IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ROBERT BALES,

Petitioner,

v.

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

Respondent.

Case No. 19-3112

PETITIONER'S TRAVERSE

Petitioner Robert Bales ("Bales"), by and through the undersigned counsel, respectfully submits this Traverse in support of his Petition for Writ of Habeas Corpus, and in opposition to the Answer and Return ("Answer") filed by the respondent, the Commandant of the U.S Disciplinary Barracks ("the Government" or "the Commandant").

INTRODUCTION

In its Answer, the Government urges the Court to deny the petition largely because the standard review precludes any meaningful inquiry into the Constitutional errors Bales has raised. The Government recites language from *Burns v. Wilson*, 346 U.S. 137 (1953), and subsequent cases applying it, selectively quoting language favorable to its position, and urging the Court to deny relief. *See, e.g.*, Answer, pp. 10-12. But nowhere in the Answer does the Government describe what the term "full and fair consideration" means. Instead, the Government merely lists out the various actions the military courts took during its review, and urges this Court to assume the military courts have done their job of conducting a meaningful review of this issues that is adequate under the Fifth Amendment.

There is a swath of Supreme Court and Tenth Circuit cases all standing for the proposition that, in a habeas action, a federal district court's role in reviewing constitutional issues raised before the military courts' constitutional issues must itself be meaningful. These cases reinforce the notion that this Court's duty to ensure constitutional due process guarantees are being protected does not end at the gates of the U.S. Disciplinary Barracks.

The Court should conduct a meaningful review and determine that military courts addressed two issues in a manner that fails to survive constitutional scrutiny. First, the military courts failed to address adequately Bales's ingestion of the drug mefloquine and its impact on his case. Before the military courts, and before this court, is evidence that mefloquine adversely impacted virtually every aspect of this case—from Bales's ability to possess the *mens rea* to commit premeditated murder, to his competence to enter a guilty plea, to whether the jury should have been able to evaluate the impact of mefloquine when imposing a sentence. And the remedy Bales has sought here is simple and fair: a remand with an order to conduct a fact-finding hearing to determine whether at the time of the killings Bales was suffering from mefloquine intoxication.

Second, the military courts erred in blocking Bales's evidence that certain Afghan witnesses flown into the United States to testify against him, whom the Government described as farmers and gardeners, were actually terrorist bomb-makers. Not only did the prosecution fail to disclose certain DNA and fingerprint evidence indicating that the witnesses were connected to terrorist attacks, but, when the defense team found it, the prosecutors fought to keep the evidence out of the view of the jury. The trial judge assented to the prosecution's position, and the military appellate courts endorsed the trial judge's decision with barely a passing reference to the issue. Had this evidence been admitted, it could have resulted in the jury allowing Bales the opportunity for parole sometime in his life. The military's cursory appellate review of such an important issue

cannot rise to the level of "full and fair consideration" as that standard has been delineated by the cases in this Circuit.

Because the military courts failed to give adequate consideration to these substantial constitutional issues, the Court should grant the writ.

DISCUSSION

I. TENTH CIRCUIT JURISPRUDENCE DEMANDS ADDRESSING THE MERITS OF THE SUBSTANTIAL CONSTITUTIONAL ISSUES RAISED IN A HABEAS PETITION.

The Government accurately describes the four-part test the federal district courts must apply when determining whether to review a military habeas petition. Review is only appropriate if: "(1) the asserted error is of substantial constitutional dimension; (2) the issue is one of law rather than of disputed fact already determined by the military tribunal; (3) there are no military considerations that warrant different treatment of constitutional claims; and (4) the military courts failed to give adequate consideration to the issues involved or failed to apply proper legal standards." *See Dodson v. Zelez*, 917 F.2d 1250, 1252–53 n.1 (10th Cir. 1990). As the first three factors are met in Bales's petition, the inquiry focuses on the last factor.

The seminal Supreme Court case on the fourth part of the test, *Burns v. Wilson, supra*, demonstrates that Bales's claims are within the permissible scope of Article III review and the constitutional deprivations he brought to the attention of the lower court cannot stand under the Constitution and Section 2241 habeas jurisprudence. In *Burns*, the Supreme Court agreed that the district court and the appellate court correctly dismissed the habeas petitions of three airmen [Air Force enlisted men] sentenced to death for rape and murder while stationed on the island of Guam, largely because their petition sought to simply relitigate their claims. 346 U.S. at 146. The *Burns* Court emphasized that that military courts "have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights." *Id.* at 142. But, the Supreme Court

qualified that Article III review *may* be precluded where a military petitioner seeks to retry the case in civil court. "[W]hen a military decision has dealt fully and fairly with an allegation raised in that [habeas] application, it is not open to a federal civil court to grant the writ simply to reevaluate the evidence." *Id.*, (internal citation omitted).

In upholding the trial and appellate courts' denials of Article III review to the airmen in *Burns*, the Supreme Court reasoned that "[p]etitioners have failed to show that military review was legally inadequate to resolve the claims which they have urged upon the civil courts. They simply demand an opportunity to make a new record, to prove *de novo* in the district court precisely the case which they failed to prove in the military courts." *Id.* at 146.

The dissent in *Burns* also informs that this Court's review of Page's constitutional claims and awarding the Writ are altogether appropriate if not necessary to protect and defend the integrity of the Constitution, Page, and the military justice system itself. Justice William O. Douglas, joined by Justice Hugo Black, concluded the Constitution required Article III habeas review of the airmen's constitutional claims and noted that the Fifth and Sixth Amendments applied to military personnel. "But never have we held that all the rights covered by the Fifth and the Sixth Amendments were abrogated by Art. I, § 8, cl. 14 of the Constitution, empowering Congress to make rules for the armed forces." *Id.* at 152. The dissenting Justices expounded that Article III courts, not Article I courts, formulate the constitutional rules which the military must follow.

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

Id. at 154.

The Supreme Court's guidance to appellate and district courts is clear: it is left to them, the Article III courts, to ensure constitutional protections are provided when the Article I courts have failed in that task. Such is the case here, and for the reasons described in Bales's opening petition, and elucidated further in Section II below, the Court should address the merits of Bales's constitutional claims and grant relief.

The Tenth Circuit cases in which the Article III courts have reached the merits of a military habeas petition and granted relief are also instructive in terms of providing parameters in which the district courts should step into the decision-making of the military courts. Cases such as *Monk v. Zelez*, 901 F.2d 885, 888 (10th Cir. 1990), and *Dodson v. Zelez*, 917 F.2d 1250, 1253 (10th Cir. 1990), demonstrate that the Tenth Circuit would encourage this Court to consider Bales's constitutional claims, decide them, and award a writ of habeas corpus even though his claims were previously considered and rejected by Article I military tribunals.

In *Monk*, the Tenth Circuit reversed the denial of a military habeas petition brought by a Marine convicted of murdering his wife by strangulation. 901 F.2d at 886. Monk passed several polygraph exams denying his involvement in his wife's death, testified at trial in his own defense, and Article I tribunals reviewed but rejected his constitutional claims that flawed jury instructions led to his unlawful conviction and sentence. *Id*. at 888. In deciding to grant the writ that had been denied in the District of Kansas, the Tenth Circuit acknowledged the holding in *Burns* that "when a military decision has dealt fully and fairly with an allegation raised in that [petition for habeas corpus], it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence." 346 U.S. at 142. But the *Monk* court went on to write that "[i]n appropriate cases, however, we will consider and decide constitutional issues that were also considered by the military courts."

Id., citing *Mendrano v. Smith*, 797 F.2d 1538, 1541-42 & n. 6 (10th Cir. 1986) (in pertinent part, "our cases establish that we have the power to review constitutional issues in military cases where appropriate"); *Wallis v. O'Kier*, 491 F.2d 1323, 1325 (10th Cir.), cert. denied, 419 U.S. 901, 42 L. Ed. 2d 147, 95 S. Ct. 185 (1974) ("Wallis asserted in his habeas corpus petition that he was being deprived of his liberty in violation of a right guaranteed to him by the United States Constitution. Where such a constitutional right is asserted and where it is claimed that the petitioner for the Great Writ is in custody by reason of such deprivation, the constitutional courts of the United States have the power and are under the duty to make inquiry"); and *Kennedy v. Commandant*, 377 F.2d 339, 342 (10th Cir. 1967) ("[w]e believe it is the duty of this Court to determine if the military procedure for providing assistance to those brought before a special court-martial is violative of the fundamental rights secured to all by the United States Constitution"). For the reasons provided in Bales's petition, as further explained below, this is one of those cases in which it is wholly appropriate – and indeed necessary – for the Article III courts to intervene to preserve constitutional principles.

Among Tenth Circuit cases addressing habeas review of military trials, *Dodson* is also instructive. In *Dodson*, the Tenth Circuit reached the merits of a Marine petitioner's constitutional jury instruction claim and reversed the denial of the Writ. *Dodson*, 917 F.2d at 1262-63. A case involving robbery, premeditated murder, felony murder, and life imprisonment, Dodson challenged his Article I sentence to life imprisonment as constitutionally flawed because the jury did not vote by ¾ for the sentence. *Id*. The issue had been raised to the military appellate courts, but those courts summarily affirmed the conviction without substantive discussion of the issue. The Tenth Circuit found Dodson's due process rights to had been violated, reversed the District of Kansas, awarded the Writ, and directed the prosecution to either order a new sentencing hearing

or to order no punishment. *Id.* at 1263. *Dodson*, like *Monk*, stands for the proposition that in military habeas cases, the Article I courts must do more than recite the issues addressed by the military courts and conclude that those issues have been fully and fairly considered. Rather, in cases where there are constitutional deprivations – as occurred with Bales – the Article I courts must step in and take action.

Turning to what constitutes "full and fair" consideration, *Watson v. McCotter*, 782 F.2d 143, 144 (10th Cir. 1986), is instructive. In *Watson*, the Tenth Circuit explained that while "full and fair" consideration has not been defined precisely, it leaves the Article III trial judge with the discretion to reach the merits and determine if constitutional protections were correctly considered and applied:

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

Watson, 782 F.2d at 144.

And that is precisely what the Government asks this Court to do in reviewing Bales's petition: merely cite the standard, enumerate what the military courts have done, and deny the petition. But, as *Monk* and the cases cited therein illustrate, the Constitution demands a more thorough review, and explanation of that review. This court should undertake such a review of the issues presented, should conclude that Bales's conviction and sentence is unreliable due to the constitutional infirmities described in the petition, and issue the writ.

II. THE MILITARY COURTS FAILED TO ADDRESS FULLY AND FAIRLY THE SUBSTANTIAL CONSTITUTIONAL ISSUES BEFORE THEM.

Having concluded that a district court must conduct a meaningful review of substantial constitutional issues raised, the Court here should address the two issues presented here that represent failures in the military justice system to provide the protections guaranteed by the Constitution. The first is the military courts' collective failure to address the impact of the drug mefloquine on virtually every aspect of his case. The second is the military courts collectively preventing Bales's defense team to show the jury that certain Afghan witnesses flown in to testify against him might have been known terrorists. These issues will be discussed in turn.

A. The Military Courts Failed to Address the Potential Impact of Mefloquine Intoxication.

The Government implores the Court not to review Bales's due process arguments surrounding the impact of mefloquine on him. (Doc. 6, Answer at 12-15.) The issue of whether Bales had been battling mefloquine intoxication at the time of the killings -- and even through the pretrial proceedings and the trial itself -- has been critically important to his defense and appeal. (Doc. 1, Petition at 17-19.) As was explained in the petition, had the Government disclosed the evidence it had of Bales's mefloquine use and what the Government knew or reasonably should have known about the potential impact of mefloquine, the landscape of Bales's case could have changed drastically. For instance, such evidence may have resulted in no authorization for the death penalty, which would have changed plea discussions remarkably. Bales could have asserted a diminished capacity defense, asserting that he could not develop the specific intent to commit the murders he was convicted of committing. And if those failed, Bales could have used the evidence of mefloquine intoxication as a matter in mitigation during sentencing. As Bales explained in his petition, the Government's failure to disclose its knowledge of the impacts of

mefloquine, and of Bales's exposure to mefloquine, is in and of itself a substantial violation of Bales' Fifth Amendment Due Process rights, and warrants relief.

On direct appeal to the Army Court of Criminal Appeals ("the Army Court"), armed with affidavits from a lay witness and an expert witness, Bales sought a fact-finding hearing to inquire whether during the time of the killings his mental state was impacted by the effects of the mefloquine he had taken incident to his service. The Army Court denied the request. *See United States v. Bales*, 2017 CCA LEXIS 627 at *21-24 (ACCA Sep. 2017). The Army Court's decision to deny the request extinguished the possibility that the military courts might determine whether Bales was truly experiencing mefloquine-based intoxication on the night of the killings and continued to be impacted it as he was being prosecuted.

In its Answer, the Government urges the Court to find that Bales's request for relief relating to the potential adverse effects of mefloquine should be rejected because the Army Court's summary discussion and dismissal of the demand for an evidentiary hearing constitutes "full and fair consideration," precluding this Court from granting relief. (Doc. 6, Answer at 12-15.) The Government relies specifically on the portion of the Army Court opinion rejecting the request for a hearing because the affidavits Bales offered "[do] not set forth specific facts but consist instead of speculative [and] conclusory observations." (Doc. 6, Answer at 13, quoting Bales, 2017 CCA LEXIS 627, at *24.) Yet the Government's argument here merely underscores the gravity of the error committed by the Army Court: any doubt as to whether Bales had taken mefloquine, and had fallen prey to its adverse effects, should have been determined in the evidentiary hearing Bales's team requested. There is no other way to determine whether Bales was impacted by the drug, and hence no other way to guarantee he had evidence to mitigate his conduct. This was the purpose of the affidavits submitted to the Army Court: to provide the evidence that Bales had been given

mefloquine and that it impacted him, and to explain that the evidentiary hearing would be the only sure way to ensure Bales was convicted of premeditated murder.

In fact, the Government's claim that the Army Court has "fully and fairly" reviewed the Bales's claims that he was impacted by mefloquine fails entirely to acknowledge several significant and clearly demonstratable factual errors underlying the Army Court's decision. Although the Government claims that the Army Court "understood that the Petitioner's claim of mefloquine exposure conflicted with his concession that 'his medical records are void of any information about him being prescribed [mefloquine]" (Doc. 6, Answer at 14), the Army Court in its decision never fully or convincingly addressed Bales's claim that the mere absence of a record of mefloquine in his medical records conclusively establishes the absence of such exposure, particularly as it relates to Bales's claims that he was given mefloquine during his first deployment to Iraq in 2003-2004.

Further, as described in Dr. Nevin's June 24, 2019 affidavit, it is a fact that the U.S. military has acknowledged that "[s]ome deploying service members have been provided mefloquine for malaria prophylaxis without appropriate documentation in their medical record." (Doc. 1-1, Nevin Affidavit at 6). Likewise, it is an undisputable fact that, during Bales's deployment to Iraq, deployment orders recommended the use of antimalarial drugs. (*Id.* at 7.) These facts are not even mentioned in the Army Court decision, much less refuted or questioned by it.

Given the unrefuted fact that the U.S. military has the conceded that medical records may be a potentially unreliable source from which to conclude the fact of non-exposure to mefloquine, and given the unrefuted fact that, per U.S. military policy, the use of antimalarial drugs was recommended during the petitioner's first deployment to Iraq in 2003-2004, the Army Court clearly erred by not fully acknowledging, and in not fairly incorporating into its opinion, the existence of

probative evidence that Bales was given mefloquine during his first deployment to Iraq in 2003-2004 and continued to suffer the effects of the exposure.

All of this is to say that the Army Court gave short shrift to the evidence Bales presented that he had been administered mefloquine, and suffered from the effects of it. As a result, it summarily dismissed the request for the all-important fact-finding hearing to determine whether Bales had been laboring under the effects of mefloquine. These are failures on the part of the Army Court, and it is left to the Article III courts to step in. The Army Court's refusal to order an evidentiary hearing runs contrary to the Fifth Amendment; and if this error is left uncorrected, will lead to a man spending life in prison without the possibility of parole based on an unreliable conviction. This Court should intervene, and issue the writ.

B. The Army Court Misstated and/or Selectively Addressed Facts in its Discussion of the DNA and Fingerprint Evidence of the Prosecution's Sentencing Witnesses.

From before his trial until the present habeas petition, Bales's position has been that any evidence that the Afghan sentencing witnesses the Government brought to testify against him were actually bomb-makers and not farmers, as the prosecution suggested, then that evidence needed to presented to the jury. Bales sought this evidence before trial and was stymied—in spite of the fact that the prosecutors were working with the U.S. State Department to secure visas for these witnesses and had access to the databases housing the DNA and fingerprint evidence the defense sought. (Doc. 1, Petition at 13-14.) In other words, the prosecution easily could have found evidence the witnesses were tied to bomb-making incidents and produced it. Instead of doing so, the prosecution moved *in limine* to prevent the defense team from offering such evidence. The trial judge endorsed the Government's position.

On direct appeal, Bales presented to the Army Court the declaration of a retired law enforcement officer who had been retained by the defense team who had uncovered evidence the

prosecution's witnesses were, in fact, bombmaking terrorists. (Doc. 1, Petition at 20-21.) The Army Court declined even to consider the affidavit in weighing the merits of Bales's appeal, writing its view that "the information contained in the declaration and accompanying enclosure was of uncertain origin, authenticity, reliability, and classification." *Bales*, CCA LEXIS 627, at *6. This, in spite of the fact that before trial Bales's defense team had pointed the Government precisely where to look, and how to conduct the simple, computer-based search that could have yielded the evidence in short order.

And, with regard to the impact this evidence could have had, the Army concluded that it could "see no scenario for the use of [fingerprints and DNA on bombs] for impeachment during the sentencing phase of the trial." *Id.* This summary conclusion is preposterous. In the trial of an American soldier, evidence that the witnesses called in sentencing had been implicated in building bombs designed specifically to kill American soldiers is nothing less than a "game changer."

Yet the Government now urges this Court to decline to review this claim because the military courts gave it full and fair consideration. (Doc. 6, Answer at 16-18.) Regarding the "full and fair consideration" standard, although the Tenth Circuit has "never attempted to define it precisely," *see Watson*, 782 F.2d at 144, it cannot encompass rubber-stamping a prosecutor's hiding evidence that stood to give the defendant a fair chance at a sentence less severe than life without parole. It cannot encompass an appellate court summarily rejecting a declaration pointing precisely to the location of evidence the prosecution refused to disclose. It simply cannot encompass the appellate court giving a pass to clear and substantial constitutional violations.

This case presents the set of circumstances the Tenth Circuit contemplated in cases like *Monk*, and others, in which the Article III courts step in to fulfill their duty to remedy conduct that falls outside the boundaries of due process. *See, e.g., Monk*, 797 F.2d at 1538, (finding it

appropriate to decide constitutional issues that were also considered by the military courts; *Mendrano*, 797 F.2d at 1541-42 (same); *Wallis*, 491 F.2d 1323 at 1325 (Article III courts have the power and are under the duty to inquire into due process violations in military courts); and *Kennedy v. Commandant*, 377 F.2d at 342 (an Article III court's duty is to determine if military proceedings have violated constitutional rights). The Court should find that the review by the military courts here did not amount to full and fair consideration, and should issue the writ.

CONCLUSION

Supreme Court and Tenth Circuit precedent demand that this Court do more than a rote checklist-style exercise of reading the military courts' decisions to determine whether certain issues have been mentioned. Bales is entitled to a meaningful review of the substantial constitutional issues he has raised, regardless of his status as a servicemember. The Court should provide this review, find that the military courts failed to ensure proceedings that were constitutionally sound, and grant the petition.

Respectfully submitted,

John N. Maher *pro hac vice*
MAHER LEGAL SERVICES PC
26 South 3rd Street, Number 68
Geneva, Illinois 60134
Tel: (708) 468-8155
john@maherlegalservices.com

Christopher Joseph, #19778
Carrie Parker, #24988
Diane Bellquist. #20969
JOSEPH, HOLLANDER & CRAFT LLC
1508 SW Topeka Blvd.
Topeka, KS 66612-1887
(785) 234-3272 Main
(785) 234-3610 Fax
cjoseph@josephhollander.com

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2020, I electronically transmitted the foregoing to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing.

By: /s/ Christopher Joseph
Christopher Joseph