the Ninth Circuit that, even if Petitioner could not file a petition for *coram nobis*, he could nevertheless have filed some other unspecified extraordinary writ, Gov't. Br. at 46, n.18, directly contradicting the position the government took in the district court. (1-FER-5-9.)

Petitioner argued that the government's position that he could have filed some other unspecified extraordinary writ was incorrect. ARB at 11-15; 1-FER-13-17; *see also* USCA Dkt. Nos. 39, 40 (FRAP 28(j) letters). However, the Ninth Circuit failed to address this issue and never considered the district court's error in holding that Petitioner's *Brady* claims could have been presented to the military courts in a *coram nobis* petition.

B. The Court Should Apply AEDPA to Article III Court Review of Military Habeas Claims of Newly Discovered Exculpatory Evidence Time Barred from Military Court Review.

Article III courts should apply AEDPA in reviewing a military defendant's habeas claim of newly discovered exculpatory evidence that is time barred from military court review under Article 73, UCMJ. AEDPA provides that habeas relief shall be granted when, as in the instant petition, "there is an absence of [an] available[] corrective process." 28 U.S.C § 2254(b)(1)(B)(i). Furthermore, AEDPA allows relief where a "factual predicate that could not have been previously discovered through the exercise of due diligence," 28 U.S.C. § 2254(e)(2)(A)(ii), and that with the newly discovered exculpatory evidence, "but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(B).

Applying AEDPA would provide a solution for military defendants who have exhausted all military remedies and where, as here, the two-year deadline for presenting newly discovered exculpatory evidence to a military court under Article 73 has elapsed. Moreover, applying AEDPA would avoid confusion and resolve a split in the circuit courts regarding whether an Article III court may review such claims, or whether a military remedy is available. *Compare Ward*, 982 F.3d at 910-13 & n.2; *Witham*, 355 F.3d at 505; *Thomas v. U.S. Disciplinary Barracks*, 625 F.3d 667, 670-71 (10th Cir. 2010); and *Chapman v. Warden*, 2021 WL 5862402, at *2-3 (11th Cir. 2021) (conflicting

unresolved opinions regarding *coram nobis* in the military courts versus habeas corpus in an Article III court), *with DeCoster v. Madigan*, 223 F.2d 906, 911 (7th Cir. 1955); *Osborne v. Swope*, 226 F.2d 908, 909 (9th Cir. 1955) (citing *Gusik v. Schilder*, 340 U.S. 128, 131 (1950)) (cases allowing habeas relief after Article 73 is exhausted).

Applying AEDPA in this instance would standardize military and civilian habeas precedent and enable military defendants, like Petitioner, to present to an Article III court exculpatory evidence discovered after the Article 73 two-year deadline has elapsed.

C. The Court Should Affirm That an Article III Court Must Review Any Evidence Discovered After Expiration of the Article 73 Deadline for Petitioning for a New Trial.

Accordingly, this Court should confirm that federal habeas corpus review is available for presenting new evidence discovered after the Article 73 two-year deadline for petitioning for new trial has elapsed. In doing so, the Court should confirm that a petition for writ of habeas corpus in an Article III court is the exclusive vehicle for an incarcerated military defendant, like Petitioner, to present newly discovered exculpatory evidence after the expiration of the Article 73 deadline. The Court should further clarify that, because there is no other relief to be sought within the military justice system, including any extraordinary writ under the All Writs Act, the AEDPA standard applies.

CONCLUSION

The Court should overrule *Burns v. Wilson* and apply AEDPA to Petitioner's case to conclude that

Petitioner is entitled to habeas corpus relief on his *Schlup* gateway innocence claim, as well as his constitutional claims of error under *Brady v. Maryland* and *Massiah v. United States*. The Court should therefore grant Petitioner's writ of habeas corpus, or alternatively, remand to the lower courts for proceedings consistent with this Court's decision.

This Court should affirm that Article III courts may review exculpatory evidence acquired after the Article 73 deadline in the military courts has expired. Furthermore, the Court should confirm that a petition for writ of habeas corpus is the exclusive remedy for an incarcerated military defendant and that there is no other extraordinary relief available. Accordingly, the Court would find that Petitioner's newly discovered evidence of actual innocence, as well as the *Brady* material withheld by the government, are cognizable on habeas review.

Respectfully submitted,

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