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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Jared D. Herrmann, Petitioner, v. Mark T. Esper, in his official capacity as Secretary of the Army, and Department of the Army, Respondents.	No. PETITION FOR A WRIT OF HABEAS CORPUS

I. THE PARTIES

Petitioner Jared D. Herrmann, formerly Sergeant Jared D. Herrmann, 10th Special Forces Group (Airborne), United States Army (Herrmann), is a private citizen with an address of 24654 North Lake Pleasant Parkway, Number 103, Peoria, Arizona 85383. Respondents are the Secretary of the Army in his official capacity and the Department of the Army, the Federal official and entity responsible for Herrmann's Federal convictions and incarceration. The United States Army Litigation Division, 9275 Gunston Road, Fort Belvoir, Virginia 22060 and The United States Attorney's Office for the District of Arizona, Two Renaissance Square, 40 North Central Avenue, Suite 1800, Phoenix, Arizona 85004 represent the Respondents.

II. JURISDICTION

The Court possesses subject matter jurisdiction pursuant to 28 U.S.C. § 2241, habeas corpus for servicemembers, 28 U.S.C. § 1331, federal question jurisdiction, and is authorized to grant relief as law and justice require, 28 U.S.C. § 2243. Although Herrmann has been released from Federal incarceration, his direct appeals were exhausted on November 27, 2017, the date on which the United States Supreme Court denied his timely Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces (CAAF).

III. VENUE

Because Herrmann was released from Federal incarceration while his convictions and sentence were moving through the direct appeal process, venue is appropriate in this district, where Herrmann resides, pursuant to 28 U.S.C. § 2241.

IV. SUMMARY OF HERRMANN'S PETITION

This case challenges the validity of Herrmann's convictions and sentence for the Federal crimes of reckless endangerment and dereliction of duty. While a non-commissioned officer on active duty in the Army (Sergeant E-5), Herrmann was one rank above three soldiers who packed reserve parachutes for use by other soldiers in airborne operations. The three soldiers "pencil-packed" 14 reserve parachutes, a disfavored short-cut where a parachute is not actually inspected, but the paperwork associated with the equipment states that it was inspected and found airworthy. Herrmann did not "pencil-pack" the reserve parachutes, but was prosecuted based on his rank and supervisory position over the three junior soldiers.

Herrmann bases his petition on four grounds. First, he challenges an element of the reckless endangerment offense the prosecution was required to prove beyond a reasonable doubt - that Herrmann's conduct "was *likely* to produce death or grievous bodily harm." Article 134, Uniform

Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2012) (emphasis added). The legal deficiency in the military courts' direct review of Herrmann's convictions is that neither the trial court, US Army Court of Criminal Appeals (Army Court) (first level of appeal), nor the CAAF (second level of appeal), fully or fairly reviewed Herrmann's claims as required to meet constitutional muster.

The trial and Army Court did not address the fact that none of the witnesses the prosecution called described Herrmann's acts as *likely* to produce death or grievous bodily harm. Instead, prosecution witnesses at trial used words like "potential," "plausible," "could," "can," and "possible" to describe the likelihood of harm of a pencil-packed reserve parachute. That no witness used the word *likely* is strong evidence that none believed pencil-packed reserve parachutes that never left the packing facility could ever result in death or grievous bodily harm.

The trial and Army Court also rejected evidence showing that at least eight conditions would have to occur before a reserve parachute ripcord would even need to be pulled, let alone malfunction, to result in potential harm. And that harm, even if extant, is rarely death or grievous bodily harm. The trial and Army Court also rejected the undisputed fact that none of the 14 pencil-packed reserve parachutes ever left the parachute rigging facility. Each was identified, re-packed, and never issued to a paratrooper for actual use, all but eliminating any possibility that they were likely to cause death or grievous bodily harm.

What is more, the Army Court and the CAAF ignored precedent that if followed would have reversed Hermann's conviction of the Charge of reckless endangerment. In an abrupt about-face away from precedent favorable to Herrmann, the Army Court and the CAAF determined to re-define the term *likely* to affirm Herrmann's conviction. In *United States v. Gutierrez*, 74 M.J. 61 (C.A.A.F. 2015), an aggravated assault case where an HIV-positive Airman had sexual relations

with various partners without informing them of his HIV-positive medical status, the CAAF reviewed the conviction in light of the very same *likely* standard applicable to Herrmann's case. In reversing an Airman's conviction for aggravated assault in violation of Article 128, UCMJ, 10 U.S.C. § 928 (2012), which contains the exact language "likely to produce death or grievous bodily harm" as reckless endangerment, the Court relied largely on expert testimony and statistical data to hold that that a 1:500 chance, or 0.20% chance, of contracting HIV does not meet the statutory definition of *likely* to produce death or grievous bodily harm. *Gutierrez*, 74 M.J. at 67. The Court reasoned that "in law, as in plain English, an event is not 'likely' to occur when there is a 1-in-500 chance of occurrence." *Id*. A risk of "almost zero does not clear any reasonable threshold of probability," nor does a risk of transmission that was only "remotely possible." *Id.* at 68.

But in sustaining Herrmann's conviction, the CAAF applied a meaning to *likely* that is far different, broader, and more condemning of defendants than what it announced only two years previously in *Gutierrez.* Although the Court recognized the concept of what constitutes *likely* must be applied consistently from one offense to another, it nevertheless offered a new and different interpretation of *likely*. In *United States v. Herrmann*, 76 M.J. 304, 308 (C.A.A.F. 2017), the Court departed from the *Gutierrez* standard (1:500 not likely) and set forth the vague standard that "a determination of whether death or grievous bodily harm is a *likely* result of an accused's conduct … is based on the trier of fact's commonsense, everyday understanding of that term as applied to the totality of the circumstances."

Application of the *Gutierrez* 1:500 standard, or 0.20% as being "not likely" would have all but ensured reversal of Herrmann's reckless endangerment conviction and sentence, especially where the leading Army Field Manual on the subject of parachute failures uses substantial data derived over time and expert opinions to conclude as Army doctrine that a main parachute will

deploy correctly 99.98% of the time. Thus, a reserve parachute will only have to be accessed .02% of the time.

The legal significance is that the *Gutierrez* 1:500 finding converted to a percentage is 0.2%, or ten times greater likelihood of death or grievous bodily harm than the .02% derived from the Army's own data and doctrine. Put differently, the likelihood of death or grievous bodily harm in *Herrmann* was at least ten times less than that found legally insufficient in *Gutierrez*.

The CAAF, like the courts below it, also rejected evidentiary showings that at least eight conditions would have to occur before a reserve parachute rip-chord would even need to be pulled, let alone malfunction, to result in harm. And, the CAAF overlooked the pivotal point that none of the prosecution witnesses described Herrmann's acts as *likely* to produce death or grievous bodily harm. Instead, witnesses at trial used words like "potential," "plausible," "could," "can," and "possible" to describe the likelihood of harm. As a result, the jurisprudence of the Court that exercises civilian oversight over all branches of the Armed Forces has issued conflicting opinions on the meaning of the same statutory word, leaving the facially-vague and undefined statutory term *likely* even more ambiguous and challenging to apply in the field – a shifting sands standard inconsistent with Due Process concerns of notice and an opportunity to be heard.

This is not a case where, as in many instances, application of the same statute to differing facts led to different decisions. This is the problematic case where the CAAF changed the definition of the law and the standard by which criminality is measured, mid-stream, which led to the type of arbitrary decision the Supreme Court's vagueness doctrine seeks to prevent. The CAAF's decision can be rightly seen as the inevitable by-product of a vague criminal statute where the invitation to be applied *ad hoc* or *post hoc* was accepted.

In law, as in English, an event is not likely to occur when there is a 0.20% chance of occurrence. *Gutierrez*, 74 M.J. at 68. A risk of almost zero does not clear any reasonable threshold of probability, nor does a risk of harm that was only remotely possible. *Id*. A commonsense, everyday understanding of .02% chance of harm, ten times less likely than the chance found legally insufficient in *Gutierrez*, must be even more unlikely.

For these reasons, Herrmann respectfully claims that the conviction and sentence for reckless endangerment are unconstitutional, that military authorities did not fully or fairly review his case, and prays this Court will vacate his conviction and sentence by authority of habeas corpus which empowers this Article III Court to determine if Article I legislative Courts, in this instance military tribunals, followed the Constitution. As the Supreme Court held in *Burns v. Wilson*, 346 U.S. 137 (1953), which remains applicable in the Ninth Circuit today:

> The constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers – as well as civilians – from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispending with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civilian courts.

Burns, 346 U.S. at 142.

For his second ground, Herrmann urges the Court to determine that his convictions and sentence for both reckless endangerment and dereliction of duty are unconstitutional. With regard to the former, the evidence is legally insufficient to prove that his conduct was *likely* to result in death or grievous bodily harm. *Jackson v. Virginia,* 443 U.S. 307 (1979). With regard to the latter, the military trial and appellate courts did not address the undisputed fact that the Army never certified Herrmann to perform the duties of which he was held accountable and imprisoned for dereliction.

For his third ground, Herrmann requests the Court to award the writ because at trial he was deprived of the right to effective assistance of counsel as guaranteed to him by the Sixth Amendment to the Constitution. Herrmann's trial defense attorney failed to locate and present exonerating and readily-available evidence in the form of the Army's primary Field Manual on the subject, which states that the chances of a main parachute failing are miniscule at best, and that harm or death as a result of the failure of a reserve parachute is not remotely likely under any standard.

Counsel also did not secure a consulting expert or a testifying expert, substantially disadvantaging failures which prejudiced Herrmann because counsel was not sufficiently prepared to fully cross-examine the two prosecution experts nor introduce compelling defense expert testimony, not only to defend against the Charges but also fully rebut the prosecution's expert testimony.

Fourth and finally, Herrmann claims the dereliction of duty conviction is unconstitutional. There is no dispute that the Army never properly, fully, or officially certified Herrmann to perform the duty of which he was convicted and sentenced for being derelict. That is, the Army never completed Herrmann's fundamental skill-set training to establish his qualifications to properly supervise junior soldiers in packing reserve parachutes. The military trial and appellate courts ignored this critical point in first convicting Herrmann of dereliction of a duty he was not qualified or certified to perform, then affirming his conviction and sentence. Additionally, the dereliction of duty conviction is constitutionally insufficient not only as the result of ineffective assistance of counsel, but also an unreasonable multiplication of charges for the same conduct.

For these reasons, discussed more fully below, Herrmann contends that the Article I military courts failed to give adequate consideration to the issues involved and failed to apply

proper legal standards to his claims such that this Article III Court may reach the merits and decide the issues to ensure constitutional guarantees were properly observed. *Burns*, 346 U.S. at 137.

V. PROCEDURAL HISTORY

A. Proceedings at Trial

On December 17, 2013, at Fort Carson, Colorado, a military judge sitting alone as a general court-martial convicted Herrmann, contrary to his pleas, of willful dereliction in the performance of his duties and reckless endangerment, in violation of Articles 92 and 134, UCMJ, 10 U.S.C. §§ 892 and 934 (2012). (R. at Result of Trial). The military judge acquitted Herrmann of solicitation to commit an offense, false official statement (two specifications), and obstruction of justice. *Id*. The commanding general who convened the court-martial approved the trial sentence of a bad-conduct discharge from the Army, confinement for ten months, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade of E-1. *Id*.

B. Proceedings Before the United States Army Court of Criminal Appeals

Upon Article 66, UCMJ, 10 U.S.C. § 866 (2012) direct review before the Army Court, Herrmann argued that the prosecution failed to prove that it was *likely* that the reserve parachutes would have been necessary during a jump and, if deployed, would have failed, and that failure would have [led] to death or grievous bodily harm. *United States v. Herrmann*, 75 M.J. 672, 674 (A. Ct. Crim. App. 2016). Herrmann cited the prosecution's failure to introduce any evidence regarding failure rates of main parachutes, the success rate of deploying a reserve chute when needed, or the rate at which instances involving the deployment of fully operational reserve parachutes results in death or grievous bodily harm. *Herrmann,* 75 M.J. at 675.

The Army Court mentioned but did not apply its superior Court's decision and rationale in *Gutierrez*, namely, that 0.2% is legally insufficient to prove *likely*. *Id*. Then, the Army Court

determined that the prosecution did not have to offer evidence concerning likelihood, as Herrmann had argued. *Id*. The Army Court instead focused on what *likely* does not mean, and, by contrast, what *likely* does mean, to reach the following judicial interpretation: "a means, force, or conduct is likely to produce death or grievous bodily harm when that is the natural and probable result or consequence of that particular means, force, or conduct." *Id*. at 676-78. This "likelihood" determination is made utilizing a common-sense approach and factoring in and balancing all relevant facts and circumstances." *Id*. at 678.

Herrmann also challenged the dereliction of duty Charge but the Army Court chose not to write on this point. Ultimately, the Army Court affirmed the findings and sentence. *Id*.

C. Proceedings before the United States Court of Appeals for the Armed Forces

Herrmann timely filed a Petition for a Grant of Review to the CAAF, which exercises civilian oversight of the military courts of criminal appeals and trial courts. Pursuant to Article 67, UCMJ, 10 U.S.C. § 867 (2012), the CAAF granted discretionary review of a single issue: whether the evidence is legally sufficient to find [Herrmann] committed reckless endangerment, which requires proof the conduct was likely to produce death or grievous bodily harm. Law students supervised by an Assistant Professor of Law and Director of Clinical Studies from the Ohio Northern University Claude W. Pettit College of Law filed a Brief of *Amicus Curie* in Support of Appellant.

In *United States v. Herrmann*, 76 M.J. 304, 308 (C.A.A.F. 2017), the Court refused to apply its two-year-old holding in *Gutierrez* that a 1:500, or .20% chance of occurrence was legally insufficient to sustain a conviction for "likely to cause death or grievous bodily harm" to Herrmann's case. The CAAF offered three main reasons for its departure from its previous precedent. First, the facts of each case were dissimilar. *Herrmann,* 76 M.J. at 307. Second,

Gutierrez was "intended as a course correction where a minimalist approach regarding what constitutes 'likely' had crept into our jurisprudence in HIV cases." *Id*. Third, that while *Gutierrez "*stands for the proposition of what does *not* constitute 'likely,' it provides no definitive answer that can be adopted in the instant case about what *does* constitute 'likely.'" *Id*.

Departing from its recent decision in *Gutierrez*, the CAAF offered an altogether different statutory interpretation of likely, "a determination of whether death or grievous bodily harm is a 'likely' result of an accused's conduct under the provisions of Article 134, UCMJ, is based on the trier of facts' commonsense, everyday understanding of that term as applied to the totality of the circumstances." *Id*. at 308. The CAAF issued its decision on June 19, 2017, and denied Herrmann's request for reconsideration on July 13, 2017.

D. Proceedings Before the United States Supreme Court

On October 11, 2017, Herrmann timely filed in the United States Supreme Court a Petition for a Writ of Certiorari to the CAAF pursuant to 28 U.S.C. § 1259(1). The question Herrmann presented was:

> Whether the Court of Appeals for the Armed Forces erred when it applied one definition of "likely to produce death or grievous bodily harm" to reverse an HIV-positive Airman's conviction for failing to inform sexual partners of his HIV-positive status where the chances of transmission were 1:500, but applied an altogether different definition of the same statutory language to affirm the conviction of an Army Special Forces parachute rigger who failed to properly inspect 14 reserve parachutes where the actual chances of harm were far less than 1:500.

The Supreme Court denied the Petition. *United States v. Herrmann*, 76 M.J. 304, 308 (C.A.A.F. 2017), *cert. denied*, 138 S. Ct. 487 (Nov. 27, 2017). Herrmann now brings this first Petition for a Writ of Habeas Corpus as a collateral challenge to his Federal court-martial convictions, sentence, and appeals.

VI. STATEMENT OF FACTS

For every airborne operation, jumpers are required to have a reserve parachute in the event of an emergency. (R. at 23). Training manuals (TM) require reserve parachutes to be opened and re-packed every 365 days if not used. (R. at 28). During February 2013, Herrmann worked as a parachute rigger (*i.e.*, one who packs, maintains, and repairs parachutes) and "In-Process Inspector" (IP) in the 10th Special Forces Group (Airborne) at Fort Carson, Colorado. (R. Charge Sheet). His job was to ensure rigger checks were completed and parachutes were packed in accordance with the appropriate TM, and then sign the parachute log record book to confirm the parachute is "airworthy in accordance with the TM." (R. at 18).

The term "pencil-packing" describes those responsible for packing the parachutes failing to properly pack or inspect them, yet still verifying the proper procedures were followed by signing the appropriate forms. (R. at 45-46). On February 19, 2013, Herrmann supervised three parachute riggers: Specialist (SPC) Martinez-Mojica, SPC Brown, and SPC Arrington. (R. at 207, 252, 277). That day, a non-commissioned officer working with Herrmann spot-checked the paperwork of numerous riggers. When she checked Arrington's sheet, she noticed he had packed more parachutes than she thought was possible for him. (R. at 44). Subsequent investigation revealed that 14 reserve parachutes were pencil-packed by Martinez-Mojica, Brown, and Arrington while Herrmann signed off on the paperwork. (R. at 65). Each parachute with deficiencies (and every other parachute in the shack) was re-packed.

The prosecution granted Martinez-Mojica immunity and ordered her to cooperate in the case against her former Sergeant, Herrmann. (R. at Grant of Immunity and Order to Cooperate). The prosecution issued "non-judicial punishment" under Article 15, UCMJ, 10 U.S.C. § 815 (2012) to Brown and Arrington. The result being that none of the actual perpetrators of the pencil-

packing faced trial, prison, criminal convictions, or criminal discharge from the Army that stood to follow them for the rest of their lives.

At trial, outlining the potential for harm from pencil-packing, one witness testified, "if they weren't packed as they were supposed to be, lives are *potentially* in danger." (R. at 133). "If a Soldier jumps [with] a piece of equipment that hasn't been inspected properly or is missing a component, death; that is a *plausible* outcome." (R. at 69). When asked about the potential for harm if a spring is missing, another witness said the jumper could "*potentially* die or get seriously hurt." (R. at 133). During all of the testimony, witnesses interjected numerous qualifying terms like "could have," "could be," "could get," "can cause," "potentially," "may not," and "if." (R. 198, 199, 200, 201).

The prosecution called an expert in research and development of static line parachutes. He testified that, "the parachute *may* not open quick enough in a total malfunction scenario and *can potentially cause* serious harm or death to the paratrooper if there is a total malfunction." (R. at 202). He also testified that "the opening shock *can* be pretty violent and *maybe causing* a--*maybe* the parachute *may not* be able to fully open properly." (R. at 201).

During closing argument, the prosecutor described the possibilities as: [Petitioner's] actions *could and may* have likely produced death or serious bodily harm, and that all witnesses testified that if a reserve were to fail to deploy the result *could be* death, and at best harm." (R. at 380). In response, the defense highlighted the weakness of the prosecution's case:

> The government has provided you no statistics with regard to how often a reserve chute needs to be . . . deployed. The reserve chute is typically deployed . . . when somebody's air speed is too fast or when the main chute doesn't deploy properly and they have to cut away and that's when you get the reserve chute, but they have produced no evidence that because of these inadequacies that is a likelihood.... As a matter of fact, through Mr. Whiteman [prosecution expert witness] what you heard was that even without

> that spring, the experts said that chute will still deploy and somebody could land safely . . . So, the government hadn't shown that if these deficiencies weren't corrected that the chute would fail. All they said is that this is a possibility. Everything they have produced is speculative, well, it could happen, but they have not produced any evidence that if those things failed – those deficiencies failed that this is a likely result.

(R. at 400).

VII. GROUNDS FOR WHICH HERRMANN SEEKS HABEAS CORPUS RELIEF

Herrmann respectfully offers the following four grounds in support of his Petition:

A. GROUND ONE – FIFTH AMENDMENT DUE PROCESS

The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. "[The Supreme Court's] cases establish that the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 135 S. Ct. 2551, 2556-57 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983)).

Vagueness forces courts to "picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents a serious potential risk of physical harm." Note, *Johnson v. United States*, 129 Harv. L. Rev. 301 (2015). The fair notice requirement ensures that the Government speaks clearly when proscribing conduct, so that police, prosecutors, judges, and juries are not impermissibly delegated lawmaking authority to be supplied on an *ad hoc* and subjective basis. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). A statute must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited" and "provide explicit standards for those who apply [it]." *Grayned,* 408 U.S. at 108.

The crime of reckless endangerment pursuant to Article 134, UCMJ, 10 U.S.C. § 934 (2012), has four elements. They are:

> 1) That the accused did engage in conduct;
>
> 2) That the conduct was wrongful and reckless or wanton;
>
> 3) That the conduct was likely to produce death or grievous bodily harm to another person; and
>
> 4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Manual for Courts-Martial, *United States*, pt. IV ¶ 100a.b. (2012) (hereinafter MCM).

The issue here focuses on the third element. The MCM does not define the term *likely*. Paragraph 54(c)(4)(a)(ii) does, however, contain explanatory text for aggravated assault under Article 128, UCMJ, 10 U.S.C. § 928 (2012). Article 128 uses the identical language *likely to produce death or grievous bodily harm* as reckless endangerment. "When the natural or probable consequence of particular conduct would be death or grievous bodily harm, it may be inferred that the conduct is *likely* to produce that result." *See* paragraph 54(c)(4)(a)(ii). MCM, pt. IV, ¶ 100a.c. (5) (emphasis added).

Undefined in the statute and vague on its face, this particular element of the reckless endangerment offense is left even more amorphous in light of the military courts' efforts to apply it in reviewing Herrmann's Due Process claim. Indeed, the military courts' efforts to define *likely* in a manner that would enable them to affirm Herrmann's conviction is the precise opposite of giving "full and fair consideration" to his Due Process claim. It is left to this and other Federal courts to determine the merits of Herrmann's Due Process claim and create substance behind the contours of the term "likely" in order to: 1) ensure fair criminal law notice of just what specific conduct is prohibited; 2) prevent arbitrary or discriminatory prosecutions and convictions and

appeals where vague statutory language leads to *ad hoc* applications and *post hoc* rationales; 3) reconcile the two different interpretations of the very same word by the civilian court charged with judicial oversight for the all branches of the military; 4) reconcile the appropriate application of two federal offenses that use the same terms - reckless endangerment and aggravated assault; 5) correct for equal protection implications where the result for an HIV-positive airman differs from that of a parachute rigger, the former acquitted while the latter convicted on the same operative word; and 6) correct the manifest injustice that occurred as a result of a constitutionally vague statute because a .02% chance of occurrence cannot rise to the level of *likely* for purposes of sustaining the conviction, by any definition of *likely*.

Because the term *likely* is not defined in the MCM, the courts have gone to great lengths attempting to judicially interpret its meaning, showing that the language does not give the ordinary person, or even seasoned judicial officers, a reasonable opportunity to know what is prohibited. For example, in the excerpt of the Army Court's decision below, the Army Court considered the following as bearing on the judicial interpretation of *likely*, which is revealing of the ambiguity surrounding the concept the term was intended to represent:

> "'likely' does not mean "more than merely a fanciful, speculative, or remote possibility;" "'likely to produce death or grievous bodily harm' must entail something distinct, although not entirely unrelated, from simply "foreseeable;'" "'likely' does not mean more likely than not;'" "Nor does it require greater than 50% certainty;" "for purposes of determining likelihood of death or grievous bodily harm must be probable, not merely possible;" "Even if "likely" and "foreseeable" were precisely coextensive, then the question in these cases of "how likely is likely?" would simply transmute into "how foreseeable is foreseeable?'" "Likelihood determinations involve 'magnitudes of probability, not mathematical certainty;'" "We are confident that wherever the legal standard does rest, it is at a point less than 'more likely than not;'" "A likely consequence has been legally defined as one that is 'natural and *probable*;'" "probable means less than preponderance;" "'natural and probable' should not be interpreted to mean more likely than not;" "risk compared to

> odds;" "chances should not be measured in terms of mathematical percentages;" "a plain English definition;" "In military law, a depraved-heart murder charged under Article 118(3), UCMJ, requires a dangerous act; an act "characterized by heedlessness of the *probable* consequences of the act or omission, or indifference to the *likelihood* of death or great bodily harm;'" "many reputable dictionaries and each contains multiple definitions of the word 'likely;'" "the plain English denotations of the term somewhat different than the same term's connotations, common usage, and synonyms;" and "Definitions of "likely to occur" range from "expected outcome" to "probable" to "something less than reasonably certain" to "justifying belief of occurrence" to "might well happen.'"

Herrmann, 75 M.J. at 675 – 678.

The vagary of the statute is not only borne out by the lengths to which the Army Court went trying to define it, *supra*, but also by the distinct interpretations accorded the statute between the Army Court in *Herrmann*, the CAAF in *Gutierrez*, and within the CAAF itself comparing *Gutierrez* and *Herrmann*. Each Court reached different judicial interpretations based on different rationales for the single statutory word, *likely*.

It is well-settled, however, that the language "likely to produce death or grievous bodily harm" cannot mean one thing in some fact scenarios and entirely another thing in others. The law requires "only one standard: whether the means were likely to produce death or grievous bodily harm." *United States v. Outhier*, 45 M.J. 326, 328 (C.A.A.F. 1996).

As the law stands now, there are varying or "shifting sands" judicial interpretations for the same statutory term in light of the Army Court's and the CAAF's disparate rulings on the same question. In addition to varying judicial interpretations within the crime of reckless endangerment, the different standards extend to the distinct crime of aggravated assault. "Likely to produce death or grievous bodily harm" cannot not mean one thing for purposes of an aggravated assault charged under Article 128, UCMJ, and another thing for purposes of a reckless endangerment charged

under Article 134, UCMJ. All this is to say that even though there are vagaries in the various decisions that define *likely*, the conduct at issue in Herrmann's case cannot be said to be *likely* to produce death or bodily harm under any standard or plain English definition of the word.

The unconstitutional facial vagary coupled with inconsistent applications of the same statutory language implicates equal protection concerns as well. The CAAF applied one standard for an HIV-positive airman and an altogether different standard for a Special Forces parachute rigger. In reversing his conviction for aggravated assault for having sex with varied partners without informing them of his HIV-status, the CAAF held in *Gutierrez* that a 1:500 chance of causing harm does not satisfy the requirement element of *likely*. By contrast, in sustaining the parachute rigger's conviction in *Herrmann*, the CAAF sought to limit the 1:500 *Gutierrez* ratio to HIV-cases, which is a distinction without a legal difference.

And, in the search for the truth, the Army's leading Field Manual on point, however, shows that a main parachute will deploy properly 99.98% of the time. Headquarters, Department of the Army, Field Manual 3-21.220, *Static Line Parachuting Techniques and Training*, (October 2013), Table 15-2, page 15-4. Accordingly, a reserve parachute would only have to be pulled .02% of the time. Within that .02% of reserve parachute pulls, the possibility of a failure reduces to almost never.

Of those injuries, an even smaller amount can be viewed likely to produce death or grievous bodily harm. The total crude injury rate for military static-line parachuting is only 10.5:1000 jumps. Knapik, Joseph *et al*, Epidemiological Report No. 12-HF-17G072-10, *Military Airborne Training Injuries and Injury Risk Factors*, Fort Bragg, North Carolina, June-December 2010, US Army Public Health Command (Provisional) January 2011.

These injuries include: poor parachute landing falls (PLFs) (88.1%); static line problems (6.1%); entanglements (2.0%); tree landings (1.2%); and poor aircraft exits (0.9%) accounted for 98% of known events associated with injuries. None of these injuries involved the reserve parachute. The rate of *serious* injury or death is much lower. Although the U.S. military does not publicly release fatality statistics, new arrivals to the 82nd Airborne Division are told that fatalities occur in roughly 1:125000 jumps. A foreign study even showed zero fatalities out of 43,690 jumps. Cilli, F, *et al, Parachuting Injures: A Retrospective Study of 43,690 Military Descents*, Balkan Medical Review 9 (2006) at 145.

The CAAF also discounted Herrmann's showing of the many preconditions that must occur in sequence before a paratrooper would have to pull her reserve parachute. For example:

> While the evidence demonstrated the potential for harm from a T11R parachute malfunction, the government did not demonstrate the likelihood of such an event happening in the first place. More specifically, the government did not demonstrate the likelihood of failure because of the pencil packing or the likelihood of any condition that must occur prior to a jumper needing his reserve occurring. The government put on either no or insufficient evidence regarding the likelihood of: 1) the reserve parachute making it through in-house checks; 2) the reserve parachute getting onto a prospective jumper; 3) JMPI not catching the deficiency; 4) the prospective jumper making it onto an aircraft; 5) the prospective jumper exiting the aircraft; 6) the main parachute failing to the point a reserve parachute is needed; 7) the jumper activating the reserve parachute; and 8) the reserve parachute failing because it was not re-packed. Not only was the government required to demonstrate that the totality of each step would make it likely the reserve parachute would be needed and fail, but they did not demonstrate it would happen within the following 365 days. At the 365-day point, the pencil packed parachutes would be repacked.

Appellant's CAAF Br. at 9.

Although there are vagaries in the various decisions that define *likely*, the conduct at issue in Herrmann's case cannot be said to be *likely* to produce death or bodily harm under any standard.

Indeed, under *Gutierrez*, or even under the language in CAAF's rationale in its *Herrmann* opinion, the conviction is legally insufficient because .02% is below the common everyday understanding of likely to occur. Put differently, and notwithstanding the varying standards the CAAF announced for the same statutory language, application of *Gutierrez* or application of *Herrmann* results in the same outcome in this particular case: .02% does not satisfy the required criminal element of *likely*. The probability of getting seriously injured or killed in an airborne operation is markedly lower than the risk of transmitting HIV as set forth in *Gutierrez*. Accordingly, Herrmann must be one of the arbitrary prosecutions and convictions and flawed appeals the vagueness doctrine and *Bouie*, *supra*, seek to prevent.

The CAAF also discounted that no witness testified that a pencil-packed parachute was "likely" to cause harm was sufficient to sustain the conviction. Moreover, the CAAF overlooked the fact that the chain of potential victims in *Gutierrez* is possibly exponential, as each unprotected sexual act could spread HIV to numerous, unknowing victims, and in turn, those victims could unknowingly spread the disease. In the instant case, if an accident caused by a pencil-packed reserve parachute ensued, the victim chain – if even extant - would consist of one link.

Based on all the evidence adduced at trial, it appears that – at most – it was conceivable that a pencil-packed reserve parachute would fail to properly deploy if pulled in an emergency after a main parachute did not deploy as intended. What the CAAF overlooked, however, is that this conceptual possibility rarely occurs: certainly, less than in 1:500 instances.

The statistical evidence shows that that the likelihood of a pencil-packed reserve parachute that never left the packing facility ever producing death or grievous bodily harm is near nil. The overall injury rate for *all* airborne operations, including those which occur in the far more likely deployment of one's main parachute, is only 10.5:1000. The gross majority of these overall injuries

are not death or serious bodily injuries. This statistic combined with the aforementioned failure rate of reserve parachutes is far less than the 1:500 standard CAAF enunciated in *Gutierrez*. Herrmann is hence placed in a position whereby he is adjudged by a far stricter standard than one who infected with HIV knowingly had sex with others without informing them of his medical condition.

Varying standards for conduct arising under one statute, let alone two statutes containing the same phraseology, cannot be sufficient for the specificity required of Due Process in American criminal law. More fundamentally, criminal defendants charged under a statute are entitled to equal application of that statute, because the principle of "'equality before the law . . . gives to the humblest, the poorest, the most despised [person] the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty.'" *Jones v. Helms,* 452 U.S. 412, 424 n.23 (1981) (quoting Cong. Globe, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard)).

If HIV transmission is not the likely consequence of one person diagnosed with HIV having unprotected sex with another HIV-free victim, then, the probability of a pencil-packed reserve parachute causing serious bodily injury cannot be punishable by that very standard of likelihood. For these reasons, the required element, "[t]hat the conduct was *likely* to produce death or grievous bodily harm to another person," was not, and cannot be satisfied beyond a reasonable doubt and was not fully nor fairly reviewed in military courts. *Burns*, 346 U.S. at 142.

As Judge Wiss wrote in his separate opinion in *United States v. Joseph*, 37 M.J. 392, 402 (C.M.A. 1993):

> [W]hen the Government comes before a court of law and tries to fit a round peg of conduct into a square hole of a punitive statutory provision, it is not the proper function of the court to reshape the hole so that it will accept the peg and, in the process, distort the

> hole's character. Rather, it is the proper limit of the court's function to consider whether the hole -- politically determined -- already is large enough so that the peg fits within it.

37 M.J. at 402 (Wiss, J., concurring in the result).

Here, the CAAF tried to write its way out of an earlier precedent to the severe detriment of Herrmann. Such a reshaping of its own precedential hole in order to sustain a finding of guilt in no manner provides due process to Herrmann, those who may follow him, or allows this Court to conclude with confidence that military courts fully and fairly reviewed Herrmann's claims.

B. GROUND TWO – EVIDENCE CONSTITUTIONALLY INSUFFICIENT TO SUSTAIN CONVICTIONS

Due Process requires the prosecution to prove each element of a criminal offense beyond a reasonable doubt. *Fiore v. White*, 531 U.S. 225 (2001) (granting federal habeas corpus relief because prosecution failed to present sufficient evidence to prove each element of charged crime). "The test for legal sufficiency is whether, considering the evidence in the light most favorable to the government, any rational trier of fact could have found the appellant guilty beyond a reasonable doubt. *Jackson,* 443 U.S. at 319.

Here, the record lacks sufficient evidence to meet the meaning of "means *likely* to produce death or grievous bodily harm." First, no witness provided testimony using likely, but instead, terms to convey more remote possibilities and speculations. Second, many conditions would have had to occur for a paratrooper to have to pull her reserve parachute. Third, the Army's own Field Manual states that a reserve parachute will have to be pulled only .02% of the time, which is very near zero. Fourth, the 14 parachutes were opened, inspected, re-packed and never put into use. Fifth, application of the rationales in both *Guitierrez* and *Herrmann* shows that it was potentially conceivable that Herrmann's conduct might have caused death or grievous bodily harm, but the evidence simply does not rise to the level of "likely" or "probably."

Indeed, under *Gutierrez*, or even under the language in CAAF's rationale in its *Herrmann* opinion, the conviction is legally insufficient because .02% is below the common everyday understanding of likely to occur. Put differently, and notwithstanding the varying standards the CAAF announced for the same statutory language, application of *Gutierrez* or application of *Herrmann* results in the same outcome in this particular case: .02% does not satisfy the required criminal element of *likely*. The probability of getting seriously injured or killed in an airborne operation is markedly lower than the risk of transmitting HIV as set forth in *Gutierrez*. Accordingly, this is one of the arbitrary prosecutions and convictions the vagueness doctrine seeks to prevent.

The same is true for the dereliction of duty conviction and sentence. There is no evidence of record that the Army fully, properly, and officially certified Herrmann to perform the duty for which he faced trial for being derelict. This critical absence of evidence of an element of the Article 92, UCMJ, 10 U.S.C. § 892 (2012) offense the prosecution was required to prove beyond a reasonable doubt demonstrates the constitutional insufficiency of the conviction.

Accordingly, the convictions and sentence are unconstitutional and the military courts' review was neither full nor fair by allowing these convictions to stand while reversing the conviction and sentence in *Guitierrez*. *See Juan H. v. Allen*, 408 F.3d 1262 (9th Cir. 2005) *cert. denied*, 546 U.S. 1137 (2006) (habeas granted where evidence insufficient to support delinquency adjudication for aiding and abetting murder and attempted murder); *McBath v. Gomez*, 1997 U.S. App. LEXIS 20922 (9th Cir. Aug. 4, 1997), *cert. denied,* 522 U.S. 953 (1997) (habeas granted were evidence insufficient to sustain conviction for attempted burglary); *Mitchell v. Prunty*, 138 F.3d 1280 (9th Cir.), *cert. denied*, 525 U.S. 824 (1998) (habeas granted where insufficient evidence to sustain charges of aiding and abetting murder).

C. GROUND THREE – SIXTH AMENDMENT INEFFECTIVE ASSISTANCE OF COUNSEL

In *Strickland v. Washington*, 466 U.S. 668, 686 (1984), the Supreme Court found that the Sixth Amendment entitles criminal defendants to the "effective assistance of counsel"— that is, representation that does not fall "below an objective standard of reasonableness" in light of "prevailing professional norms." To prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate: (1) that his counsel's performance was deficient and (2) that this deficiency resulted in prejudice. *United States v. Green*, 68 M.J. 360, 361-62 (C.A.A.F. 2010).

In judging the reasonableness of counsel's challenged conduct, the judge will look to the facts of the particular case, viewed as of the time of counsel's conduct. *Strickland*, 466 U.S. at 690. Furthermore, the court will consider the totality of the circumstances, bearing in mind "counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work . . . [and] recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id*.

"At the heart of an effective defense is an adequate investigation. Without sufficient investigation, a defense attorney, no matter how intelligent or persuasive in court, renders deficient performance and jeopardizes his client's defense." *Richter v. Hickman*, 578 F.3d 944, 946 (9th Cir. 2009); *United States v. Scott*, 24 M.J. 186, 192 (C.M.A. 1987) (finding ineffective assistance of counsel when defense counsel failed to conduct adequate pretrial investigation). "In many cases, "[p]retrial investigation is . . . the most critical stage of a lawyer's preparation." *House v. Balkcom*, 725 F.2d 608, 618 (11th Cir. 1984). Stated differently, where counsel did not possess the investigatory foundation to make informed tactical decisions, he is not entitled to judicial deference to his tactical trial decisions.

In this case, trial defense counsel unreasonably failed to secure and use the relevant Army Field Manual which states that a main parachute will deploy properly on a standard jump 99.98% of the time. Headquarters, Department of the Army, Field Manual 3-21.220, *Static Line Parachuting Techniques and Training*, (October 2013), Table 15-2, page 15-4. The trial judge was authorized to take judicial notice of this Field Manual and consideration of a .02% chance of a main parachute failing, then and only then having to pull the reserve parachute, and having it too fail, stood to exonerate Herrmann. Counsel unreasonably failed to investigate "all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." ABA Standards for Criminal Justice: Prosecution and Defense Function, Standard 4-4.1(a) (3d ed. 1993).

Counsel also unreasonably failed to anticipate that the prosecution would call two expert witness on the operation of main and reserve parachutes and was thus not prepared to meaningfully cross examine the prosecution's experts against Herrmann. Counsel, a civilian practitioner, did not retain a consulting defense expert on the subject, nor did counsel secure the services of a testifying defense expert to prepare and present expert opinion testimony on the most critical question: that main parachutes open nearly 100% of the time, thereby dispensing altogether with the need for a reserve parachute. Without sufficient preparation to cross-examine the prosecution's expert or a defense expert to place at issue the prosecution expert's testimony, Herrmann was substantially disadvantaged at trial.

Consequently, counsel's unreasonable failure to utilize the Army's leading Field Manual, a consulting expert, and a testifying expert, each readily available and required to prepare and present a compelling legal defense, actually prejudiced Herrmann in the form of his conviction and sentence for reckless endangerment. *See Thomas v. Chappell*, 678 F.3d 1086 (9th Cir. 2012),

cert. denied, 568 U.S. 1186 (2013) (habeas granted were counsel failed to investigate and present available evidence that would have corroborated defense theory that murder was committed by someone other than the accused); *Reynoso v. Giurbino*, 462 F.3d 1099 (9th Cir. 2006) (habeas granted where counsel cannot be said to have made a tactical decision without first procuring the information necessary to make such a decision).

After trial, Herrmann secured new counsel for both his appeal to the Army Court and then to the CAAF. After the CAAF denied Herrmann's request for reconsideration, he retained the undersigned legal counsel, each former active duty military legal officers, prosecutors, and defense counsel. Only upon review in preparation for filing in the Supreme Court Herrmann's Petition for a Writ of Certiorari to the CAAF did counsel recognize that neither trial nor appellate defense counsel had previously researched, developed, or used the Army's leading Field Manual to introduce compelling evidence that main parachutes will open 99.98% of the time, thereby establishing by reliable statistical data tracked over time that only .02% of the time would a reserve parachute ever become an issue. Had the trial judge or the appellate judges received this potent evidence on the question of likelihood of death or grievous bodily harm, it stands to reason that Herrmann may have been acquitted or his convictions and sentence vacated.

In an interesting postscript, the Army Appellate Judge who wrote the decision in *Herrmann*, Senior Judge Steven Haight, is brothers with the Army Infantry Officer, Brigadier General David B. Haight, who signed Field Manual 3-21.220 into existence. Had the Field Manual and its doctrinal data been offered upon appeal to the Army Court, it stands to reason that it may have made statistically clear that less than a .02% chance is well below any definition of *likely*.

D. GROUND FOUR – DUE PROCESS, INEFFECTIVE ASSISTANCE OF COUNSEL, AND UNREASONABLE MULTIPLICATION OF CHARGES FOR THE SAME CONDUCT

The crux of the prosecution's case at trial was to address the danger associated with failing to directly inspect and actually pack reserve parachutes and discourage the practice of pencil-packing. It is undisputed that Herrmann did not personally pencil-pack any reserve parachutes. Instead, the prosecution's theory was that he was responsible and accountable for the failures of the three soldiers who were one rank junior to him and who actually did the pencil-packing.

To achieve these admittedly legitimate goals, the prosecution turned to the three soldiers who actually pencil-packed the reserve parachutes to testify against their former Sergeant. The prosecution granted Martinez-Mojica immunity and ordered her to cooperate in the case against her former Sergeant, Herrmann. (R. at Grant of Immunity and Order to Cooperate). The prosecution issued "non-judicial punishment" under Article 15, UCMJ, 10 U.S.C. § 815 (2012) to Martinez-Mojica, Brown and Arrington. The effect – unlike Herrmann, none of the actual perpetrators of the pencil-packing faced trial, prison, and criminal discharge from the Army which stood to follow them for the rest of their lives. Martinez-Mojica was directed to return to parachute-rigging and re-assume her duties packing and inspecting. Then, the prosecution lodged two Charges for the same conduct against Herrmann, reckless endangerment and dereliction of duty.

To the extent the reckless endangerment conviction fails, so too must the dereliction of duty. They are inextricably intertwined with the identical operative facts, are the result of an unreasonable multiplication of charges by the prosecution, and inadequately defended due to the deficient assistance of counsel at trial. The prosecution claimed Herrmann's dereliction was his failure to supervise the junior enlisted soldiers recklessly endangered the lives of fellow paratroopers. The dereliction of duty charge is simply a description of the prosecution's theory of Herrmann's wrongdoing as a failure-to-supervise that resulted in the reckless endangerment. The

duty of which he was accused of being derelict must be a legal nullity because Herrmann was not certified to supervise soldiers in their packing of reserve parachutes on the date in question.

VIII. PRAYER FOR RELIEF

WHEREFORE, Petitioner Jared D. Herrmann respectfully prays that the Court:

1) Award the writ, reverse, overturn, and vacate his convictions and sentence in their entirety with prejudice;

2) Order Respondents to immediately and forthwith restore all pay, rank, benefits, entitlements, and privileges as have been unlawfully denied by Respondents of said prosecution, conviction, sentence, and lack of full and fair review;

3) Order Respondents to immediately, completely, and expeditiously make all such changes to all of Herrmann's official and unofficial records in Respondents' care, custody, and/or control in order to fully effectuate, enable, and carry out the Order of this Court;

4) Award Herrmann costs and attorneys' fees; and

5) Grant such other relief as may be appropriate and to dispose of this matter as law and justice require, 28 U.S.C. § 2243; or alternatively,

6) The Court, pursuant to Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts (Habeas Rules), should order the Respondents to produce the transcript of trial, the transcript of all postconviction hearings (before the Army Court and the CAAF), other relevant records in the case, file its answer, motion, or other response, and afford Petitioner the opportunity to reply to the Respondents' answer;

7) The Court should order discovery on behalf of Petitioner pursuant to Habeas Rule 6;

8) The Court should order expansion of the record pursuant to Habeas Rule 7;

9) The Court should conduct a hearing at which evidence may be offered concerning the

factual allegations of the Petition; and

10) Grant such other relief as may be appropriate and to dispose of this matter as law and justice require. 28 U.S.C. § 2243.

Respectfully submitted,

Jared D. Herrmann

By: s/ John N. Maher
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DATED this 26th day of November 2018.

VERIFICATION

Pursuant to 28 U.S.C. § 2242, Petitioner Jared D. Herrmann's application for a Writ of Habeas Corpus is in writing and signed and verified by his attorneys acting on his behalf.

CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2018, I electronically transmitted Petitioner Jared D. Herrmann's Petition for a Writ of Habeas Corpus Under 28 U.S.C. § 2241, to the Clerk's Office using the CM/ECF System for filing, forwarding to a judge pursuant to the Court's assignment procedure per Habeas Rule 4, and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants: United States Attorney for the District of Arizona.

By: s/ John N. Maher