23-7336

ORIGINAL

Case No. 23-3079

IN THE SUPREME COURT OF THE UNITED STATES

SEAN A. GRAY,
Appellant,

v.

KEVIN PAYNE,
COMMANDANT,
UNITED STATES DISCIPLINARY BARRACKS,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court, in *Burns v. Wilson,*[1] stated that a federal civilian court may not consider a military habeas petitioner's claim "when a military decision has dealt fully and fairly with an allegation raised in that application..." The D.C. Circuit Court "has recognized that the standard of review in non-custodial collateral attacks on court-martial proceedings is 'tangled.'"[2] The D.C. Circuit has therefore interpreted the *Burns* standard as one that "should not differ 'from that currently imposed in habeas corpus review of state conviction,' and held that 'the test of fairness requires that military rulings on constitutional issues conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule.'"[3] The Tenth Circuit Court, however, has applied a much more restrictive standard. In *Dodson v. Zelez,*[4] the court laid out the following factors that must be overcome by a military petitioner before a Tenth Circuit court could consider a petitioner's habeas claims:

> 1. The asserted error must be of substantial constitutional dimension.
> 2. The issue must be one of law rather than of disputed fact already determined by the military tribunals.
> 3. Military considerations may warrant different treatment of constitutional claims.
> 4. The military courts must give adequate consideration to the issues involved and apply proper legal standards.[5]

Since the *Dodson* standard was laid out by the Tenth Circuit in 1990, no military habeas petitioner within the Tenth Circuit's jurisdiction has overcome those

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[1] 346 US 137 (1953)
[2] *Sanford v. United States,* 586 F.3d 28 at 31 (D.C. Cir. 2009)
[3] *Id.,* at 31 citing *Kauffman v. Secretary of the Air Force,* 415 F.2d 991 (D.C. Cir. 1969)
[4] 917 F.2d 1250 at 1252-1253 (10th Cir. 1990)
[5] *Id.,* at 1252-1253 (10th Cir. 1990) (citations omitted).

factors and had their habeas claims considered on the merits. In contrast, the *Sanford* court, cited above, had no issue reaching the merits of that military habeas claim in the D.C. Circuit.

The question presented to this Court is:

Are the *Dodson* factors a violation of the Suspension Clause and therefore an unconstitutional bar to habeas for military prisoners? Furthermore, does the application of the *Dodson* factors by the Tenth Circuit, which has failed to allow merits review for any military habeas petition, amount to a violation of the equal protections guaranteed by the Due Process Clause of the Fifth Amendment? Lastly, has this Court's *Burns* full and fair consideration standard been eclipsed by changes to societal and military law over the past 71 years, thereby rendering the standard inadequate to its intended task?

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Sean A. Gray, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

PRIOR PROCEEDINGS

Gray v. Payne, 2023 U.S. App. LEXIS 32150 (10th Cir. 2023), docket/case number 23-3079 (appealing district court decision on habeas petition) (at Appx. A);

Gray v. Payne, 2023 U.S. Dist. LEXIS 76604 (D. Kan. 2023), docket/case number 23-3006-JWL (habeas petition) (at Appx. B);

U.S. v. Sean A. Gray, 80 M.J. 169, docket/case number 20-0085/AR (petition for grant of review) (at Appx. C);

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JURISDICTION

The Tenth Circuit Court of Appeals entered its judgment on December 5, 2023 and denied a timely petition for rehearing on February 24, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This petition has been timely filed in accordance with Rule 13.1 and 13.3 of the Rules of the Supreme Court of the United States if placed in the prison mail system[6] before April 23, 2024. All notifications required by Rule 29.4(b) or (c) have been made at the time of filing.

RELEVANT CONSTITUTIONAL PROVISIONS & STATUTES

The Suspension Clause of Art. I § 9 Cl. 2 of the Constitution prevents the suspension of the writ of habeas corpus "unless when in Cases of Rebellion or Invasion the public Safety may require it."

The Due Process Clause of the Fifth Amendment of the Constitution guarantees equal protections under the laws of the United States in the same way as the Fourteenth Amendment's Equal Protection Clause.

28 U.S.C. §§ 2241 – 2255 habeas corpus statutes

STATEMENT OF THE CASE

Petitioner, a military prisoner, petitioned the District Court of Kansas for a writ of habeas corpus, under 28 U.S.C. § 2241, on January 9, 2023 asserting a claim of ineffective assistance of counsel. That petition was denied by the district court

[6] In accordance with Rule 29.2 of this Court

without being reviewed on the merits because the court concluded that Petitioner did not overcome the *Dodson* factors set forth by the Tenth Circuit to assess whether a military prisoner's case was fully and fairly considered by the military courts. The district court concluded that Petitioner's claim failed to overcome the second *Dodson* factor, because the claim "would turn on factual issues" and "[a]ccordingly, the Court conclude[d] that Petitioner's claim [did] not present solely an issue of law..."[7] The district court further concluded that Petitioner's claim failed to overcome the fourth *Dodson* factor because the Army Court of Criminal Appeals (ACCA) "solicit[ed] affidavits [and] applied the... *Strickland* standard..."[8] Petitioner appealed the district court's decision to the Tenth Circuit arguing that the second *Dodson* factor, that an issue must be one of law only and not of disputed fact, was improperly applied to Petitioner's case because it contradicted the finding of this Court in *Strickland,*[9] that cases of ineffective assistance of counsel present mixed questions of law and fact.

Petitioner further asserted that the district court improperly applied the fourth *Dodson* factor. Specifically, Petitioner took issue with the district court's failure "to take into account...more relevant portions of...affidavits that [Petitioner] pointed out in the traverse"[10] and the district court's failure to address whether the CAAF's denial of the petition for grant of review satisfied the fourth *Dodson* factor[11] in accordance with the same court's prior handling in similar cases.[12] The Tenth Circuit affirmed

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[7] Appellate brief, p. 8 citing *Gray*, 2023 Dist. LEXIS 76604
[8] Appx. B
[9] *Strickland v. Washington*, 466 US 668 at 698 (1984) "both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact." at 698
[10] Appx. B
[11] Appellate brief, pp. 4-5
[12] cf. *Jefferson v. Berrong*, 783 F. Supp. 1304 at 1308 (D. Kan. 1992)

the district court's ruling but in doing so, the court appears to have acknowledged the possibility that the second *Dodson* factor is unconstitutional.

The court used Petitioner's argument – that the second *Dodson* factor couldn't be applied to Petitioner's claim of ineffective assistance of counsel due to this Court's assertion in *Strickland* that ineffective assistance of counsel claims contain mixed questions of law and fact – as proof that Petitioner, therefore, could not have overcome the second *Dodson* factor. The court correctly understood that Petitioner's assertion is that "the district court should not even have applied this factor to his claim because an ineffective-assistance claim presents a mixed question of law and fact under *Strickland*[]." However, the court then says that "his acknowledgment that the *Strickland* standard is 'in direct contradiction to the second *Dodson* factor,' amounts to a concession that this factor cannot weigh in his favor."[13] It seems, by this statement, that the court is well aware that it's rule, the second *Dodson* factor, is in contradiction with the standard set forth in *Strickland*, that ineffective assistance of counsel claims contain mixed questions of law and fact. The court also noted Petitioner's assertion that the second *Dodson* factor acts as a bar to habeas for military prisoners but falsely claimed that Petitioner presented no support for that issue.

Petitioner requested a rehearing on the two issues of whether the second *Dodson* factor and the *Dodson* factors as a whole are an unconstitutional bar to habeas in violation of the Suspension Clause. In the petition for rehearing Petitioner

[13] Appx. A

elaborated on the second *Dodson* factor issue. Petitioner pointed the court to 28 U.S.C. § 2243 which states that an "applicant or the person detained may, under oath...allege any other material facts."[14] Petitioner contended that the second *Dodson* factor seems to preclude the application of § 2243 for military prisoners because § 2243 allows an "applicant or the person detained" to "allege any other material facts." Citing the habeas statutes, Petitioner reasoned that the second *Dodson* factor "runs afoul of Congress' intent in the statutes" and violates the Suspension Clause. Petitioner asserted that the "simple fact that Congress passed 28 USC §§ 2241 – 2255 into law, and have maintained within those statutes the clear expectation that issues of fact will need to be presented in habeas petitions, it seems that the circuit court overstepped its bounds when it decided the *Dodson* case."[15]

Petitioner then elaborated on the issue of the *Dodson* factors as a whole being an unconstitutional bar to habeas, thus violating the Suspension Clause. In support of this argument, Petitioner pointed to the district court's failure, and the Tenth Circuit's failure to correct the district court on this point, to address the CAAF's rejection of Petitioner's petition for grant of review, where Petitioner asserted that this rejection amounted to a lack of full and fair consideration. Petitioner cited the district court's own ruling that a summary dismissal from CAAF cannot be seen as satisfying the fourth *Dodson* factor because if that were the case then "federal review

[14] This is in the context of a petitioner being produced at a hearing "Unless the application for the writ and the return present only issues of law" and the petitioner being given the opportunity to "deny any of the facts set forth in the return *or allege any other material facts.*" (emphasis added)

[15] Reconsideration brief, p. 6

for constitutional error would automatically be precluded."[16] Petitioner argued that the cited statement in *Jefferson* is true because "military prisoners do not have the same appellate opportunities that state or federal prisoners have."[17] Because both state and federal prisoners have multiple levels of appeal, including to this Court, but military prisoners, when rejected at the CAAF level, have only one appellate court review their issue,[18] military prisoners are "automatically...precluded" from federal review for constitutional error on direct appeal once the CAAF rejects a petition for grant of review. Petitioner then analyzed the proper application of a full and fair consideration rule by citing this Court's rationale in *Stone v. Powell*,[19] which was decided well after this Court's full and fair consideration rule in *Burns* was decided but well prior to the Tenth Circuit's own full and fair consideration rule was applied to the military in *Dodson*. The crux of the argument from Petitioner here was that "if a claim is not a 'judicially created' right but, rather, a constitutional right, the full and fair consideration rule could not be applied because...it would bar 'access to federal courts by state prisoners with constitutional claims distasteful' to a court."[20]

Petitioner pointed out the vast changes that have occurred in the military since this Court's ruling in *Burns* and cited extreme differences in the types of cases tried by the military now versus in the 1950s when *Burns* was decided, alluding to the possibility that *Burns* should be revisited for relevance in today's military society.

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[16] *Jefferson*, 783 F Supp. at 1308

[17] Reconsideration brief, p. 9

[18] Military prisoners cannot appeal a CAAF rejection for grant of review and their appeal process is over at this point. Only if the CAAF reviews an appeal can a military prisoner then appeal to this Court. 10 USC § 867a(a)

[19] 428 US 465 (1976)

[20] Reconsideration brief, p. 10, citing *Stone* at 522

Petitioner then pointed to this Court's decision in *Parisi*.[21] In *Parisi* this Court stated that a military prisoner "must...be permitted to resort to civilian courts to make sure that the military regime acts within the scope of statutes governing the problem and any constitutional requirements" once he has exhausted all other remedies.[22] Lastly, Petitioner pointed out that when Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), they made no change to § 2241 of the habeas statutes, which is the statute military prisoners file under. If Congress had intended to limit a military prisoner's ability to petition for habeas, or even wanted to condone the Tenth Circuit's judicially-created rule, Congress would have done so.

Here, Petitioner asserts that the *Dodson* factors as a whole are an unconstitutional bar to habeas for military prisoners in violation of the Suspension Clause. This is so for all of the reasons stated above: the *Dodson* factors violate Congress' intent of the statutes, including § 2241 and § 2243; the *Dodson* factors have never been successfully overcome by a military habeas petitioner since their institution in 1990, other than *Lips*[23] which was then overturned by the Tenth Circuit; the *Dodson* factors amount to a judicially-created rule preventing military prisoners from gaining access to a constitutionally-available remedy in the Tenth Circuit; and if the second *Dodson* factor is deemed an unconstitutional bar to habeas in ineffective assistance of counsel cases, the whole test is therefore unconstitutional.

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[21] *Parisi v. Davidson*, 405 US 34 (1972)

[22] Reconsideration brief, p. 11, citing *Id.*, 405 US at 54

[23] *Lips v. Commandant, USDB*, 1992 U.S. Dist. LEXIS 17310 (D. Kan. 1992) petition granted, decision overturned in *Lips v. Commandant*, 997 F.2d 808 (10th Cir. 1993) the court deciding that it should never have reached the merits due to the *Dodson* standard.

Finally, because other circuit courts do not follow the *Dodson* test, and therefore other district courts periodically reach the merits of military habeas petitions, military prisoners in the Tenth Circuit's jurisdiction are denied equal access to the courts, thus violating the equal protections guaranteed by the Due Process Clause of the Fifth Amendment.

REASONS TO GRANT THE WRIT

This Court instituted, in *Burns*, the full and fair consideration standard that must be overcome before a military prisoner may have his habeas petition reviewed on the merits. In the same opinion, deference was given to military courts, by federal civil courts, at least as much as is given to state courts.[24] In *Schlesinger*, this Court recognized that Congress has always ensured military prisoners' right to petition for habeas in the civil courts.[25] Yet, the Tenth Circuit has seen fit to prescribe a standard which has ensured that no military prisoner within the Tenth Circuit's jurisdiction can receive a review on the merits of any habeas petition unless the issue brought forth is a challenge to jurisdiction. If this is to be deemed acceptable, then the meaning of jurisdiction must revert back to what it meant before military prisoners were given the statutory right to bring issues other than jurisdiction in habeas petitions, where a constitutional violation negates jurisdiction.[26] The military courts

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[24] *Burns*, 346 US at 142

[25] *Schlesinger v. Councilman*, 420 US 738 at 750 (1975) ("If Congress had intended to deprive civil courts of their habeas corpus jurisdiction, which has been exercised from the beginning, the break with history would have been so marked that we believe the purpose would have been made plain and unmistakable.")

[26] *Runkle v. United States*, 122 US 543 at 555-556 (1887) "To give effect to its sentences [a court-martial] must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with; and that its sentence was conformable to law." See also *McClaughry v. Deming*, 186 US 49 at 62

do not provide adequate review during the military appellate process because they know that military prisoners will not receive merits review of habeas issues by the civil courts.[27] The *Dodson* factors have allowed the military to game the system to perfection in the Tenth Circuit for 34 years. This has resulted in a violation of the Suspension Clause by prohibiting access to the writ for military prisoners within Tenth Circuit's jurisdiction and has resulted in unequal access to the civil courts for military prisoners in violation of the equal protections guaranteed by the Fifth Amendment. Until the federal courts start overseeing the military decisions, correcting constitutional violations and ensuring propriety in the military jurisprudence, military prisoners are without necessary safeguards against unlawful violations of their constitutional rights, have the constitutionally-available access to the writ of habeas corpus denied, and are subject to violation of their equal protections guaranteed by the Fifth Amendment due to lack of equal access to the civil courts.

The *Dodson* factors have effectively barred access to habeas for military prisoners and taken away proper habeas jurisdiction from the district courts. This is obvious when viewed alongside the other circuit courts that have reviewed military

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(1902) "A court-martial is the creature of statute, and, as a body or tribunal, it must be convened and constituted in entire conformity with the provisions of the statute, or else it is without jurisdiction." And *Johnson v. Zerbst*, 304 US 458 at 467-468 (1937) where this Court asserted that when a court-martial deprives an accused of rights guaranteed by the Constitution, in this case it was the right to effective counsel, the court loses jurisdiction "due to failure to complete the court-as the Sixth Amendment requires."

[27] *United States v. Norman*, 2022 CCA LEXIS 605 (NMCCA, 2022); *United States v. Goings*, 2022 CCA LEXIS 603 (NMCCA, 2022); *United States v. Portillo*, 2022 CCA LEXIS 602 (NMCCA, 2022); *United States v. Martinez*, 2022 CCA LEXIS 574 (NMCCA, 2022); *United States v. Montagna*, 2022 CCA LEXIS 576 (NMCCA, 2022); *United States v. Fausnaught*, 2022 CCA LEXIS 596 (ACCA, 2022); *United States v. Juarezcid*, 2022 CCA LEXIS 595 (ACCA, 2022); *United States v. Jackson*, 2022 CCA LEXIS 591 (ACCA, 2022); *United States v. Westbrook*, 2022 CCA LEXIS 593 (ACCA, 2022); All of the above cited cases were summarily dismissed by the military branch court of criminal appeals without anything but a statement that the court considered the entire record.

habeas petitions on their merits while still adhering to the *Burns* full and fair consideration standard. Even before instituting the *Dodson* standard, the Tenth Circuit clearly had no interest in entertaining military habeas petitions. This is obvious in the court's treatment of the full and fair consideration standard before *Dodson* which assessed that an issue was fully and fairly reviewed by military courts even when "its opinion summarily disposed of the issue with the mere statement that it did not consider the issue meritorious or requiring discussion."[28]

The Tenth Circuit's treatment of military habeas cases has given the military *carte blanche* throughout the trial and military appeals process, allowing the military to proceed with impunity so long as the military appellate courts state that they fully and fairly considered the issues raised. The Tenth Circuit takes *Burns* too far, if *Burns* should even stand today. The *Parisi* Court summed up the meaning behind the deferential treatment asserted in *Burns*:[29]

> While we have stated in the past that special deference is due the military decision-making process, this is so neither because of comity, nor the sanctity of the Executive Branch, but because of a concern for the effect of judicial intervention on morale and military discipline, and because of the civilian judiciary's general unfamiliarity with extremely technical provisions of the Uniform Code of Military Justice which have no analogs in civilian jurisprudence.[30]

With this understanding in mind, it is clear that "special deference" should not be applied broadly across the full spectrum of military courts-martial. Especially in light

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[28] *Watson v. McCotter*, 782 F.2d 143 at 145 (10th Cir. 1986)

[29] While *Parisi* cites *Gusik v. Schilder*, 340 US 128 (1950) and not *Burns* as the referenced case here; it is *Burns* which declared that military courts deserved at least as much deference as the state courts. *Burns*, 346 US at 142

[30] *Parisi*, 405 US at 51 (citations and brackets removed) (Separate opinion)

of the change that came with this Court's ruling in *Solorio*,[31] which opened up military jurisdiction over any crime, whether service-connected or not, that a military member might be accused of. So, by this Court's own understanding of the reason for the civil court's special deference towards the military courts, deference should not be applied where either no effect on morale and military discipline is threatened, or when there are analogs between military justice in a particular case and civilian jurisprudence. In most cases tried by court-martial in the military today, there are more analogs in civilian jurisprudence than there are differences. Approximately 80% of the inmates currently incarcerated at the USDB were convicted of sexual assault or rape, which have direct analogs in civilian jurisprudence.[32] Many of the constitutional issues brought in military habeas petitions also have direct analogs in civilian jurisprudence. Military members have a right to effective assistance of counsel, to compel witnesses in their favor, to cross-examine witnesses against them, to expert assistance, to present evidence in their defense; all issues that are regularly presented in military habeas petitions.

Further, this Court cannot ignore the analogs between the rules for evidence between military and federal judicial systems. One of the most common issues on direct appeal in military cases is that Military Rule of Evidence (MRE) 412 was improperly applied. MRE 412 reads as follows:

> (a) Evidence generally inadmissible. The following evidence is not admissible in any proceeding involving an alleged sexual offense except as provided in

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[31] *Solorio v. United States*, 483 US 435 (1987) (Overruling *O'Callahan v. Parker*, 395 US 258 (1969) and deciding that the test for jurisdiction by the military is whether or not the accused "was a member of the Armed Services at the time of the offense charged." at 451)

[32] See Appx. E

> subdivisions (b) and (c): (1) Evidence offered to prove that a victim engaged in other sexual behavior; or (2) Evidence offered to prove a victim's sexual predisposition. (b) Exceptions. In a proceeding, the following evidence is admissible, if otherwise admissible under these rules: (1) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the accused was the source of semen, injury, or other physical evidence; (2) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the accused to prove consent or if offered by the prosecution; and (3) evidence the exclusion of which would violate the accused's constitutional rights.[33]

Meanwhile, Federal Rules of Evidence (FRE) 412 reads as follows:

> (a) Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct: (1) evidence offered to prove that a victim engaged in other sexual behavior; or (2) evidence offered to prove a victim's sexual predisposition. (b) Exceptions. (1) Criminal Cases. The court may admit the following evidence in a criminal case: (A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence; (B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and (C) evidence whose exclusion would violate the defendant's constitutional rights.[34]

Rule 412 in both federal and military law is but one example. In both forums, rule 413 is titled "Similar crimes in sexual offense cases", and both are worded identically with the only differences being the naming of the proceeding, the court, and the accused. Rule 414 in both forums is the same. Rules 411, 410, 409, 408, 407 etcetera and so on are also all identical. It seems incomprehensible that any court, but especially this Court, today can say that the military decisions deserve deference because of "civilian judiciary's general unfamiliarity with extremely technical provisions of the Uniform Code of Military Justice which have no analogs in civilian jurisprudence."[35] This Court need not even compare every military rule for courts-

[33] Manual for Courts-Martial (MCM) 2019, MRE 412
[34] FRE 412, searched for on Lexis Nexis, February 6, 2024.
[35] *Parisi*, supra, p. 11

martial with federal or state court rules. This Court has already agreed that military courts-martial mirror state and federal courts in many ways.[36]

Rule 10 of the rules for this Court states that when:

> a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter... or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

the case meets the "character of the reasons the Court considers" a case. In cases where military prisoners are seeking habeas relief over court-martial convictions, the D.C. Circuit has interpreted the *Burns* full and fair consideration standard as one that:

> should not differ from that currently imposed in habeas corpus review of state convictions, and that the test of fairness requires that military rulings on constitutional issues conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule.'[37]

Of note, the *Sanford* case cited here, decided in 2009, was a review on the merits of a military prisoner's habeas petition. In contrast, the Tenth Circuit has laid out the *Dodson* factors which, since instituted, have not allowed a single military habeas petition to meet the merits review stage of their habeas petition (excepting jurisdictional challenges) and, in so doing, have denied military prisoners the habeas review provided them by Congress in the habeas statutes. The Third Circuit acknowledges "that the *Burns* decision is far from clear."[38] The Third Circuit stands by the full and fair consideration standard with no clear test for determining whether

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[36] See *Ortiz v. United States*, 138 S. Ct. 2165 at 2166 (2018)

[37] *Sanford*, 586 F.3d at 31.

[38] *Armann v. McKean*, 549 F.3d 279 (3rd Cir. 2008) (further stating that the AEDPA standard would not apply when claims are not adjudicated on the merits.)

the standard has been overcome.[39] The Fourth Circuit, also, follows the full and fair consideration standard set forth in *Burns*, without adhering to the *Dodson* standard. The Fifth Circuit has continued to follow the *Calley* test, that a claim of error must be "one of constitutional significance, or so fundamental as to have resulted in a miscarriage of justice."[40] The Ninth Circuit follows the *Burns* standard while adding that "a federal court may only grant a writ of habeas corpus to guard against the military courts exceeding their jurisdiction, and to vindicate constitutional rights."[41] The Sixth Circuit also follows the *Burns* full and fair consideration standard, but not the *Dodson* standard. Interestingly, however, the Sixth Circuit does cite *Lips*, which was a Tenth Circuit case decided after *Dodson*, and the only case since *Dodson* to reach the merits in the district courts of that circuit.[42] However, the case was reversed on appeal due to failure to overcome the *Dodson* factors.[43] Most importantly for the purposes of this petition, is that the Second,[44] Third, Fourth, Fifth, Sixth, Ninth, Eleventh (follows the Fifth Circuit[45]) or the D.C. Circuits have all declined to adopt

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[39] *Id.*

[40] *Loya v. Underwood*, 857 Fed. Appx. 834 (5th Cir. 2021) citing *Calley v. Callaway*, 519 F.2d 184 at 199 (5th Cir. 1975)

[41] *Erickson v. Blanckensee*, 2021 U.S. App. LEXIS 34289 (9th Cir. 2021) citing *Broussard v. Patton*, 466 F.2d 816 at 818 (9th Cir. 1972)

[42] *Witham v. United States*, 355 F.3d 501 at 505 (6th Cir. 2004)

[43] *Lips*, Supra, p. 8

[44] In *Roukis v. United States Army*, 2014 U.S. Dist. LEXIS 160690 (S.D. NY, 2014) the district court states that the standard for review is the *Burns* full and fair consideration standard, and, in addition, the court cites the 10th Circuit *Lips* case, *Roberts v. Callahan*, 321 F.3d 994 (10th Cir. 2003), and *Thomas v. U.S. Disciplinary Barracks*, 625 F.3d 667 (10th Cir. 2010). All while avoiding following the 10th Circuit standard set in *Dodson*.

[45] *Brooks v. United States*, 2016 U.S. Dist. LEXIS 183902 (N.D. Fl. 2016) citing *Burns*' "full and fair consideration" standard, and *Betonie v. Sizemore*, 496 F.2d 1001 at 1005 (5th Cir. 1974) which states that federal district courts have jurisdiction under 28 USC § 2241 to consider a military prisoner's petition when the Petitioner is "questioning the validity of the judgments which led to their confinement, alleging that the military proceedings leading to their sentences were fatally defective because they were deprived of the basis[sic] constitutional guarantee of assistance of counsel".

the Tenth Circuit *Dodson* standard, though it was decided in 1990.[46] The Seventh Circuit appears to follow the Tenth Circuit standard, however, though the Tenth Circuit entertains far more military habeas petitions, the Seventh Circuit has reached the merits on more than one military habeas petition, as recently as 2018.[47]

The effect of the *Dodson* factors as applied by the Tenth Circuit should be obvious to this Court at this point. Military prisoners do not have equal access to the federal courts in violation of the equal protections guaranteed by the Due Process Clause of the Fifth Amendment. The D.C. Circuit reviewed *Sanford* on the merits of his habeas petition. *Youngberg* and *Hurn* were both reviewed on the merits in the Seventh Circuit. *Armann* was reviewed on the merits by the district court,[48] though the Third Circuit reversed. The simple fact that no military prisoners have received merits review of a habeas petition since *Dodson* was decided and that outside of the Tenth Circuit military prisoners have received merits review – though the Tenth Circuit reviews far more military habeas petitions than any other circuit – is proof of both a violation of the equal protection guaranteed by the Fifth Amendment and of the Suspension Clause. Military prisoners within the Tenth Circuit's jurisdiction do not have equal access to the courts as their counterparts do in other circuits. The Ninth Circuit has no problem reaching the merits of a military habeas petition.[49] Nor does the D.C. Circuit,[50] or the Seventh Circuit, as shown above. Other circuits are

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[46] No cases were found in the 1st or 8th Circuits that could be cited to indicate whether those circuits follow the 10th Circuit *Dodson* standard or not.

[47] *Youngberg v. Krueger*, 2018 U.S. Dist. LEXIS 192818 (D. Ind. 2018); *Hurn v. Kallis*, 2018 U.S. Dist. LEXIS 94943 (D. Ill. 2018).

[48] *Armann v. Warden*, 2007 US Dist. LEXIS 39660 (W.D. Pa. 2007)

[49] See *Rich v. Stackley*, 2018 US Dist. LEXIS 63854 (S.D. Ca. 2018)

[50] See *Sanford*, Supra, p. 11

more difficult to determine due to their lack of military habeas petitions. The evidence is plain enough though, the Tenth Circuit uses the "special deference" doctrine of *Burns* to deny equal access for military prisoners to district courts that are granted in other circuits, thus violating the equal protections guaranteed by the Due Process Clause of the Fifth Amendment. This Court, in discussing the equal protection guarantee of the Fifth Amendment has stated "[w]e do not understand a few contrary suggestions appearing in cases in which we found special deference to the political branches of the Federal Government to be appropriate..."[51]

It is in light of these facts, that only the Seventh Circuit even cites *Dodson* as a relevant standard in reviewing military habeas petitions, that other Circuits routinely review the merits of military habeas petitioner's claims, and that the Tenth Circuit routinely, and completely, denies access by military habeas petitioners that is granted by other circuit courts, that Petitioner contends that this Court has a duty to clarify the meaning of the full and fair consideration standard set forth in the *Burns* decision and consider whether the standard is still appropriate today. Particularly so because the Tenth Circuit handles far more military habeas petitions than any other circuit, due to the USDB – the largest military confinement facility – being located in Kansas, within the Tenth Circuit's jurisdiction. With so many petitions being reviewed in the Tenth Circuit, which, in any other circuit would have a much higher likelihood of being considered on the merits, this Court must define the meaning of "full and fair consideration", and if that standard is even relevant

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[51] *Adarand Constructors, Inc. v. Pena*, 515 US 200 at 217 – 218 (1995)

given the changes that have taken place since *Burns* was decided in 1953, both in the military and in society.

Petitioner questions whether *Burns*' full and fair consideration standard and the deference doctrine should stand given the changes that have occurred since *Burns* was decided in 1953. As was stated above, deference was given to military courts by the civilian courts due to the nature of military law at that time. At the time *Burns* was decided only 5% of cases tried by the military were sex assault cases, whereas from 2011 – 2020 almost 25% of cases were sex assault cases,[52] to name one example. Beyond this statistic, the military underwent a change in jurisdictional power after this Court decided in *Solorio* that the military had court-martial jurisdiction over any military member regardless of the crime, the location of the crime, and whether the crime even had anything to do with the military. Prior to *Solorio*, contrary to this Court's own assertion that until 1960 the test for court-martial jurisdiction was always based on status,[53] the military generally did not attempt to assert any court-martial jurisdiction if the crime occurred within the jurisdiction of local courts and those courts were open.[54] Although the cases cited do not prove that status wasn't the

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[52] From 1951-1960 207 cases were found to be related to sexual assault or rape out of a total 3,879 cases tried. From 2011-2020 1,721 cases were found to be related to sexual assault or rape out of a total of 7,305. This search was conducted via Lexis Nexis on January 3, 2024. Surely there are other civil crimes tried by the military. Sexual assault and rape are simply the most prevalent and simplest to search in order to show the Court that the military's jurisdiction has moved significantly toward more civil crimes than at the time of the *Burns* decision.

[53] *Solorio*, 483 US at 451

[54] Cf. *Coleman v. Tennessee*, 97 US 509 at 513 (1879) where the Articles of War are cited as applying "in time of war" and "when committed by persons who are in the military service of the United States." Here, the test would have been both, the status of the military and the status of the accused, not just whether the accused was in the military but whether the act occurred in time of war, insurrection or rebellion. *United States v. Jaekley*, 1950 CMR LEXIS 11950 CMR LEXIS 1 (USAFCMR 1950) crime committed on base, military related; *United States v. McCrary*, 1951 CMA LEXIS 155 (CMA 1951) crime was desertion from military; *United States v. Emerson*, 1951 CMA

only test, they do show that the military prosecuted mostly, if not totally, military-specific crimes. In contrast, today the military prosecutes far more crimes analogous to civil crimes than it does military-specific crimes. It is in this light – that crimes prosecuted by the military in the 1940s and 1950s were almost always military-specific crimes with no analogs in civil jurisprudence – that the *Burns* Court saw the need for civil courts to give such deference to military judicial decisions. As has been shown, that is not the case in today's military jurisprudence.

In light of the above facts and the changes that have occurred since *Burns* was decided, and, even more importantly, the fact that both the *Dodson* and *Solorio* cases were originally military courts-martial convened under the *O'Callahan*[55] service-connection doctrine, Petitioner contends that this Court must consider the constitutionality of *Dodson*. As has been discussed above, *Burns* was decided at a time when the military prosecuted almost entirely cases where the crimes were military-specific. *O'Callahan* made it law that the military could only try cases that were service-connected, though the military had leeway to try crimes that were analogous to civil crimes if they could show that the crimes were service-connected. Contrary to this Court's implication in *Solorio*, the *O'Callahan* ruling caused no shift in the then-current practices of court-martial jurisdiction. *O'Callahan* simply tried to keep the military from asserting more jurisdiction than it had previously sought to

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LEXIS 148 (CMA 1951) crimes of absent without leave; *United States v. Sherwood*, 1951 CMA LEXIS 130 (CMA 1951) created false military documents, stolen military pistol and absent without leave; *United States v. McSorley*, 1951 CMA LEXIS 132 (CMA 1951) same as *Sherwood*; *United States v. Martin*, 1951 CMA LEXIS 131 (CMA 1951) violation of security regulations. These are only the first six cases (excepting *Coleman*) found beginning at 1950. All are directly related to military interests and none have anything to do with sex crimes or civilian crimes even.

[55] *O'Callahan v. Parker*, 395 US 258 (1969)

assert. *Dodson* was a military service-member who was court-martialed under the *O'Callahan* doctrine. Then *Solorio* changed the jurisdiction for the military and made the test for jurisdiction one of status alone. From that point forward the military tried consistently more crimes analogous to civil crimes.[56] When the Tenth Circuit court adopted the *Dodson* factors as the test for full and fair consideration, it failed to take into account the historical context in which *Burns* was decided and the purpose behind the deference doctrine as explained in *Parisi* and reinforced in the *Solorio* decision.[57] The *Dodson* factors are being applied to all military cases, regardless of whether the crimes a petitioner was convicted of were analogous to civil crimes or not and therefore civil courts are giving deference to the military where the military does not deserve and should not receive deference. "One overriding function of habeas corpus is to enable the civilian authority to keep the military within bounds."[58] That overriding function of habeas corpus is not, nor can it be, accomplished when deference is being given to the military courts – which are not bound to the Constitution – at least as much as it is given to state and federal courts which are bound to the Constitution. And this deference is being given even in matters which civil courts are better equipped to judge – those that are analogous to civil cases, which is the majority that reach civil courts in habeas proceedings. "[T]he writ of habeas corpus occupies a position unique in our jurisprudence, the consequence of its

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[56] See the statistics cited in Petitioner's request for reconsideration, p. 11, fn 29.

[57] See *Solorio* 483 US at 448 ("The notion that civil courts are "illequipped" to establish policies regarding matters of military concern is substantiated by experience under the service connection approach.")

[58] *Parisi*, 405 US at 49.

historical importance as the ultimate safeguard against unjustifiable deprivations of liberty."[59] Without access to civil courts to receive proper review of habeas petitions, military prisoners are without "the ultimate safeguard against unjustifiable deprivations of liberty."

CONCLUSION

The military justice system, instead of being a system designed to uphold the constitution and the bill of rights, "has roots in a system almost alien to the system of justice provided by the Bill of Rights, by Art III, and by the special provision for habeas corpus..."[60] The factors decided in *Dodson* must be overturned in order to ensure proper oversight of the military justice system by the civil courts through habeas corpus as the Great Writ is intended to do. This is the only possible effective remedy for a court that refuses to properly apply the law in order to oversee military jurisprudence. When a court can simply deny a petition because it consists of "not solely issues of law"[61] even though the actual standard requires no "disputed issues of law", there is clearly an abuse of discretion by the courts and the Tenth Circuit condones that abuse by supporting those decisions. The first question presented to this Court was whether the *Dodson* factors are a violation of the Suspension Clause and therefore an unconstitutional bar to habeas for military prisoners? The answer to that question is, unequivocally, yes; and should therefore be overturned.

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[59] *Schlesinger*, 420 US at 752
[60] *Parisi*, 405 US at 53
[61] Appx. B

Short of that, the *Dodson* factors may be modified to apply only to cases where the crimes are military-specific, i.e. crimes in which the civil courts would not have had jurisdiction to try the crimes because provisions do not exist to do so. If this Court upholds the *Burns* doctrine of deference to military decisions by civil courts, deference must be limited to convictions of military-specific crimes which, "because of the civilian judiciary's general unfamiliarity with extremely technical provisions of the Uniform Code of Military Justice which have no analogs in civilian jurisprudence", civil courts would be ill-equipped to deal with. Only in such a narrow scope of cases could the *Dodson* factors be appropriate and remain in effect. The second question presented to this Court was whether the application of the *Dodson* factors by the Tenth Circuit, which has failed to allow merits review for any military habeas petition, amount to a violation of the equal protections guaranteed by the Due Process Clause of the Fifth Amendment due to failing to provide equal access to the courts? The answer to that question, again, is yes, and the proposal of this paragraph is a proper solution.

Lastly, Petitioner requests this Court also consider whether the *Burns* full and fair consideration test, which was applied due to the deference given military courts in *Burns* and *Gusik*,[62] should still be applied today, given the vast differences in military jurisprudence today versus what it was in 1953 when *Burns* was decided. If deference should only be given in military-specific cases that have no analogs in civil jurisprudence, then *Burns* should, perhaps, only apply to those cases. The final

[62] *Gusik*, Supra, p. 11

question presented to this Court was whether this Court's full and fair consideration standard in *Burns* has been eclipsed by changes to societal and military law over the past 71 years, thereby rendering the standard inadequate to its intended task? Again, the answer to that question is yes, however, as stated above, *Burns* may still have relevance in cases that have no analogs in civil jurisprudence.

Without this Court correcting the current court-made rules as proposed in the above three paragraphs, this Court would be allowing the current status quo to continue, which, as has been shown, has effected unequal access to the courts by military prisoners in violation of the equal protections guaranteed by the Fifth Amendment to the Constitution, and has prevented all military prisoners in the Tenth Circuit's jurisdiction proper access to habeas review. Petitioner respectfully requests this Court consider the questions presented and ensure that justice, not just law, is accomplished for those tried under the military judicial system.

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Respectfully Submitted,

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APPENDIX

A – Tenth Circuit Court Decision

B – District of Kansas Decision

~~C – CAAF Decision~~

D – ACCA Decision

E – Annual Correctional Report