IN THE MATTER OF AN APPLICATION TO THE CRIMINAL CASES REVIEW COMMISSION IN THE CASE OF

REGINA

-v-

ALEXANDER WAYNE BLACKMAN

REPORT IN SUPPORT OF THE APPLICATION

This is a Report prepared by we three counsel jointly, in support of an application to the Criminal Cases Review Commission ('CCRC') by former Acting Colour Sergeant Alexander Wayne Blackman of the Royal Marines ('the Applicant'), pursuant to Section 12A of the Criminal Appeal Act 1995.

We were instructed on behalf of the Applicant in September 2015 under the Bar Public Access Scheme and our names and chambers appear below.

15th December 2015

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EXECUTIVE SUMMARY

1. **We raise the following matters in support of this application for a referral to the Court Martial Appeal Court:** (*Note they are listed in no special order of importance*)

    a. **There is now new evidence in the form of an expert pathology report by Dr Ashley Fegan-Earl, that supports the Applicant's contention at trial that the deceased appeared dead and he believed him to be dead before he shot him, merely intending to desecrate his body.**

    b. **There is now new evidence in the form of a psychiatric report by Professor Neil Greenberg, who concludes that the Applicant was suffering from an abnormality of mental functioning at the time of the incident thus reducing any culpability from murder to manslaughter by reason of diminished responsibility. This report and its conclusions are confirmed by a new second report by Dr Michael Orr, the psychiatrist who examined the Applicant in November 2013, after his conviction but before sentence.**

    c. **There is now the new argument that on the evidence actually heard and summed up at trial, manslaughter by reason of loss of control ought to have been left to the Board as an alternative verdict to murder. This was overlooked by all parties, and notably the learned Judge Advocate General.**

    d. **There is now the new evidence of the Telemeter Report, Colonel Oliver Lee and RSM Moran supporting loss of control manslaughter.**

    e. **There is now the new argument that on the evidence adduced at trial, the lesser verdict of unlawful act manslaughter ought to have been left to the Board as an alternative to murder. This was overlooked by all parties, and notably the Judge Advocate General.**

    f. **There is now the new argument that on the evidence adduced at trial, the lesser verdict of gross negligence manslaughter ought to have been left to the Board as an alternative to murder. This was overlooked by all parties, and notably the Judge Advocate General.**

    g. **There is now the new argument that the murder conviction is unsafe, because it was secured in part by long and improper cross-examination of the Applicant by the Crown on inadmissible evidence, namely the diary of Marine C (Hammond). Nobody objected to this, as they should have done, and notably not the Judge Advocate General.**

    h. **There is now the new argument that the murder conviction is unsafe, because the Applicant's defence representation below was incompetent.**

INTRODUCTION

2. The structure of this Report is that we shall set out below a concise introduction to the case and to the five Grounds of Appeal, each of which is then considered in greater depth in the body of the Report. The footnotes form an integral part of the Report throughout. Except where otherwise stated, the emphasis added in bold is ours throughout.

Case History

The Trial

3. The Applicant, then known as 'Marine A', was jointly charged with two other Royal Marines with a single count of murder of an unknown Afghan insurgent on 15th September 2011 whilst on active service in Helmand, during Operation Herrick 14.

4. On 8th November 2013 at a Court Martial heard at Bulford Court Martial Centre before the learned Judge Advocate General, HH Judge Blackett ('the JAG'), and a Board of seven officers, the Applicant was convicted of murder, contrary to section 42 of the Armed Forces Act 2006. His co-accused (then known as 'Marine B'[1] and 'Marine C'[2]) were both acquitted.

5. On 6th December 2013, the Applicant was sentenced to life imprisonment with a minimum term of 10 years before consideration of parole, a reduction to the ranks and dismissal with disgrace from HM Armed Forces.

The Appeal

6. The Applicant appealed with leave against his conviction and sentence to the Court Martial Appeal Court ('CMAC') at a hearing on 10th April 2014.

7. The Applicant's single ground of appeal against conviction was that section 160(1) of the Armed Forces Act 2006, which allows for conviction by simple majority of votes by the Board, rendered his conviction inherently unsafe,[3] and was not human rights compatible.

8. Judgment was reserved, and was given by Lord Thomas LCJ on 22nd May 2014. The Applicant's appeal against conviction was dismissed. His appeal against sentence was allowed but only to the extent that the minimum term was reduced from 10 years to 8 years.

Our Instruction

9. Following the dismissal of the appeal against conviction the Applicant's case, as is well-known, continued to evoke strong public sympathy and dismay. There were well over 100,000 signatories to a petition for a Parliamentary Debate which took place on

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[1] Lance Corporal Watson
[2] Marine Hammond
[3] Reported as *Blackman* [2014] EWCA Crim 1029 at [16] (Volume VI, Tab 8)

September 16th 2015.[4] The Daily Mail newspaper launched a campaign '*Justice for Sergeant Blackman*' that same month, spearheaded by the author Frederick Forsyth CBE, the former Commanding Officer of the SAS Regiment Major General Sir John Holmes, the musician Sir Tim Rice, and Richard Drax MP.

10. These various efforts culminated in our being instructed to advise and report in September 2015.

The Present Application

11. The Applicant now applies to the Criminal Cases Review Commission for his conviction of murder and the sentence imposed on appeal, to be referred back to the CMAC under section 12A of the Criminal Appeal Act 1995, on the basis that:

    a. There is a real possibility that the conviction would be overturned, and in the alternative that the sentence would be further reduced, if so referred;
    b. This real possibility arises from new evidence and new arguments which were not put forward at trial or appeal; and
    c. The Applicant has already appealed both against his conviction and sentence.

12. To repeat well-known principles of jurisdiction, the CMAC will only overturn the conviction if it is found to be unsafe.[5] It may quash the sentence and pass in substitution for it any sentence that it thinks appropriate, so long as it is a sentence that the Court Martial had power to pass in respect of the offence in question, and is not more severe than the sentence originally imposed.[6]

13. The proper interpretation of '**real possibility**' was considered in *R v Criminal Cases Review Commission, ex parte Pearson* [2000] 1 Cr App R 141,[7] DC. Lord Bingham LCJ who held that, in this context, a 'real possibility' is:

> "*... more than an outside chance or a bare possibility, but which may be less than a probability or a likelihood or a racing certainty.*" (*ibid* at 149F)

14. The fresh evidence and the new legal arguments which we submit give rise to a real possibility that the conviction would be overturned, or in the alternative the sentence reduced, are set out below.

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[4] This Parliamentary debate can be found in Hansard at Column 339WH *et seq*, and also at the following web address:
http://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm150916/halltext/150916h0001.htm#15091640000001

[5] Section 12 of the Court Martial Appeal Act 1968

[6] Section 16A of the Court Martial Appeal Act 1968

[7] Volume VII, Tab 12

Fresh Evidence

15. We submit there is a real possibility that the CMAC would receive the following fresh evidence under section 28 of the Court Martial Appeals Act 1968[8] and that as a result:

    a. the CMAC would find the conviction unsafe; or, in the alternative,
    b. the CMAC would reduce the minimum term still further.

Ground 1: Pathology Evidence

16. We have obtained a new pathology report dated 20th November 2015 from the distinguished forensic pathologist Dr Ashley Fegan-Earl.[9] Dr Fegan-Earl explains and concludes that there are a number of medical reasons why the deceased may well have **appeared** dead to the Applicant when he fired.

17. Inexplicably, no pathology evidence whatever was called in defence of the Applicant at his trial.[10] There was only minimal and frankly wholly ineffectual cross-examination of the Crown pathologist Dr Nicholas Hunt[11] by Mr Berry QC, then defending.

18. Had Dr Fegan-Earl's report been obtained at trial, it would have given strong forensic support to the Applicant's contention that he believed the insurgent already dead when he discharged his weapon. This was after all his sole defence at trial.

Ground 2: Psychiatric Evidence

19. We have obtained a new psychiatric report dated 15th November 2015 from Professor Neil Greenberg.[12] He is perhaps the country's leading expert on psychiatric illness within the military. Professor Greenberg concludes that:

    a. The Applicant was suffering at the time from an abnormality of mental functioning which arose from a recognised mental condition, namely an Adjustment Disorder.
    b. On the balance of probabilities, the Adjustment Disorder substantially impaired the Applicant's ability to form a rational judgment and / or to exercise self-control.
    c. This Adjustment Disorder was a significant contributory factor causing him to have shot the insurgent.
    d. This abnormality of mental functioning also lends support to the Applicant's contention that he thought the insurgent was dead when he fired. This is because his Adjustment Disorder may well have affected his judgment, and in particular his ability to judge such matters as this correctly.

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[8] This is effectively identical to section 23 of the Criminal Appeal Act 1968.
[9] Volume II, Tab 1
[10] The old legal team had obtained an unhelpful report from a Dr Jason Payne-James, a forensic physician and police surgeon, which they did not in the event use.
[11] Transcript 29.10.13, pp 21D-25G (Volume VI, Tab 1)
[12] Volume II, Tab 2

20. No psychiatric evidence was sought by the old defence legal team before conviction.[13] Psychiatric evidence belatedly obtained from an experienced consultant psychiatrist, Dr Michael Orr in a report dated 27th November 2013,[14] was relied on in mitigation before the Court Martial and again on appeal, but only in relation to sentence. Inexplicably, none was ever sought by the old legal team prior to his conviction for murder. This was a material and significant failing by them.[15] It was arguably even professional negligence.

21. Dr Michael Orr has now written a further report dated 4th December 2015.[16] He agrees with Professor Greenberg's opinion, and he explains that if he had been instructed prior to trial to consider the defence of diminished responsibility, and most certainly if he had been provided with the extensive materials that Professor Greenberg has since unearthed, he would have given a like diagnosis and opinion.

22. Had Professor Greenberg's report and Dr Orr's second report been available at trial:

    a. they would have raised the defence of diminished responsibility;
    b. they would also have supported an alternative verdict of manslaughter on the basis of loss of control; and
    c. they would also have supported the Applicant's primary contention (and sole trial defence) that he honestly believed the insurgent was already dead when he fired, intending then only to desecrate his body.

Appeal against Sentence

23. In the alternative, even if the CMAC is not willing to quash the conviction, the new psychiatric evidence affords the Applicant greater mitigation than was ever available to him previously, on the basis that it shows he was suffering at the time from a genuine mental illness. This would justify a further reduction in the minimum term.

New Evidence in relation to Operation Herrick 14

24. We have obtained the following further new evidence:

    a. The Ministry of Defence "*Operation Telemeter Report*",[17] commissioned by the Navy to enquire into the circumstances that led to the shooting;
    b. A new witness statement from Colonel Oliver Lee,[18] formerly the Commanding Officer of the Applicant at the time of the shooting; and

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[13] "*It is very unfortunate that the only medical evidence before the Court Martial and before us was obtained over two years after the murder.*" (judgment on the appeal against sentence, *Blackman* [2014] EWCA Crim 1029 at [75], *per* Lord Thomas LCJ; Volume VI, Tab 8)
[14] Volume III, Tab 6
[15] *Ravalia* [1998] EWCA Crim 2926 (Volume VII, Tab 13), which is addressed further under **Ground 5: Incompetent Representation**.
[16] Volume II, Tab 3
[17] Volume II, Tab 8, comprising the "*Telemeter – Internal Review*" and the "*Op Telemeter Review Human Factors Report*"
[18] Volume II, Tab 4

c. A new witness statement from Regimental Sergeant Major ('RSM') Stephen Moran,[19] formerly the RSM of the Applicant at the time of the shooting.

25. The secret and classified Telemeter Report was signed off by its author Brigadier Huntley RM on 11th March 2015, and was made available to us after a Statement in Parliament so undertaking, by the Under Secretary of State for Defence Mark Lancaster MP, on 16th September 2015.[20]

26. Likewise, the Prime Minister David Cameron MP answering a Question in Parliament from Richard Drax MP on 25th November 2015, confirmed that the Government had disclosed the Report to us for the purposes of this CCRC application.[21]

27. None of this new evidence was available to the Applicant at trial or on appeal, nor indeed was it yet in existence.

28. Had this evidence been available at trial, it would have supported an alternative verdict of manslaughter on the basis of loss of control. Therefore, we deal with this topic more fully hereafter under **Ground 3A: Loss of Control**.

Appeal against Sentence

29. In the alternative, even if the CMAC is not willing to quash the conviction, the new evidence in relation to his leadership failings in Operation Herrick 14 affords the Applicant greater mitigation than was ever available to him previously, on the basis that

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[19] Volume II, Tab 6

[20] The Under Secretary stated as follows:

"***I remain convinced that transparency is the key in this case and I am keen to provide it. Therefore, if Sergeant Blackman's defence team wished this report to be considered by the Criminal Cases Review Commission, the MOD would provide them with a confidential copy.***" (Hansard at Column 358WH; see footnote 4 above for the link to the full Debate)

[21] The question asked of the Prime Minister and his answer were as follows:

Richard Drax (South Dorset) (Con):

"*I know that my right hon. Friend is aware of the growing chorus of concern surrounding the conviction of Alexander Blackman, the former Royal Marine non-commissioned officer who shot a fatally wounded insurgent in Afghanistan in 2011. If there is indeed new evidence and if, as many feel, there has been a miscarriage of justice, does my right hon. Friend agree it is right that this matter should be looked into again?*"

The Prime Minister:

"*This is exactly why the Criminal Cases Review Commission exists—to look at where there is or may have been a miscarriage of justice. As my hon. Friend knows, we gave the internal report of the naval services to Sergeant Blackman's legal advisers, so there is proper disclosure in this case. The legal team says that it is looking at the option of applying to the Criminal Cases Review Commission. While we are on this point, let me say that our Royal Marines have a worldwide reputation as one of the world's elite fighting forces. They have made an incredible contribution to our country, and we should pay tribute to them.*"

it demonstrates the true extent to which he was failed by his chain of command. This too would justify a further reduction in the minimum term. Again, we deal with this topic more fully under **Ground 3A: Loss of Control**.

New Legal Arguments

30. There is a real possibility that the CMAC would, on the basis of the following new legal arguments, whether taken individually or cumulatively, find the conviction for murder unsafe.

Ground 3: Failure to leave manslaughter

31. The JAG erred in failing to leave manslaughter to the Board. It was an alternative verdict clearly raised by the evidence which was actually called and summed up.[22] Yet the issue of whether to leave manslaughter as a possible verdict was never raised at trial, or on appeal, by any party. This was a fundamental error in the process and professional negligence by the old legal team.

32. There were three possible routes to an alternative verdict of manslaughter on the evidence actually heard by the Board and indeed summed up by the JAG:[23]

Ground 3A: Loss of Control

a. Loss of control:[24]

   i. There was sufficient evidence called below upon which the Board could have found that the Applicant shot the insurgent having lost his self-control as a result of one or more qualifying triggers; AND
   ii. The new evidence in relation to the failures of his commanders further supports that defence of loss of control manslaughter, as explained below.

Ground 3B: Unlawful Act Manslaughter

b. There was sufficient evidence called below upon which the Board could have found that the Applicant's shooting the insurgent was an unlawful and dangerous act which caused the insurgent's death, even if the Applicant believed the insurgent to be dead at the time; and

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[22] See *Coutts* [2006] UKHL 39 at [23], *per* Lord Bingham (Volume VII, Tab 4)
[23] We now raise a fourth ground – diminished responsibility – under **Ground 2: Psychiatric Evidence**. This could not of course arise on the evidence actually heard by the Board. It requires psychiatric evidence, which should have been obtained and presented by the old defence team at trial, but inexplicably was not.
[24] Pursuant to sections 54 and 55 of the Coroners and Justice Act 2009

Ground 3C: Gross Negligence Manslaughter

c. As above, there was sufficient evidence called below upon which the Board could have found that the Applicant in shooting the insurgent, had been grossly negligent as to whether he was alive or dead, even if the Applicant honestly believed the insurgent to be dead at the time.

Diminished Responsibility

33. This is dependent on the new psychiatric evidence from Professor Greenberg and Dr Orr summarised above. Therefore, we will deal with diminished responsibility more fully hereafter under **Ground 2: Psychiatric Evidence**.

Ground 4: Improper Cross-Examination

34. The Applicant was asked improper questions at great length in cross-examination by Crown counsel in relation to Marine C's (Hammond's) diary. No objection was raised at trial by those then defending or by the JAG, and no complaint about this was raised as a ground of appeal, as it should have been, by those then defending.

35. This line of cross-examination was calculated to give the diary in the eyes of the Board the appearance of an evidential status which it ought never to have had, since it was in law inadmissible against the Applicant. This caused real (perhaps irreparable) prejudice to his case.

Ground 5: Incompetent Representation

36. The Applicant was represented at trial and on appeal by counsel Mr Anthony Berry QC leading Mr Peter Glenser, who were instructed by Mrs Issy Hogg solicitor of Messrs Coomber Rich of Basingstoke.

37. The Applicant's then representatives conducted his defence inadequately in many respects, and in a way that resulted in errors and irregularities both at trial and on appeal, and which rendered the process unfair and the verdict against him unsafe.

THE FACTS

The Prosecution Case

38. On 15th September 2011, when on active service during Operation Herrick 14 in Helmand, Afghanistan, the Applicant shot at close range and killed an unknown Taliban insurgent.

39. The deceased had been captured following an earlier incident, when he was shot and mortally wounded by an Apache helicopter gunship.

40. The Applicant at that time held the rank of acting Colour Sergeant in J Company ('J Coy'), 42 Commando ('42 Cdo'), 3 Commando Brigade ('3 Cdo Bde'), of the Royal Marines.

41. He was in command of a multiple of some 15 men in total, based at Command Post ('CP') Omar, in the Nad-e Ali North area ('NDA(N)') of Helmand Province, Afghanistan. This was aptly described by at least one national newspaper at the time as "*the most dangerous square mile in the world*".

42. At 14:27 that day, CP Talaanda, which was also in NDA(N), and approximately one mile to the north-west of CP Omar, came under Taliban small arms fire. Fire was returned.

43. At approximately 15:00 that day, CP Omar received reports over the radio from J Coy Headquarters, that two insurgents, one armed with a long-barrelled weapon, were moving between compounds to the north of CP Omar. The Applicant's multiple was ordered to prepare a patrol which left CP Omar at approximately 15:30, comprising the Applicant leading eight of his soldiers.

44. By 15:59, having searched compounds and spoken to locals who denied seeing anything, and not having spotted the insurgents, the patrol headed back towards CP Omar. The patrol had nearly reached home base, when it was reported that the two insurgents had been sighted by the Persistent Ground Surveillance System ('PGSS' – effectively a balloon with a range of cameras and sensors). An Apache helicopter gunship was scrambled in support from Camp Bastion.

45. At 16:18 the Apache engaged the target with its 30 mm chain gun cannon. The attack was called off by Headquarters after no less than 139 explosive rounds had been fired at the insurgent.

46. At that point the Applicant's patrol was tasked by J Coy Headquarters to carry out what is known as a Battle Damage Assessment ('BDA'). Once they had reached the edge of a field the injured insurgent was spotted lying out in the open. He was very seriously injured, having sustained a "*sucking chest wound*"[25] and many other shrapnel injuries to his sides and back.

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[25] This is the contemporaneous description the Applicant himself gave of the injury as recorded on the video footage (Professor French's transcript; Volume III, Tab 4, p 13)

47. The Applicant together with Marine C, approached the insurgent and recovered an AK47 variant rifle, a hand grenade and two magazines of ammunition. They also checked that the insurgent was clear of booby traps.

48. Marine B (Lance Corporal Watson) was also a member of the patrol. He was acquitted in due course. He was wearing a helmet-mounted camera that recorded much of what subsequently took place. This was unknown to the others and was against regulations.

49. The Applicant called for assistance from his men to move the insurgent. Marine B and Marine D (Marine Pearson – charged but later not proceeded against) dragged the insurgent towards a line of trees at the side of the field.

50. At all times there was a well-grounded fear of renewed attack by the missing insurgent (of the two first spotted), or by their confederates.

51. There followed conversation between the marines concerning treating the insurgent.[26] The Crown relied on these exchanges in support of its case that the killing was premeditated and that there was no genuine attempt to assist the dying man, but rather doing it for appearances only for the benefit of anyone who might have been observing.

52. The defence on the other hand was, that whilst the marines may well have been personally unsympathetic to the insurgent, their attempts to assist him were genuine and compliant with the relevant protocols, and that their untoward conversation was merely soldierly banter and black humour typical in combat situations.

53. The footage culminates with the Applicant being seen to shoot the insurgent in the chest with his pistol. Then he states, "*There you are, shuffle off this mortal coil you cunt… It's nothing you wouldn't do to us.*"[27]

54. The Applicant later says, "*I've just broke the Geneva Convention*."[28]

55. Biometric enrolment was completed and the body was abandoned *in situ*. This was the standard operating procedure in this theatre. The patrol then returned to base at CP Omar.

56. Since the body was never recovered, there was of course no post mortem examination ever conducted.

57. The footage came to light over a year later in the hands of an uninvolved individual, and by a chain of fortuitous and now irrelevant circumstances. This led to the present investigation.

58. When arrested and first interviewed over a year later on 22nd September 2012, the Applicant stated that he gave first aid to the insurgent but that despite those efforts he had

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[26] Professor French's transcript (Volume III, Tab 4, p 10 *et seq*)
[27] Professor French's transcript (Volume III, Tab 4, p 21)
[28] Professor French's transcript (Volume III, Tab 4, p 21)

passed on. During that interview the Applicant was only shown a part of the headcam footage, not including the shooting.

59. The Applicant was further interviewed the following month on 12th October 2012 and was now shown the remaining footage, which did also capture the shooting. The next day he was again interviewed in relation to that footage. During that later interview on 13th October 2012, the Applicant handed in a prepared statement (itself dated 12th October 2012)[29] stating that he believed that the insurgent was dead before he shot him. This became in due course his sole trial defence.

The Defence Case

60. His basic defence was a simple one in this prepared statement,[30] which we now set out in full:

> "*1. I am P055242E CSgt Alexander Blackman. I wish to make this prepared statement which I have asked my solicitor to write down and read out for me. The content of the statement is my version of events.*
>
> *2. On 22nd Sept 2012 I was interviewed about the content of a video footage taken by a headcam worn by a member of my multiple. The explanation I gave then remains my recollection of events of the incident a year ago. If I have made any mistakes in that recollection, no malice is intended by it. It is simply due to passage of time.*
>
> *3. On 12th Oct 2012 I was shown further footage taken by a headcam. In that footage I am seen to discharge my sidearm into the body of an insurgent. I can confirm that he was an insurgent in two ways:-*
>
> *a) He had been struck by an Apache helicopter being controlled from our Ops room*
>
> *b) On examination he was found to be carrying on AK47 with two full magazines and a live high explosive hand grenade.*
>
> *4. In my interview on 22 Sept 2012 I made reference to first aid and to his death. In the second video footage I am heard on the radio making reference to the fact that he has "passed." This comment is prior to my discharging my sidearm. At the time I made this comment I genuinely believed he was dead.*
>
> *5. Following my return to theatre from R&R in mid-August and up to this incident, my multiple was subject to numerous contacts.* ***On the majority of occasions we went out, when I was multiple commander, there was some form of incident. Also ring*** (sic) ***the tour there were a number of casualties and fatalities.***

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[29] Volume III, Tab 2, p 2
[30] Volume III, Tab 2, p 2

6. By the time of the incident I had lost my troop commander, who I highly respected. I also witnessed how badly affected other members of the multiple were by other deaths and life changing injuries. I was upset by the loss of Mr Augustine and was worried for the welfare of my lads. This was a very stressful time.

7. Returning to this incident, I regret to say that following the death of this insurgent, ***my stress and anger took over and I discharged my sidearm****. The comments that I am heard to make during the video footage are a* ***demonstration of my anger*** *at the time. I accept I should not have reacted in this way.*

8. ***However I wish to emphasise that at the time I discharged my sidearm, I was firmly of the opinion that the insurgent was already dead.***"

61. The Applicant eventually gave trial evidence to like effect – that he believed the insurgent was already dead when he fired the shot. He believed he was desecrating a dead body. Consequently, it was argued that he lacked the *mens rea* for murder i.e. an intention to kill or to inflict grievous bodily harm.

62. This was the only defence run at trial. There was no mention of any other from first to last.

63. In evidence the Applicant conceded that he may have been wrong in his assessment of the man being dead, but that if so his mistake was an honest one:

During his examination in chief, it was put to him that the insurgent appears to be moving and there was this exchange with his own counsel:

"*Q: He appears to be moving.*
A: I was -- I was very surprised the -- the amount he did move. Obviously I believed he was dead and, having not seen any movement in him for the last few minutes, he suddenly became very animated after I'd discharged my side-arm.
Q: So what did you think to yourself?
A: I questioned whether I was right in my mind, had I made a mistake.
Q: Yes. Is that what you were thinking in those seconds which followed the shooting?
A: Yes." (Transcript 30.10.13,[31] p 40A-C)

Later in his examination in chief, the Applicant was asked what he thought after he had returned to CP Omar:

"*Q: What did you think now at that point when you said that to the lads? What is it you thought, by that stage, you had done?*
A: I was still of the belief that I -- you know, he was dead when I discharged my weapon. There was a possibility I may have made a mistake.
Q: Because why?

[31] Volume VI, Tab 2

A: Because he was so animated after I discharged my…" (*ibid*, p 41C-D)

64. He explained much of the dialogue captured on camera as "*dark humour*",[32] common amongst Marines in that stressful environment and itself a coping mechanism to alleviate the horror of combat. He explained that his comment following the shooting, "*I've just broke the Geneva Convention*" meant his desecration of the enemy's body.[33]

65. Crucially, he also stated in terms in chief that, notwithstanding the fact that he thought the insurgent was dead, **he had lost his self-control** when he shot him:

> "*Q: You thought he was dead?*
> *A: Yes.*
> *Q: So why did you shoot him?*
> *A:* ***Stupid, lack of self-control, momentary lapse in judgement.***
> *Q: What was the purpose of it? What did you think you were doing?*
> *A: I -- well, I can't say. I've thought it about it a lot obviously over the last year as we've been going through all these pleadings. I can't give a -- anything to say -- other than to say, you know,* ***it was a lack of poor judgement on my part, a lack of self-control.***" (*ibid*, p 39D-E)

[32] *ibid*, pp 12D-E, 35G, 52G-H
[33] *ibid*, p 40F-G

GROUND 1: PATHOLOGY EVIDENCE

There is new expert pathology evidence available to support the Applicant's contention that the insurgent appeared dead and he believed him to be dead before he shot him in order to desecrate the body.

66. Section 28(1) of the Court Martial Appeals Act 1968 allows the CMAC to receive fresh evidence i.e. evidence not adduced at trial.

67. Section 28(2) of the 1968 Act sets out the following well-known factors to which the Appeal Court shall have particular regard, when considering whether to receive fresh evidence:

> "*(a) whether the evidence appears to the Court to be capable of belief;*
> *(b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;*
> *(c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and*
> *(d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings.*"

We shall address these statutory considerations below.

68. Although this was their sole line of defence at trial and despite the Crown calling Dr Hunt, a Home Office forensic pathologist, to speak of signs of life visible to him (at least) on the footage, the old legal team did not explore this issue with any expert pathologist of their own, nor did they attempt to challenge Dr Hunt.[34]

69. It is simply inexplicable in this case that the defence did not instruct a pathologist of their own to report. Yet they were once seemingly alive to the issue, because they told Mrs Blackman as early as 25th October 2012 (a year before the trial commenced) that they intended to do so.[35]

70. Whilst a physician was instructed to report, his expertise did not go to the matter in issue, because he was essentially a police surgeon, albeit very distinguished. His report was unhelpful, and so he was not used. Thus no pathologist was ever instructed to report for the defence prior to our taking over this case, nor any expert evidence called.

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[34] Transcript 29.10.13, pp 21D-25G (Volume VI, Tab 1)

[35] Notes of a conference at Mr Glenser's chambers attended by Mrs Warner-Blackman, Mr Glenser and Mrs Hogg (but not the Applicant, who was in custody) on 25th October 2012 (Volume IV, Tab 5, p 15):

> "*Told Mrs B that we have been in touch with a consultant physician (deals with transition of life to death)* ***and we will have a consultant pathologist as well (who deals with after death).***"

We comment this was anyway bizarre advice. Since when does a pathologist not deal with *"the transition of life to death*"?

71. Dr Ashley Fegan-Earl, a distinguished Home Office forensic pathologist, has now been instructed. His full report dated 29th November 2015 is appended.[36] Dr Fegan-Earl was instructed by us to consider three questions:

    a. Whether the insurgent was alive or dead when the Applicant discharged his firearm;
    b. Whether he was already mortally wounded (i.e. whether his death was imminent and inevitable) and thus whether the discharge of the firearm definitely accelerated the death; and
    c. Whether it is possible from a forensic viewpoint that the Applicant could have reasonably believed that the insurgent had died prior to him discharging his firearm, given the **appearance** which he then presented.

72. In short Dr Fegan-Earl agrees with the prosecution pathologist Dr Nicholas Hunt on the first two questions, namely that the insurgent was alive at the time the Applicant shot him, and that it did accelerate the insurgent's death, notwithstanding that death was imminent in any event.[37] So much for the first two questions.

73. Crucially however Dr Fegan-Earl also concludes that **the Applicant can reasonably have believed** that the insurgent was already dead. It is this conclusion that we now rely on:[38]

> "*In my opinion, it is entirely plausible that this individual could have sustained serious lung injuries (evidenced by a sucking wound) with a progressive deterioration in blood pressure such that he became less responsive and* ***could be perceived as having died, albeit he was alive at that time, but in a low output state. (He still had a heartbeat but had lost so much blood that no pulse could have been detected even had it been sought and the individual may be perceived as dead.)*** *It is worth stating that in many injuries such as these, blood loss may be predominantly internal rather than external, i.e. blood from a bleeding lung, or*

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[36] Volume II, Tab 1

[37] Dr Fegan-Earl's conclusions are as follows (Volume II, Tab 1, pp 13-14):
"*1. The deceased was still alive at the time at which he was shot by Sgt Blackman.*
2. He had sustained multiple ballistic injuries from a high velocity weapon resulting in major and probably fatal injuries to his chest. It is reasonable to suggest that, given the timings, and the multiplicity of injuries, that death was highly likely. The only circumstances which I can conceive of him having survived would have been by the timely application of advanced resuscitative procedure being applied to him then and there, regardless of whether the final shot had been discharged. Realistically this was impossible in the circumstances.
3. The responses seen on video suggest progressive physiological deterioration, and it is possible that he was entering into a traumatic cardiac arrest which is a low output state, in which no observable signs of life are apparent, rather than true cessation of heart beat.
4. This could have allowed for the misinterpretation that he had already died.
5. The final physical responses of the insurgent may relate more to basic brain reflexes rather than any deliberate movement of the hands towards the chest."

[38] Volume II, Tab 1, pp 12-13

> *other major structure in the chest, may "sump" within the chest space. Thus, the external blood loss may be deceptively small compared to the ongoing internal bleeding that cannot be visualised.*
>
> ***It is also important to emphasise that subtle signs of life can be difficult to elicit. There is a distinct difference between a modern emergency department with multiple designated individuals monitoring the vital signs of an individual, and the capacity for soldiers who are present in an extraordinarily dangerous situation with the risk of ongoing attack, to seek and identify such subtle signs.***
>
> ***It is true to say that bodies that are at point of death or following death may continue to twitch*** *(such was observed in bodies post judicial hangings; colonic specimens following surgical excision may also continue to move). Anecdotal evidence from soldiers indicates that even those with what are patently fatal injuries may twitch owing to excitability of the muscles. Post mortem twitching is recognised by clinicians. Whilst it is apparent from the video clips that there is some apparent volitional movement, it would be worth consideration of whether a non-medical soldier in a battle situation could reasonably distinguish between volitional movement and post mortem twitching, and thus could have misinterpreted any volitional movement as representing such post mortem twitching.*
>
> ***Overall, given that the insurgent had suffered multiple wounds from a high velocity weapon with a high level of lethality, and that his movements became progressively less apparent, in my view it is reasonable to suggest that he may have been in so-called traumatic cardiac arrest, albeit alive, and thus have potentially been perceived as having died prior to discharge of the firearm.***"

74. This new report therefore goes to the heart of the Applicant's sole defence run at trial – not that he was dead, but that he honestly believed him to be so. Had such an opinion by a forensic pathologist been sought much earlier as of course it should have been, it would have provided Mr Berry QC with the ammunition to meaningfully challenge Dr Hunt, who was arguably the prosecution's most important witness, and then to call his own evidence on the point.

75. Indeed, if Mr Berry had forearmed himself with such a report as Dr Fegan-Earl now produces, it may very well be that Dr Hunt would have agreed, after exchange of expert reports in the usual way, that the insurgent indeed **looked** dead to a layman.

76. As it was, Dr Hunt was only cursorily cross-examined by Mr Berry and was never asked the single most significant question which the defence needed to ask, namely "*Could the insurgent reasonably have **appeared** dead to the accused at the time he fired?*"[39]

[39] Transcript 29.10.13, pp 21D-25G (Volume VI, Tab 1)

77. There is a real possibility that the CMAC will receive this as fresh evidence[40] and find the murder conviction to be unsafe as a result.

[40] The discretion whether to admit fresh evidence is case and fact specific on authority, and it is a wide one focusing on the interests of justice. See *Erskine* [2009] EWCA Crim 1425 at [39] *per* Lord Judge LCJ (Volume VII, Tab 6)

GROUND 2: PSYCHIATRIC EVIDENCE

There is new expert psychiatric evidence available that the Applicant was suffering from a mental illness thereby reducing his culpability from murder to manslaughter by reason of diminished responsibility.

78. Since 4th October 2010, section 2 of the Homicide Act 1957, as amended by section 52 of the Coroners and Justice Act 2009, has provided:

> "***2.— Persons suffering from diminished responsibility.***
> *(1) A person ("D") who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an abnormality of mental functioning which—*
> *(a) arose from a recognised medical condition,*
> *(b) substantially impaired D's ability to do one or more of the things mentioned in subsection (1A), and*
> *(c) provides an explanation for D's acts and omissions in doing or being a party to the killing.*
> *(1A) Those things are—*
> *(a) to understand the nature of D's conduct;*
> *(b) to form a rational judgment;*
> *(c) to exercise self-control.*
> *(1B) For the purposes of subsection (1)(c), an abnormality of mental functioning provides an explanation for D's conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct.*"

79. Following the Applicant's conviction of murder his old defence team for the first time now hurried to instructed a psychiatrist, namely Dr Michael Orr, but for mitigation and sentencing purposes only. Dr Orr concluded that the Applicant was suffering from some symptoms of a "*combat stress disorder*".[41]

80. This opinion was readily accepted both by the JAG at sentencing and the CMAC on the appeal against sentence. The details of Dr Orr's report dated 27th November 2013 are considered in more depth at para 86 *et seq* (*post*).

81. Professor Neil Greenberg's report dated 15th November 2015 goes much further, and concludes that the Applicant was suffering from an Adjustment Disorder, which was an abnormality of mental functioning bringing him within the statutory defence of diminished responsibility.

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[41] First Report of Dr Michael Orr dated 27th November 2013 (Volume III, Tab 6, p 53)

82. Professor Greenberg has drawn from a wealth of new material, some of which was not previously available at all, and some of which was simply never provided by the old legal team to Dr Orr when it should have been.[42]

83. Professor Greenberg's full report is appended.[43] The following opinions appear:

a. There is good evidence that the Applicant was suffering from an Adjustment Disorder at the time of the shooting;
b. An Adjustment Disorder is a recognised medical condition;
c. Such a disorder due to its effects may well have impacted upon the Applicant's ability to judge correctly whether or not the insurgent was dead;
d. The Adjustment Disorder substantially impaired the Applicant's ability to form a rational judgment, and to exercise self-control;
e. The Adjustment Disorder was a significant contributory factor in causing the Applicant to shoot the insurgent; and
f. These conclusions can safely be arrived at even four years after the event by the gathering of sufficient contemporaneous evidence, which he had been able to do.

84. Therefore, there are three critical and new conclusions to be taken from Professor Greenberg's report.

a. That the defence of diminished responsibility was available to the Applicant, had his previous lawyers only bothered to explore what surely should have been an obvious issue.
b. That such psychiatric evidence, if it had been obtained, would also have assisted the Board in their assessment whether the Applicant honestly believed the insurgent was dead, thus going in addition to his sole trial defence.
c. That there is a well-established link in the military context, between poor leadership and troops acquiring a mental illness.[44]

85. It is noteworthy that the Applicant never received any trauma risk management ('TRiM') nor was he ever visited by the Padre as CP Omar was considered too dangerous for such

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[42] **Dr Orr writes that the sole materials he was given by the old legal team were the footage, the police interviews, and his two-hour interview with the Applicant** (see his first report dated 27th November 2013 at para 3.1, 4.1 and his second report dated 4th December 2015 at para 3.2.5-3.2.6; Volume III, Tab 6 and Volume II, Tab 3 respectively)

[43] Volume II, Tab 2

[44] At Appendix A to his report, Professor Greenberg writes:

"***Studies of UK personnel carried out in Afghanistan*** *have shown that troops who perceive experiencing high quality leadership have around one tenth of the rate of traumatic stress problems compared to troops who report poor leadership.* ***The direct relationship between the perceived quality of leadership and mental health has also been demonstrated in many other studies*** *of military forces carrying out arduous duties many of which date back fifty or more years.* ***Thus the link between poor leadership and poor mental health is very well established.***" (Volume II, Tab 2, p 42)

visits.[45] Visits from his Commanding Officer Lt Col Murchison were almost non-existent. This is further explanation why his mental illness went undetected. That the Applicant was indeed poorly led and let down by his chain of command, and the special relevance of that issue to loss of control, is dealt with hereafter under **Ground 3A: Loss of Control**.

86. Upon receipt recently of the new psychiatric evidence from Professor Greenberg, Dr Michael Orr was newly instructed by us to review Professor Greenberg's findings. Tellingly, Dr Orr now adheres to Professor Greenberg's opinion.

87. Dr Orr in a second report dated 4th December 2015,[46] has expanded his original opinion of November 27th 2013, because he accepts the new and much fuller evidence unearthed and described by Professor Greenberg.

88. Dr Orr confirms that all he previously had to go on from the old legal team, was the headcam footage, the police interviews, and his own 2-hour interview with the Applicant.[47] There were only five days between his oral instruction on November 22nd 2013) and his report dated November 27th 2013. Nothing was ever put into writing by Mrs Hogg by way of a letter of instruction.

89. Such was the pressure of time and the lack of preparation afforded to him, and it being clear to him that it was now too late to consider diminished responsibility, as the Applicant had already been convicted of murder, he did not then do so.[48]

90. Even so, he diagnosed a **combat stress disorder** that was readily accepted for the purposes of mitigation first by the JAG in his sentencing remarks and subsequently by the appeal court in their judgment reducing sentence.

91. Dr Orr's new conclusions are as follows:[49]

> "***6.1 Having now carefully considered the new materials comprehensively assembled by my colleague, which were not available to me, I have reconsidered this case afresh.***
>
> ***6.2 I can confirm that I am in agreement with Professor Greenberg's diagnosis of an Adjustment Disorder, which is an abnormality of mental functioning and is a recognised medical condition.***

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[45] These matters are confirmed by the jointly agreed extracts from the Telemeter Report provided by kind agreement of the MoD to Professor Greenberg via ourselves (and cited in his report at p 20; Volume II, Tab 2)
[46] Volume II, Tab 3
[47] See Dr Orr's second report dated 4th December 2015 at para 3.2.5-3.2.6 (Volume II, Tab 3) and his first report dated 27th November 2013 at para 3.1, 4.1 (Volume III, Tab 6)
[48] Dr Orr's second report dated 4th December 2015 at para 3.2.3 (Volume II, Tab 3)
[49] *ibid* at para 6.1-6.5 (Volume II, Tab 3)

> ***6.3 I am also in agreement that his symptoms were of such a nature as to substantially impair Mr Blackman's ability to form a rational judgement in relation to his conduct and exercise a proper level of self control.***
>
> ***6.4 I have now carefully considered the provisions of section 2 of the Homicide Act 1957 with which I am familiar, and concerning which in addition I have again refreshed my memory.***
>
> ***6.5 In agreement with Professor Greenberg, and in agreement with the very full reasons he gives, I now conclude that Sgt Blackman had available to him the defence of diminished responsibility at his original trial.***"

92. Dr Orr's new conclusions are particularly significant for two reasons. First, because all psychiatric evidence is a matter of professional opinion and judgment, and we now have two eminent psychiatrists who agree on the issue. Second, Dr Orr had the advantage of examining the Applicant two years closer to the killing. He is therefore well-equipped to consider and reapply Professor Greenberg's new researches and findings.

93. Given that the JAG and the Board, and later the Lord Chief Justice and the CMAC, unhesitatingly accepted Dr Orr's original conclusion about combat stress disorder, there is no reason to think that his subsequent opinion will not be equally readily accepted.

94. Accordingly, there is a real possibility that the CMAC will receive both new psychiatric reports, exercising their wide discretion to receive fresh evidence where it will advance the interests of justice to do so.

95. We turn now to the tests set out in *Erskine* [2009] EWCA Crim 1425 at [92].[50] This case authoritatively governs the tests for the appeal court to apply before receiving new psychiatric evidence at this stage. We set out the tests in that judgment, interspersed with our submissions upon them in bold.

> "*The court will normally expect the parties to provide a detailed analysis of the facts to assist it in the application of the statutory test, including an analysis of the following:*
>
> *(i) the psychiatric and/or psychological evidence or other information in relation to the appellant's mental state which was available at the time of trial;*" **Dr Orr's report was only sought by the old legal team post-conviction, and he was only given a fraction of the relevant materials and was never asked to consider diminished responsibility. It was too late anyway. The horse had left the stable, as the Applicant was already convicted of murder.**
>
> "*(ii) the evidence which has become available since the trial, and an explanation why it was not available at trial;*" **No report was sought by the old legal team pre-conviction, which is an inexplicable and culpable failure by them. The new Professor Greenberg report has unearthed a wealth of new material,**

[50] Volume VII, Tab 6

which was previously unknown to Dr Orr. Having read it, Dr Orr in his second report now agrees with Professor Greenberg.

"*(iii) the circumstances in which the appellant sought to raise on the appeal (a) the evidence available at the time of the trial and (b) evidence that has become available since the trial;*" **As above, no proper professional efforts were made by his old legal team.**

"*(iv) the reason why such evidence or information as was available at the time of the trial was not adduced or relied on at trial. This will ordinarily include details of the advice given, the reasons for the appellant's decision at trial and, subject to paragraph 89 any relevant evidence of the mental condition in the period leading up to and at the time of the trial and its impact on his decision making capacity;*" **It seems the Applicant's old legal team merely took his word that he was not suffering from mental illness as being sufficient, in spite of obvious warning signs to the contrary. The dictates of good professional practice when defending a client in a murder case such as this demanded the obtaining of a psychiatric report before trial. This point is explored in greater detail below at para 315 *et seq* under the heading of incompetent representation.**

"*(v) the impact of the fresh evidence on the issues argued at trial and whether and the extent to which it involves a re-arguing of issues considered at trial;*" **The evidence goes directly to undermine his conviction for murder and reduce it to manslaughter by reason of diminished responsibility. Note however that it <u>also</u> impacts on his primary defence that he believed the insurgent to be dead. For the new evidence indicates that his Adjustment Disorder compromised his ability to make such judgements. It would therefore also have been powerful evidence relevant to the main defence to murder, and capable of producing a complete acquittal.**

"*(vi) the extent to which the opinions of the experts are agreed and where they are not.*" **There is no dispute between these two experts in their respective conclusions, thus making the evidence strongly reliable.**

96. Accordingly, the murder conviction is unsafe.

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97. In the alternative, even if the CMAC is not minded to quash the conviction, the new evidence affords the Applicant greater mitigation than was available to him previously, as it shows he was genuinely suffering from an undiagnosed mental illness. This would justify we submit a further reduction in the minimum term imposed on his earlier appeal.

GROUND 3: FAILURE TO LEAVE MANSLAUGHTER

The Board should have been directed that the alternative verdict of manslaughter was available to them on the evidence heard at trial, on each one of the following bases: loss of control, unlawful act manslaughter, and gross negligence manslaughter.

98. The JAG failed to direct the Board on the alternative verdict of manslaughter on any basis whatever. In **Grounds 3A**, **3B, and 3C** below, we submit this alternative should have been left, on each of the three bases of loss of control manslaughter, unlawful act manslaughter and gross negligence manslaughter respectively. In this section we deal with the general principle of law that where manslaughter is a clear alternative to murder on the evidence, it **must** be left by the JAG to the Board.

General Principles

99. The sole issue left to the Board in summing up was whether they were sure that the Applicant knew or believed the insurgent to be alive when he fired. Such a stark choice was famously described by Phillimore J as "*neck or nothing*" in *Parrott* (1913) 8 Cr App R 186 at 193, CCA, a graphic analogy which has been cited in many subsequent cases.[51] It encapsulates the dilemma here.

100. The way the issue was framed to them by the JAG meant that the above question was the sole issue in the trial and left the Board with the starkest choice of all: guilty of murder, or not guilty of anything.

101. The duty to leave a possible alternative verdict when that possibility arises on the evidence was reaffirmed in the House of Lords by Lord Bingham in what is the leading case on this topic, *Coutts* [2006] UKHL 39:[52]

> "*The public interest in the administration of justice is, in my opinion, best served if in any trial on indictment the trial judge leaves to the jury, subject to any appropriate caution or warning, but* ***irrespective of the wishes of trial counsel****,* ***any obvious alternative offence which there is evidence to support.*** *I would not extend the rule to summary proceedings since, for all their potential importance to individuals, they do not engage the public interest to the same degree.* ***I would also confine the rule to alternative verdicts obviously raised by the evidence: by that I refer to alternatives which should suggest themselves to the mind of any ordinarily knowledgeable and alert criminal judge, excluding alternatives which ingenious counsel may identify through diligent research after the trial****. Application of this rule may in some cases benefit the defendant, protecting him against an excessive conviction. In other cases it may benefit the public, by providing for the conviction of a lawbreaker who deserves punishment. A defendant may, quite reasonably from his point of view, choose to roll the dice. But the interests of society should not depend on such a contingency.*

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[51] For example, *Coutts* [2006] UKHL 39 at [16] *per* Lord Bingham (Volume VII, Tab 4)
[52] Volume VII, Tab 4

> *It is of course fundamental that the duty to leave lesser verdicts to the jury should not be exercised so as to infringe a defendant's right to a fair trial. This might be so if it were shown that decisions were made at trial which would not have been made had the possibility of such a verdict been envisaged.* ***But no such infringement has ordinarily been found where there is evidence of provocation not relied on by the defence****…*" (*ibid* at [23]-[24])

102. The Coutts principle was reaffirmed in *Foster* [2007] EWCA Crim 2869,[53] *per* Sir Igor Judge P:

> "*Dealing first with the narrow question, it was long established, certainly from the early part of the 20th century (R. v Hopper (1916) 11 Cr. App. R. 136; [1915] 2 K.B. 431), at a time when murder carried the death penalty, that* ***irrespective of submissions to the contrary, even if both sides were agreed, the judge was obliged to leave the possibility of acquittal of murder and conviction for manslaughter on any available basis for which there was some evidence****. This requirement was not abated merely because its application might complicate the task of the jury.* ***The line of authority since Hopper is unbroken.*** *(See, among many others, Mancini v Director of Public Prosecutions (1943) 28 Cr. App. R. 65; [1942] A.C. 1; Bullard v R. (1958) 42 Cr. App. R. 1; [1957] A.C. 635; Von Starck v R. [2000] 1 W.L.R. 1270). No further citation of authority is needed. Each member of the present constitution, faced with the issue when sitting in the Crown Court, has unhesitatingly applied the principle, now reinforced, yet again, by Coutts.*
>
> *Murder involves unlawful killing: so does manslaughter. If the circumstances in which the defendant killed his victim may have amounted only to manslaughter, as a matter of law, he cannot be guilty of murder. Notwithstanding the abolition of the death penalty,* ***the judge's directions must not deprive the defendant of a defence to the charge of murder which, on the evidence, may be open to him, whether that evidence emerges from the defence actually advanced by the defendant at trial, or where it arises on the evidence generally. Therefore if there is any evidence that the killing may have occurred in circumstances which amounted to manslaughter, that possible verdict should be left to the jury*** *and s.6(2) of the 1967 Act would apply unless this would cause unfairness to the defence because it had not had a proper opportunity to deal with the possible alternative****. Critically to the result in Coutts and indeed other similar cases, the jury were not given any opportunity, direct or indirect, to consider a manslaughter verdict when it undoubtedly arose on the evidence. It was therefore impossible to know whether, if properly directed at the outset, the jury would have accepted or rejected this possible defence, and returned their verdict accordingly.*** *Sometimes described as a ''compromise'' verdict, (see Von Starck), the verdict remains a true verdict by which the jury indicates its inability either to accept the Crown's case to its full extent, or to acquit the defendant altogether on the basis of his defence.*" (*ibid* at [37]-[38])

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[53] Volume VII, Tab 7

103. It was ultimately the responsibility of the JAG to ensure that manslaughter was left to the Board if it arose on the evidence – which we submit it plainly did. The line of authority on this point is long established. In a case much approved since, *Hopper* [1915] 2 KB 431,[54] CCA, Lord Reading LCJ held:

> "***Whatever may be the line of defence adopted by counsel for a prisoner at the trial, the judge is bound to put to the jury such questions as appear to him properly to arise upon the evidence even although counsel may not himself have raised some point.***
>
> *After careful consideration of all the circumstances we have come to the conclusion that the question as to the crime being manslaughter only ought to have been left to the jury so as to enable them if they thought right to find a verdict of manslaughter.* ***It was not in our opinion correct to say that there was no alternative but to find accident or murder. There was sufficient evidence to justify the jury, if they accepted a certain view of the facts and circumstances, to find a verdict of manslaughter.*** *It is not for us to say whether they would have found such a verdict, but the question is whether it should have been left open to them to find it if they thought fit.*
>
> *Further, it has also to be borne in mind, although upon this not much reliance can be placed, that there had been much drinking, and the fact that there had been a fight all tended to make the appellant lose control of himself at the critical moment when he fired the rifle. In those circumstances the question ought to have been left to the jury, upon a proper direction, to say, if they were so minded, that the crime was manslaughter and not murder.*
>
> *We do not assent to the suggestion that as the defence throughout the trial was accident, the judge was justified in not putting the question as to manslaughter.* ***Whatever the line of defence adopted by counsel at the trial of a prisoner, we are of opinion that it is for the judge to put such questions as appear to him properly to arise upon the evidence even although counsel may not have raised some question himself. In this case it may be that the difficulty of presenting the alternative defences of accident and manslaughter may have actuated counsel in saying very little about manslaughter, but if we come to the conclusion, as we do, that there was some evidence—we say no more than that—upon which a question ought to have been left to the jury as to the crime being manslaughter only, we think that this verdict of murder cannot stand.***
>
> *We desire to add further that we do not accept the argument addressed to us by counsel for the Crown, and relied upon by the judge in his summing-up, that because the appellant said that he was not angry at the time, that must be taken against him as negativing the proposition that the crime could be manslaughter. In saying that he was not angry the appellant was trying to shelter himself behind the plea of accident, and it was open to the jury to say that the statement he made was not true. Other views of the facts than those given by him in his evidence*

[54] Volume VII, Tab 11

> *cannot be excluded. In a Court of justice it is for the Court, with the assistance of the jury, to arrive at the true view of the facts without paying too much attention to whether a particular witness is called by one side or the other.*
>
> *Having arrived at the conclusion that the question whether the crime was manslaughter and not murder should have been left to the jury, this Court has power under s. 5, sub-s. 2, of the Criminal Appeal Act, 1907, to substitute for the verdict found the verdict which might have been found if the jury had been properly directed. We cannot possibly say that a verdict of manslaughter would have been found by the jury, but as the question should have been left to them the appellant is entitled to the benefit of a verdict for the lesser offence.* ***We direct accordingly that the verdict of murder be quashed and a verdict of manslaughter entered.***" (*ibid* at 435-436)

104. Later cases have re-affirmed *Hopper* and its principle for over a century.[55] As Lord Bingham held in *Coutts*:[56]

> "*The objective must be that defendants are neither over-convicted nor under-convicted, nor acquitted when they have committed a lesser offence of the type charged. The human instrument relied on to achieve this objective in cases of serious crime is of course the jury. But to achieve it in some cases the jury must be alerted to the options open to it. This is not ultimately the responsibility of the prosecutor, important though his role as a minister of justice undoubtedly is. Nor is it the responsibility of defence counsel, whose proper professional concern is to serve what he and his client judge to be the best interests of the client.* ***It is the ultimate responsibility of the trial judge****...*" (*ibid* at [12])

The Responsibility of Counsel

105. Whilst the ultimate responsibility lies with the trial judge, the matter does not end there. There is also a concomitant duty upon counsel. It was described in *Hodson* [2009] EWCA Crim 1590[57] by Keene LJ as follows:

> "*We cannot conclude this judgment, however, without emphasising the duty upon counsel, at a trial such as this, to ensure that they raise with the judge, if he has not raised it of his own volition, the need at least to consider the propriety and necessity of leaving an alternative verdict such as section 20 to the jury if it is available on the facts****. Particularly where there has been a fairly recent House of Lords' decision such as Coutts, it is the duty of counsel to draw such matters to the judge's attention to ensure that things do not go wrong****, as they went wrong in this case.*" (*ibid* at [16])

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[55] See e.g. *Coutts* at [14], *per* Lord Bingham (Volume VII, Tab 4) and *Foster* at [37] *per* Sir Igor Judge P (Volume VII, Tab 7)
[56] Volume VII, Tab 4
[57] Volume VII, Tab 10

106. Hodson had been convicted of wounding with intent and appealed successfully against conviction on the basis that the alternative of unlawful wounding had not been left to the jury.

107. A trial judge should be assisted by the advocates on both sides. It is noteworthy that in *Gurpinar* [2015] EWCA Crim 178[58] at [15], Lord Thomas LCJ has only this year extended this duty to actually requiring henceforth **written** submissions from the advocates.

108. Here the JAG was assisted by neither side. Nobody mentioned manslaughter from first to last inexplicably.

109. The duty of prosecuting counsel in his role as minister of justice required that alternative verdicts should be suggested by him to the trial judge for his consideration. Our correspondence with Mr Perry QC on this issue is appended.[59] In essence he has declined to comment or to explain his silence on this issue at trial.

110. As will be seen below, the Applicant's old defence team failed to advise him or take his instructions at all, at any time, on whether or not to raise manslaughter as an alternative verdict.

The Applicant's Instructions

111. It is still not clear whether the old legal team's failure to pursue the manslaughter alternatives was deliberate but misguided, or inadvertent but negligent.

112. Mrs Issy Hogg the solicitor with conduct of the case, wrote an email to the Defendant's Assisting Officer, Captain Steve Cox RM (now Major) copied to her own senior partner Ms Joanne Coomber, an email on 22nd October 2013[60] as follows:

> "*I have been in plentiful contact with Anthony* [Berry QC] *and Peter* [Glenser] *who both have everything very much under control. Anthony, having thoroughly considered every word, is adopting the "more is less"* (sic) *approach i.e. concentrating on Al's constant assertion that he thought that the insurgent was already dead* ***with no other clever defences that will distract the board*** *away from the task in question.*"

113. Mr Berry QC wrote in Annex I to his letter to us of 9th November 2015[61] that:

> "*Mrs Hogg's use of the term "clever defences" in her e-mail of 22 October 2013 to Major Cox* [did] *not relate to possible alternatives of manslaughter. It concerns instead a brief, but soon dismissed notion, as to whether there would be any mileage in the fact that the insurgent's body had not been recovered.*"

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[58] Volume VII, Tab 9
[59] Volume V, Tab 8
[60] Enclosure 4 to our letter dated 19th October 2015 (Volume V, Tab 4, p 74)
[61] Volume V, Tab 5, p 84

114. Whatever she meant there, the new witness statements of the Applicant, his wife and his Defending Officer (and indeed Mr Berry's own recent letters) show that Mr Berry QC came to this case with a closed mind to any ideas beyond the sole issue of whether the insurgent was dead. And what is also clear is that manslaughter was never advised or discussed with the Applicant in any sensible way or his instructions sought on the issue.

115. We append recent witness statements of the Applicant,[62] his wife,[63] and the Defending Officer, Major Cox,[64] who were present throughout most and possibly all of the conferences between the Applicant and his old legal team. There are some minor differences in recollection, to be expected of honest witnesses recalling conversations in 2012 and 2013.

116. It is the common denominator of all three however that no advice was given by the old legal team, and no instructions taken by them from the Applicant, on the manslaughter alternatives.

117. For ease of reading, a composite document showing the Applicant's and Major Cox's comments verbatim and side by side is also appended,[65] as Major Cox refers in his witness statement to the numbered paragraphs in the Applicant's statement.

118. All three witnesses show that at best, manslaughter was only mentioned in passing in a wholly desultory way (Major Cox's recollection) and not discussed or advised in any proper or meaningful way at all, let alone as constituting a potential defence to the murder charge. And at worst, it was never mentioned at all by the old legal team to the Applicant and his wife, as is their recollection.

119. All three agree that instructions were never taken from the Applicant as to whether or not he wished a manslaughter verdict to be left to the Board as a lesser alternative to murder.

120. Major Cox thinks Mr Glenser made some passing reference to unlawful act manslaughter at some stage, though his recollection of this he says is vague. He also says the Applicant and his wife may not have been present.

121. Mr Berry QC himself now says however on behalf of his team that no consideration was given by them to unlawful act manslaughter – so if Major Cox were right and it ever was mentioned at all, it cannot have been in any meaningful way.

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[62] Volume IV, Tab 1 (with the Exhibits produced by the Applicant at Tab 2)
[63] Volume IV, Tab 4 (with the Exhibits produced by the Applicant's wife at Tab 5)
[64] Volume IV, Tab 6 (with the Exhibits produced by Major Cox at Tab 7)
[65] Volume IV, Tab 8

122. Mr Berry suggests "*manslaughter*" was raised by him but only in a "***limp***" way,[66] because – he claims – the Applicant wanted nothing which would jeopardise continuing his career as a Royal Marine.

123. The Applicant, his wife, and the Defending Officer however, strongly deny any such conversation, let alone ever being given the option by the old legal team. Whilst of course he wanted to continue his career as a Royal Marine (generally speaking), he was never asked by Mr Berry and never gave this as a reason for not raising manslaughter.

124. Mr Berry is notably vague and ambiguous on whether this desire to continue as a Marine was just Mr Berry's own private assumption, or whether he ever specifically asked and received such an answer from his client. Certainly there is no note or endorsement of any such exchange, which would be a crucial matter for the old legal team to record if it had ever occurred, if only to protect themselves.

125. The Applicant insists in his witness statement that if he had known about the manslaughter options, he would have wanted them to be raised to the Board in case his sole main defence were to fail (as of course it eventually did). Moreover he took no important decision without first discussing it with his intelligent wife, who attended most if not indeed all of the conferences. She is adamant in her witness statement that no such option was ever heard by her or presented to her. Both say they were wholly unaware of its existence until our instruction in 2015.

126. It may well be that this unhappy conflict of evidence will need to be explored and tested in cross-examination and resolved by the appeal court hereafter.

127. **Regardless** of what the Applicant himself or his old legal team might have wanted however, we submit that it was incumbent on the JAG to have left the manslaughter alternatives to the Board in any event as a matter of law, because (apart from diminished responsibility of course) they arose foursquare from the evidence actually called and summed up.

128. We have written several times to the old defence team, seeking their full explanations for this omission, and also for a large number of other concerns which we have detailed to them, about their conduct of the defence case.

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[66] In his letter to us dated 2nd October 2014 (Volume V, Tab 3, p 45) Mr Berry wrote:
"*We certainly discussed manslaughter in its various forms during the conferences I had with him pre trial. However, any such discussion was comparatively* ***limp*** *when set beside his obvious determination to stick to his guns.*"
In Annex I to his letter to us dated 9th November 2015 (Volume V, Tab 5, p 84), Mr Berry wrote:
"*Against this background* ***it became very clear during the hours in conference that Sgt Blackman would not consider doing anything that might endanger his career in the Marines.*** *In the circumstances, and as indicated previously, our discussions about possible alternatives* ***were rather limp*** *in the sense that they were not actively pursued given his determination to succeed with the defence prepared on the basis of his very clear instructions.*"

129. The full correspondence is appended. We have also created for ease of reference a single composite document showing side-by-side both our questions, and their responses.[67]

130. We have accordingly done everything possible in our power to give them a full opportunity to explain their actions, before making the serious criticisms which must follow hereafter.

131. We have concluded that we have not received satisfactory explanations from them, and we thus feel ourselves duty bound to make those criticisms. We judge the criticisms which follow are fair and correct, and we have not made them lightly.

132. In our letter dated 13th September 2015,[68] we asked:

> "*For our part we can see no inconsistency and we must say frankly (and even without the benefit of hindsight) that we would in your position have run the defences in the alternative- as is of course commonly done. This was all the more desirable here we suggest where you called no expert to counter Dr Hunt, and where a murder conviction carried life imprisonment whereas manslaughter on these unique facts might even conceivably have avoided an immediate prison term altogether, or should have received at worst we would suggest a short term. Again we must invite your full comments.*"

133. Mr Berry QC replied in his letter of 2nd October 2015:[69]

> "*Again, I completely disagree with your suggestion that there is "no inconsistency" in running the defences in the alternative. Of course, it is sometimes done but definitely NOT in these circumstances when to do so would destroy the force of the argument being deployed in support of his "main defence." It amounts, in reality, to an invitation to reject his main defence and convict in respect of manslaughter.*"

134. We then asked why Mr Berry could not have addressed the Board somewhat along these lines:[70]

> "*If you reject his main defence, that is not the end of the matter. You must go on to consider whether he may have lost control (as he himself says he did in terms in several passages of his evidence) which can potentially reduce murder to manslaughter under the following trigger conditions…etc etc*"

135. His answer and his reiteration of his original position is to be found in Annex I to his letter to us dated 9th November 2015:[71]

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[67] Volume V, Tab 1
[68] Volume V, Tab 2, p 30
[69] Volume V, Tab 3, p 46
[70] Enclosure 1 to our letter dated 19th October 2015 (Volume V, Tab 4, p 59)
[71] Volume V, Tab 5, p 83

> "*Whatever the position,* ***we profoundly disagree with the proposition that it was feasible to run any of the "alternatives" alongside his "main defence"****, namely that he believed the insurgent to be dead at the point he discharged his sidearm… **I cannot imagine ever addressing a Board or jury in such terms** and in the circumstances that pertained. An "honest belief" was the very essence of Sgt Blackman's case and the focus of his defence. To blithely put that to one side by (effectively) saying "but if you think he is lying about that then please consider another defence which runs along the following lines…" would be* ***completely destructive****. I am of the firm view that a Board would find such an approach* ***cynical in the extreme****, and would very likely conclude that the defence were "trying it on". The "main defence", as you describe it, would be summarily rejected and remove any chance of a successful acquittal.*"

136. Mr Berry's approach, with respect, was misguided and wrong. That much is demonstrated by the long line of authorities going back over a century which we have cited above.

137. However, common sense and experience alike also indicate that there is nothing at all unusual about defending counsel running manslaughter as an alternative to murder, even when the primary defence is a complete denial. It happens daily in Crown Courts up and down the land. Nonetheless and extraordinarily, Mr Berry QC remains fixed in his denial of this fact.

138. Addressing our question why a psychiatric report was only sought post-conviction and not pre-trial, he answers:[72]

> "*It is worth noting that had we instructed Dr Orr before conviction, his report would not have assisted Sgt Blackman given the nature of the charges which he faced, his clear, unequivocal instructions and the fact that, contrary to what you now argue, it would not have been possible to run a dual defence at that time.*"

139. Dr Orr himself demonstrates the fallacy of Mr Berry's argument when he explains in his second report that the only reason he did not consider the question of diminished responsibility was because he was not asked and it was too late – the Applicant had already been convicted of murder. Had he been asked for an opinion on the question prior to trial Dr Orr is clear that he would have found that the defence of diminished responsibility was available. He writes:[73]

> "*I was told the purpose of my report was solely to assist the Court in its sentencing decision following the guilty verdict. I was not instructed to address the possible defence of diminished responsibility under Section 2 of the Homicide Act 1957. Mr Blackman had already been found guilty of murder and so it was clear to me it was too late for that. The experiences and symptoms described in the context of what is known as Combat Stress Disorder are similar to, and often identical with, those that*

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[72] Annex I to the old defence team's letter to us dated 9th November 2015 (Volume V, Tab 5, p 79)
[73] In his second report dated 4th December 2015 (Volume II, Tab 3)

> *are described in Adjustment Disorders and I therefore have no difficulty in agreeing with Professor Greenberg's diagnostic formulation.*" (*ibid* at para 3.23)
>
> "*My preference for the descriptive label of "Combat Stress Disorder" at the time of my first report, derived from my appreciation that he had recently been found guilty of murder and that such opinions as I could now offer the Court were for the sole purpose of assisting the Court in its decision on sentence. I felt the Court would be better assisted with this description which is familiar to the layman.*" (*ibid* at para 5.10)
>
> "*The question of diminished responsibility had not been considered in the pre-trial period or, as far as I am aware, during the trial itself at all, and because my report was concerned only with the sentencing process, I did not feel that going beyond my brief was appropriate.*" (*ibid* at para 5.12)

140. If Mr Berry were right in his dogmatic position, the logic would be that the defence in a murder trial could **never** argue for a manslaughter verdict unless the accused had first clearly admitted to the court that he was guilty of manslaughter.

141. We can illustrate the fallacy of Mr Berry's position in this way. Let us imagine a defendant in a murder trial were running self-defence (which is of course a complete defence just like the dead body defence here) because he says the deceased ran at him with a knife. His counsel (adopting Mr Berry's reasoning) could not and would not tell the jury in closing about the lesser alternative verdict of manslaughter by reason of loss of control, because to do so would be "*destructive*" and "*cynical in the extreme*" (Mr Berry's words). But what if his client had killed the deceased after catching him sexually abusing his child?

142. Mr Berry's approach simply does not withstand proper scrutiny. It was incumbent upon the defence team to consider the manslaughter alternatives and to advise their client carefully about them. If the client were voluntarily abandoning them after proper advice, good practice dictated that a signed endorsement should be sought, or at the very least a careful note made. Here they singularly failed in their professional duty.

143. Nowhere in his responses to us despite repeated clear invitations, does Mr Berry address the *Coutts* principle. We asked:[74]

> "*Were you aware of the authority of R v Coutts and the line of subsequent authorities applying its principle, when conducting Sgt Blackman's defence before the Court Martial?*
> *If so, why did you not raise the issue of manslaughter before speeches?*"

144. Mr Berry bluntly answered:[75]

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[74] In Enclosure 1 to our letter to the old defence team dated 19th October 2015 (Volume V, Tab 4, p 64)
[75] In Annex I to his letter to us dated 9th November 2015 (Volume V, Tab 5, p 84)

"*The issue of manslaughter did not arise for all of the reasons explained above.*"

145. Mr Berry either fails to understand or arrogantly chooses to ignore a well-established principle of law.

146. Mr Berry nowhere dealt with the fact that the Applicant had overtly raised manslaughter by loss of control **in his own evidence**. Once that had occurred, Mr Berry was duty-bound to grapple with the implications of that evidence, whatever primary defence he had been running.

Conclusion

147. The JAG's failure to leave manslaughter meant that the Board did not have a complete set of tools with which to decide their verdicts. In delivering the judgment of the Board in the Privy Council case of *von Starck v The Queen* [2000] 1 WLR 1270,[76] Lord Clyde held in this context:

> "*The function and responsibility of the judge is greater and more onerous than the function and the responsibility of the counsel appearing for the prosecution and for the defence in a criminal trial. In particular counsel for a defendant may choose to present his case to the jury in the way which he considers best serves the interest of his client. The judge is required to put to the jury for their consideration in a fair and balanced manner the respective contentions which have been presented. But his responsibility does not end there.* ***It is his responsibility not only to see that the trial is conducted with all due regard to the principle of fairness, but to place before the jury all the possible conclusions which may be open to them on the evidence which has been presented in the trial whether or not they have all been canvassed by either of the parties in their submissions****. It is the duty of the judge to secure that the overall interests of justice are served in the resolution of the matter and that the jury is enabled to reach a sound conclusion on the facts in light of a complete understanding of the law applicable to them…* ***if there is evidence on which a jury could reasonably come to a particular conclusion then there can be few circumstances, if any, in which the judge has no duty to put the possibility before the jury****. For tactical reasons counsel for a defendant may not wish to enlarge upon, or even to mention, a possible conclusion which the jury would be entitled on the evidence to reach, in the fear that what he might see as a compromise conclusion would detract from a more stark choice between a conviction on a serious charge and an acquittal.* ***But if there is evidence to support such a compromise verdict it is the duty of the judge to explain it to the jury and leave the choice to them***." (*ibid* at 1275C-H)

148. This passage from Lord Clyde was cited with approval by Lord Rodger in *Coutts*[77] at [78]. Lord Rodger also cited with approval the words of Callinan J in *Gilbert* (2000) 201 CLR 414 at [101]:

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[76] Volume VII, Tab 14
[77] Volume VII, Tab 4

> "*The appellant was entitled to a trial at which directions according to law were given. It is contrary to human experience that in situations in which a choice of decisions may be made, what is chosen will be unaffected by the variety of the choices offered,* ***particularly when, as here, a particular choice was not the only or inevitable choice.***" (*Coutts* at [88])

149. This is not the sort of case where the JAG considered but rejected in a reasoned way, the proposition that manslaughter should be left to the Board. Here the matter was simply never considered by the JAG **at all**. It is submitted that had the JAG directed his mind to the question, and had he been assisted to do so by the advocates, he inevitably would have left manslaughter to the Board.

150. This failure was a material irregularity which renders the Applicant's conviction unsafe. The CMAC could not in future have any sufficient basis for concluding that the Board would inevitably have convicted the Applicant of murder, if manslaughter had been left to them as an option. As Lord Rodger put it in *Coutts*:

> "… ***a failure to give the necessary direction must usually make the verdict unsafe*** *since the appeal court will have no sufficient basis for concluding that a reasonable jury would inevitably have convicted the appellant of murder if they had been given the appropriate direction.*" (*ibid* at [91])

GROUND 3A: LOSS OF CONTROL

The Board should have been directed that the alternative verdict of manslaughter by reason of loss of control was available to them on the evidence heard at trial.

151. There was considerable evidence of loss of control by the Applicant when he fired. However, loss of control was never mentioned at trial or later on appeal by the old defence team or by any other party.

The Law

152. Since 4th October 2010, the common law defence of provocation has been abolished and replaced by "*loss of control*" pursuant to sections 54 and 55 of the Coroners and Justice Act 2009. This reads:

> "***54 Partial defence to murder: loss of control***
> ***(1) Where a person ("D") kills or is a party to the killing of another ("V"), D is not to be convicted of murder if—***
> ***(a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control,***
> ***(b) the loss of self-control had a qualifying trigger, and***
> ***(c) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.***
> ***(2) For the purposes of subsection (1)(a), it does not matter whether or not the loss of control was sudden.***
> *(3) In subsection (1)(c) the reference to "the circumstances of D" is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint.*
> *(4) Subsection (1) does not apply if, in doing or being a party to the killing, D acted in a considered desire for revenge.*
> ***(5) On a charge of murder, if sufficient evidence is adduced to raise an issue with respect to the defence under subsection (1), the jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.***
> ***(6) For the purposes of subsection (5), sufficient evidence is adduced to raise an issue with respect to the defence if evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply.***
> ***(7) A person who, but for this section, would be liable to be convicted of murder is liable instead to be convicted of manslaughter.***
> *(8) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder does not affect the question whether the killing amounted to murder in the case of any other party to it.*
>
> ***55 Meaning of "qualifying trigger"***
> ***(1) This section applies for the purposes of section 54.***
> ***(2) A loss of self-control had a qualifying trigger if subsection (3), (4) or (5) applies.***

> *(3) This subsection applies if D's loss of self-control was attributable to D's fear of serious violence from V against D or another identified person.*
> ***(4) This subsection applies if D's loss of self-control was attributable to a thing or things done or said (or both) which—***
> ***(a) constituted circumstances of an extremely grave character, and***
> ***(b) caused D to have a justifiable sense of being seriously wronged.***
> *(5) This subsection applies if D's loss of self-control was attributable to a combination of the matters mentioned in subsections (3) and (4).*
> *(6) In determining whether a loss of self-control had a qualifying trigger—*
> *(a) D's fear of serious violence is to be disregarded to the extent that it was caused by a thing which D incited to be done or said for the purpose of providing an excuse to use violence;*
> *(b) a sense of being seriously wronged by a thing done or said is not justifiable if D incited the thing to be done or said for the purpose of providing an excuse to use violence;*
> *(c) the fact that a thing done or said constituted sexual infidelity is to be disregarded.*
> *(7) In this section references to* "D" *and* "V" *are to be construed in accordance with section 54.*"

153. The Court of Appeal has held that it should rarely be necessary to look at old provocation cases, as loss of control is fully encompassed within the new statutory provisions: *Gurpinar* [2015] EWCA Crim 178[78] at [4], *per* Lord Thomas LCJ.

154. If there is sufficient evidence to raise the defence as an issue, the burden shifts to the prosecution to disprove it to the criminal standard: section 54(5). Whether there is sufficient evidence is a matter for the trial judge: section 54(6).

155. The 3 principal components of the defence are set out in section 54(1):

> "*(a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control,*
> *(b) the loss of self-control had a qualifying trigger, and*
> *(c) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.*"

156. Once there was evidence raising the issue, it was for the JAG to consider whether to leave it to the Board. Whatever the tactical decision made by the defence, it was the JAG's ultimate responsibility.

157. Lord Bingham said in *Coutts*:[79]

> "*It is of course fundamental that the duty to leave lesser verdicts to the jury should not be exercised so as to infringe a defendant's right to a fair trial. This might be*

[78] Volume VII, Tab 9
[79] Volume VII, Tab 4

> *so if it were shown that decisions were made at trial which would not have been made had the possibility of such a verdict been envisaged.* ***But no such infringement has ordinarily been found where there is evidence of provocation not relied on by the defence****…*" (*ibid* at [24])

158. Thus the JAG's duty was to consider whether, on the whole of the evidence, the defence arose, and he was bound to leave the defence to the Board under section 54(4) of the Coroners and Justice Act 2009 if "*sufficient evidence is adduced to raise an issue… on which a jury, properly directed, could reasonably conclude that the defence might apply*" after consideration of each of the components of the defence under sections 54 and 55.

159. As Lord Judge described it in the leading case of *Clinton* [2012] EWCA Crim 2:[80]

> "*This requires a common sense judgment based on an analysis of all the evidence.*" (*ibid* at [46])

The Evidence at Trial

160. That such evidence was before the Board is we say beyond doubt – indeed it was highlighted and relied on at the sentencing hearing and again on the appeal against sentence, it is instructive to note.

161. We will now demonstrate this failure graphically by means of listing the events and the relevant evidence from first to last in the chronological order in which they occurred; as usual in this Report, we will add our own emphasis in bold throughout the citations which follow.

Interview

162. The Applicant handed in a short written prepared statement during his interview of 12th October 2012[81] in which he stated, *inter alia*:

> "*5. Following my return to theatre from R&R in mid-August and up to this incident, my multiple was subject to numerous contacts. On the majority of occasions we went out, when I was multiple commander, there was some form of incident. Also ring* (sic) *the tour there were a number of casualties and fatalities.*
>
> *6. By the time of the incident I had lost my troop commander, who I highly respected. I also witnessed how badly affected other members of the multiple were by other deaths and life changing injuries.* ***I was upset*** *by the loss of Mr Augustine and was worried for the welfare of my lads.* ***This was a very stressful time.***
>
> *7. Returning to this incident, I regret to say that following the death of this insurgent,* ***my stress and anger took over and I discharged my sidearm****. The*

[80] Volume VII, Tab 3; *Clinton* was a series of conjoined appeals in which the Court of Appeal (Criminal Division) gave authoritative guidance in relation to loss of control manslaughter.
[81] Volume III, Tab 2, p 2

*comments that I am heard to make during the video footage are a demonstration of **my anger at the time**. I accept I should not have reacted in this way.*"

Evidence-in-Chief

163. In the Applicant's evidence-in-chief he said in terms that he had lost his self-control when he shot the insurgent:

"*Q: You thought he was dead?*
A: Yes.
Q: So why did you shoot him?
*A: **Stupid, lack of self-control, momentary lapse in judgement**.*
Q: What was the purpose of it? What did you think you were doing?
*A: I -- well, I can't say. I've thought it about it a lot obviously over the last year as we've been going through all these pleadings. I can't give a -- anything to say -- other than to say, you know, **it was a lack of poor judgement on my part, a lack of self-control.***" (Transcript 30.10.13,[82] p 39D-E)

164. As regards what the law considers qualifying triggers, the Applicant gave the following relevant evidence in chief in relation to the traumatic events preceding the shooting:

"*Q: We have heard during the course of this case there were a number of very unfortunate incidents of serious injury and death --*
A: Yes.
Q: -- in relation to not members of your checkpoint, but members of your company, J Company, is that right?
A: Yes.
Q: People that you had known?
A: Yes.
Q: There was a young officer, was there not, called Lieutenant --
A: Augustin.
Q: -- Ollie Augustin, who was with a Marine I think was -- well, what happened to him?
*A: **Lieutenant Augustin and Marine Alexander MC were unfortunately killed in an IED blast that also injured critically two other members of my multiple who were attached to them at the time. Sorry, not critically, but they were left with life-changing injuries**.*" (*ibid*, pp 9G-10C)

"*Q: Now, I assure the Court that I am not going to labour this, but there was one other incident which has been referred to, I want to ask you about that, when I think that after some piece of action one man was killed and they did something with his body parts.*
A: I believe it was same incident. After they were -- when they recovered -
Q: It was the same incident? I beg your pardon.
*A: **Yeah, when they recovered the bodies of Mr Augustin and Marine Alexander they were believed to be body parts from the guys who'd suffered critical injuries***

[82] Volume VI, Tab 2

left on the ground due to the nature of the -- where the device had gone off, they weren't able to clear the area to recover these. Those body parts were then displayed in trees around that area.
Q: What is the effect on Marines under your command to this sort of thing?
*A: **It has quite a harsh effect on them. No, it's not a nice thing when you find out that, for the lads more than myself, their close friends, people they've lived with for quite a long time in the accommodation back on camp have been killed and then their -- well, parts of their body are displayed as a kind of trophy for the world to see***." (*ibid*, p 11A-D)

"*A: It's not the nicest of environment, and there's enough stresses and strains out there without me jumping all over them at every opportunity. I endeavour to keep that, as long as they were producing the goods when on sentry or doing a good job on patrol, I left them alone, so when they went to their accommodation I didn't go in there. I put that sort of out of bounds to myself so they had their private areas to reflect and do things what they wanted to do without me continuously over their shoulders.*
Q: When you were out on patrol, however, what was the situation then so far as your style of command was concerned?
A: Again, I liked to try and keep things relaxed, you know, again, making sure the guys are paying attention to what they're doing, but again, I felt no need to be, you know, the shouty man, a bit like that, and all -- you know, constantly picking them up for everything sundry out on the ground.
Q: Is humour something which is apparent when you are out on patrol?
A: Yes.
Q: If so, what type of humour?
*A: I'd say the majority of the time out there humour comes into play. Most would probably be seen inappropriate in the wider world, but **when you're faced on a daily -- or not daily, but on a regular basis with people trying to kill you**, you inject humour into the situation, some of what might be seen as **dark, as a coping mechanism.** If you didn't, I'd -- you know, I'd suggest you'd struggle to cope in any great sense.*" (*ibid*, p 12A-E)

165. There was surely sufficient evidence here for the Board to find that his loss of self-control was attributable to the traumatic experiences of his 6-month tour in Herrick 14. The actions of the Taliban insurgents during that tour of duty were arguably, pursuant to section 55(4) of the Coroners and Justice Act 2009:

"*things done… which—*
(a) constituted circumstances of an extremely grave character, and
(b) caused D to have a justifiable sense of being seriously wronged."

166. Indeed, it is arguably difficult to conceive of circumstances of any graver character, or circumstances in which a defendant would have a more justifiable sense of being seriously wronged, than in the case of a soldier such as the Applicant, who faced a real and present risk of death or grievous bodily injury on a daily basis at the hands of a cruel and ruthless enemy. An enemy moreover who revelled in torture and barbarity.

Cross-examination

167. When cross-examined by Mr Tregilgas-Davey on behalf of Marine C, the Applicant said:

> "*Q: Do I take your evidence that the decision to discharge the firearm was a sudden one?*
> *A: Yes.*
> ***Q: A spur of the moment decision?***
> ***A: Yes.***
> ***Q: Because of pent-up emotions?***
> ***A: Yes.***" (*ibid*, p 56D-E)

168. When cross-examined on behalf of the Crown, Mr Perry QC obliquely addressed the question of the Applicant's 'control' but in a manner that in fact sheds little if any light on the question. A typical example is as follows:

> "*Q: Now,* ***you were in charge of the patrol****, were you not?*
> *A: Yes.*
> *Q: And you were giving the orders?*
> *A: Yes.*
> *Q: And everyone looked to you for leadership and direction?*
> *A: Yes.*
> *Q: You would expect them all to pay attention to you?*
> *A: Yes.*
> *Q: And what you said?*
> *A: Yes.*
> *Q: And you would make sure, would you not, that what you said was heard?*
> *A: Yes.*
> *Q: And you would expect those under your command to act on what you said?*
> *A: Yes.*
> *Q: And you talk clearly and decisively on the video, do you not?*
> *A: The majority, yes.*
> *Q:* ***You were in control, were you not?***
> *A:* ***I believe so, yes.***" (*ibid*, pp 59C-60A)

169. Whilst at a superficial glance the final question and answer may tend to suggest that the Applicant was in control of his **actions** the structure of the questioning is sloppy and thus misleading. On close reading, the topic being discussed is the Applicant's control of ***his men***, not of ***himself***. It is an ambiguous passage at best, and meaningless at worst.

170. Were it to be argued that these exchanges were sufficient to negative loss of control, we would anyway rely on the analogous dicta of Reading LCJ in *Hopper*:[83]

> "*We desire to add further that we do not accept the argument addressed to us by counsel for the Crown, and relied upon by the judge in his summing-up, that because the appellant said that he was not angry at the time, that must be taken*

[83] Volume VII, Tab 11

> *against him as negativing the proposition that the crime could be manslaughter.* ***In saying that he was not angry the appellant was trying to shelter himself behind the plea of accident, and it was open to the jury to say that the statement he made was not true. Other views of the facts than those given by him in his evidence cannot be excluded.*** *In a Court of justice it is for the Court, with the assistance of the jury, to arrive at the true view of the facts without paying too much attention to whether a particular witness is called by one side or the other.*" (*ibid* at 435)

171. Arguing against ourselves for the moment, if in fact the Applicant was claiming to be in control of himself, he was arguably "*trying to shelter himself behind the plea of a dead body*" (adapting to this case the words of Lord Reading LCJ in Hopper).

172. It seems that Mr Perry QC (at least) during this passage of cross-examination, was conscious of the looming issue of loss of control and thus sought to explore it, doubtless with the intention to argue – had it ever have been raised by Mr Berry QC for discussion as it should have been – that it did not in fact arise on the evidence.

> "*Q: And, of course, after you had asked Marine B the whereabouts of the Apache, remember that?*
> *A: Yes.*
> *Q: He told you it had gone, did he not?*
> *A: Yes.*
> *Q: He told you, "It's gone south, mate". Remember that?*
> *A: Yes.*
> *Q: And, as soon as he told you it had gone south, you discharged your weapon, did you not?*
> *A: Yes.*
> *Q: So you had sufficient* ***self-control*** *to wait until you were not being observed; is that right?*
> *A: Yes.*
> *Q****: So not a fit of anger where you could not control yourself; you have waited until you could not be observed, did you not?***
> ***A: Yes.***" (*ibid*, p 65C-F)

173. It seems Mr Perry was trying to establish that the Applicant had *'self-control'* (doubtless his choice of words here was not coincidental) because he waited for the helicopter to leave. However, this suggestion too is fallacious, for a number of reasons.

174. First, because Mr Perry has here once again asked an ambiguous compound question ("*So not a fit of anger where you could not control yourself; you have waited until you could not be observed, did you not?*"). There is no way of knowing whether the Applicant's answer "*Yes*", is an acceptance that it was not a fit of anger, or that he could control himself, or that he waited until he could not be observed. Many permutations of meaning are possible.

175. Next, if the Crown were trying to suggest that, if he did the killing in a deliberate manner, therefore that would negate loss of control, that too is not a sustainable argument.

176. There are numerous cases of deliberate killings coupled with conscious, calculated, and wilful acts, that nonetheless constitute manslaughter by reason of loss of control.

177. So called 'battered wives' killings are just one such example. The 'loss of control' is accrued after months or even years of intolerable domestic behaviour before the killer 'snaps' as the result of a qualifying trigger.

178. These are the so-called '*slow burning fuse*' cases. The Applicant's experiences of 6 months of hellish conditions in Helmand were well within the statute potentially.

179. Moreover, section 54(2) of the Coroners and Justice Act 2009 states explicitly that the loss of control **need not be sudden:**

> "*(2) For the purposes of subsection (1)(a), it does not matter whether or not the loss of control was sudden.*"

180. The issue of loss of control hovered like a ghost over this trial throughout. No amount of misleading or ambiguous questioning by the Crown could overcome that fact.

181. His cross-examination later continued:

> "*Q: … Then if we go down to paragraph 7* [of the Applicant's prepared statement[84]]:
> *"Returning to this incident, I regret to say that following the death of this insurgent* ***my stress and anger took over and I discharged my firearm****."*
> *A: Yes.*
> *Q: So you attribute all of this to your stress and anger?*
> *A:* ***At the time I did, yeah.***
> *Q: But you were in charge of this patrol, were you not?*
> *A: I was.*
> *Q: And where on the video do we see any representation of your anger?*
> *A:* ***I raise my voice at several points*** *but* ***I'm a pretty guarded individual; I don't express my emotions a great deal but it would be hard for people to see when I was stressed or angry****.*" (*ibid*, pp 124F-125B)

Re-examination

182. And in re-examination by Mr Berry QC:

> "*Q: So far as stress and anger, you have been in the Marines for how many you said, 15 years?*
> *A: Fifteen.*
> *Q: What is the position so far as you being in command of a patrol in Afghanistan in hostile circumstances in the face of the enemy when it comes to* ***the presentation*** *that you give to your Marines under your care?*

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[84] Volume III, Tab 2, p 2

> *A: You've got to* -- ***no matter how stressed or anxious you may feel****, you've got to put the strongest persona forward as you possibly can. It's* --
> *Q: And so you should.*
> *A: Yes.* ***They wouldn't glean much confidence in you as a leader if you betrayed yourself as a bit of a wreck***." (*ibid*, pp 125H-126B)

Prosecution Closing

183. In his closing speech Mr Perry QC said as follows for the Crown:

> "*I just want to mention another general point: the dangerous and challenging environment, because it might be thought that it is very easy for us in the tranquility of a courtroom to cast judgment on those who operate in dangerous, challenging and life-threatening conditions. I am quite confident that for those who have never been in that situation, it is difficult to imagine quite how stressful and traumatic it can be.* ***It is fair - and this is a matter properly to be taken into account in the defendants' favour - that they have lost colleagues and comrades and they are aware that others have who served their country have suffered life-changing injuries. Those are matters to be taken into account****. Anyone who volunteers to join the armed services and put themselves forward as a volunteer to serve overseas in an armed conflict of course deserves the admiration and respect of their fellow citizens, and* ***the pressure under which the defendants were operating is certainly not to be underestimated and not to be disregarded****.* ***Conflict****, any conflict, but perhaps particularly this conflict****, is brutalising and remorseless****.*
>
> ***The prosecution invite you to take into account all those matters****, but there is one key point that has to be borne in mind.* ***The brutalising and remorseless impact of conflict or effect of conflict*** *is no justification for barbarity on the part of* ***highly-trained, highly-skilled, highly-specialised, disciplined volunteers.*** *The defendants, in truth, know this. It is demonstrated by the fact that they had to contrive a story to mislead what they did. The context that they were on active service in Afghanistan is not an exonerating condition.* ***Its sole relevance is that it may explain some of their actions****. Of course, the other side of that particular coin is that it gives them a reason to kill. That is the other side of it. Even now, Marines A and C suggest that this death was not a matter of regret. That does not make them guilty of murder, but it does perhaps give some indication as to their attitudes and state of mind.*" (Transcript 4.11.13,[85] p 9B-E)

184. These observations themselves highlight another obvious and unresolved question. It was a question which we say all parties in the case failed to address, to their respective discredit. Since Mr Perry invites the Board to take the "***brutalising and remorseless***" conditions in which the Applicant was serving "***into account***" – how exactly were they supposed to do so?

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[85] Volume VI, Tab 3

185. How were these conditions supposed to be taken into account, other than by a loss of control direction which simply never came? Everyone seems to be aware of the issues in the abstract and dances around them, but it is extraordinary to note that nobody ever puts them into this correct legal context.

Defence Closing

186. Similarly, during the defence closing speech Mr Berry QC said:

> "*... in this case the explanation that he gave, although* ***momentarily serious but perhaps in the circumstances understandable, lapse of judgment*** *given the* ***difficult circumstances in which he had been operating for months and in particular on that day****, is not necessarily that surprising.*" (Transcript 5.11.13,[86] p 2E-F)
>
> "*There is not much to do, is there, in a command post with ten men or so stuck there for months on end? You may get the odd visit from your commanding officer every fortnight and apart from cleaning your rifle and hanging around talking, all you do is wait to go out on patrol, and going out on patrol of course carries its own serious dangers.* ***You might at any moment step on a mine; you may be shot at; you may be blown up in a car or blasted from a grenade.*** *When you know, as happened in this case, that individuals in that command post and these defendants had* ***friends and colleagues who had, on that tour between May and September 2011, been murdered and maimed by the enemy****, who went so far as to hang up the limbs of soldiers they had killed and maimed on trees for the edification of their colleagues,* ***in order to taunt them and to induce fear,*** *it is hardly likely that individual soldiers in ordinary circumstances are going to behave with the degree of circumspection which apparently, according to certain questions put in this case, it is suggested should have been done.*" (*ibid*, p 3C-D)
>
> "*So he said* ***there was frustration all round. The command posts by September were being attacked every day and we know that Marine A and the others were subjected to a grenade attack two days before this incident day.*** *What he said, and this he suggested voluntarily, was that the commanders,* ***people in Marine A's position, were becoming mentally drained*** *and that was a worry for him. Of course people like Marine A do not show it and he does not show it on the video and* ***he has not come here and said, "Oh, look, I was so stressed I did this, that and the other". That is not what his defence is*** *but I am asking you, nevertheless, to look at the reality of the situation, look at what Colonel Fisher said, look at what happened to them, and the situation that they were in; Marine A on his second tour in Helmand Province, coming towards the end of it* ***and all those terrible things happening,*** *in particular the junior officer, Lieutenant Augustin, who was blown up during that tour, to whom he had been a mentor as a junior officer.*

[86] Volume VI, Tab 4

> ***These things are mentally draining*** *and what it means* ***in general terms, without applying specifically to the facts of this case****, is it is more difficult to maintain the sort of precise judgment that you need to if you are doing your job absolutely precisely day in and day out, and that* ***there are circumstances when your judgment will fail****, at least to some extent; to this extent, we suggest, in this case when at the end of the proceedings, with them anxious to get back and the insurgent having died****, to discharge out of frustration, as he more or less said, his pistol into the insurgent's head****.*[87]" (*ibid*, pp 3G-4C)
>
> "*I want to ask you in a moment - to remind you, to ask you to remember - what Marine A said when he gave evidence about this. I asked him about the shot and also asked him about what he felt in the immediate aftermath of the shot and also why he did it.* ***You will remember why he said he did it: it was a gross error of judgment, no doubt, you may think, informed by the pressures*** *which anybody, even somebody in his position with his experience, given the pressures of leadership in such objectionable circumstances, might suffer from.* ***It was out of frustration, really, that he did what he did*** *and broke, as he told them, the Geneva Convention.*" (*ibid*, pp 17G-18A)

187. For reasons that are inexplicable, Mr Berry here abandoned his client's evidence going to the defence of loss of control and did so entirely on a frolic of his own. He did this by his words "***that is not what his defence is***". He positively here abjured the idea that loss of control by his client was a defence.

188. Mr Berry QC did so moreover without at any time (not then, and not previously) advising or consulting his client about manslaughter, nor obtaining his instructions to abandon it in this way. The new witness statements of the Applicant, his wife, and his Defending Officer make this clear.[88]

189. In much the same way as the prosecution had done before him, Mr Berry was inviting the Board to take all the circumstances into account in vague and frankly meaningless terms, but nowhere did he offer them the correct legal framework in which to do so. That correct legal framework was loss of control manslaughter.

Summing Up

190. The JAG duly summed up the following portions of the Applicant's evidence which we say raised loss of control on their face:

> "*Marine A told you that he took his pistol out and shot the insurgent in the chest. He said:*
>
> > *"This was stupid, a* ***lack of self-control****, a momentary lapse of judgment: I have thought about why I did it and I can't give any explanation."*

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[87] Mr Berry QC says here his client shot "*into the insurgent's head*" – but he must surely mean his chest.

[88] These witness statements are found at Volume VI, Tabs 1, 4 and 6 respectively.

He was pressed by Mr Perry in cross-examination, he said:

> *"I don't know why I did it; it was poor judgment and* ***a lack of self-control****. My stress and anger took over and I discharged my firearm."*

When it was put to him that there did not appear to be any indication of stress or anger on the video, he said:

> *"Well I did raise my voice at several points in the video but I'm a guarded person and it's hard for people to see my stress or anger."*

Mr Meeke (sic [89]) *asked him to elaborate on this and he said:*

> *"I have been a Royal Marine for 15 years, but you have to put the strongest persona forward and you do not show yourself as a bit of a wreck. I thought the insurgent was dead… The decision to discharge the firearm was a sudden one,* ***a spur of the moment because of pent-up emotions.*** *It follows that I didn't tell Marine C what I was going to do. I told him to walk off about half a minute before and nothing he said encouraged me to discharge the firearm. There was no conversation with Marine C about me giving him the nod to shoot and he was never pressing or pushing for me to shoot the insurgent."*

… He [the Applicant] *reiterated that this* ***was a sudden, spur of the moment decision*** *to shoot…*" (Transcript 7.11.13,[90] pp 17E-18D)

191. It is of note that the JAG did not sum up to the Board at all Mr Perry QC's misleadingly ambiguous cross-examination of the Applicant concerning 'control' which we have cited above at para 168 *et seq*. The JAG no doubt appreciated the ambiguity and therefore the worthlessness of these questions and answers.

192. The clear overall evidential picture thus presented by the summing up, is that the Applicant shot the insurgent because he had lost his self-control. Yet inexplicably the requisite manslaughter direction was never given.

193. As for "*qualifying triggers*" under section 55 of the Coroners and Justice Act 2009, the JAG also summed up the evidence from the different sources of the following traumatic events during Herrick 14 which were highly relevant to that issue:

> "*We now turn to the evidence of Lieutenant Colonel Fisher, who was J Company's CO on 15th September, and at that stage holding the rank of Major. He provided an overview of the operation which he joined late in the tour after his predecessor had been wounded in an IED attack. He said:*

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[89] This is an error by the JAG. It was in fact Mr Tregilgas-Davey on behalf of Marine C who elicited the evidence here cited by the JAG.
[90] Volume VI, Tab 6

> *"We were trying to secure J area box to hand over to the Afghans, but there was a lack of Afghan partners on the ground. There was an increase in kinetic activity, particularly in the last two months, and it felt, among the men, that PGSS was of limited value to them. There was a frustration because insurgents knew its capabilities and could circumvent them, at their failure to give them cover."*

He said the Marines and Commanders were beginning to get drained mentally, that the checkpoint Commanders were increasingly feeling the pressure, particularly with the absence of Afghan partners to share the load." (Transcript 6.11.13,[91] p 48E-G)

"*He* [Lieutenant Colonel Fisher] *said at the start of the tour, the lads were keen to get out on patrol and get a whiff at the enemy. As the tour progressed, keenness tailed off, especially at the end, when people looked forward to getting home. As the tour was coming towards its conclusion, he said, and fighting was building up, levels of stress built up.*

Lieutenant Colonel Fisher said that during the deployment, 42 Commando suffered 7 killed in action, and 45 or thereabouts injured. He said many suffered life-changing injuries. He said there was an occasion when a Royal Marine was injured in an explosion and body parts were hung in a tree by insurgents." (*ibid*, p 49C-D)

"*You heard quite a lot about the deaths* [on 27th May 2011[92]] *of Lieutenant Augustine, a young officer whom Marine A said he respected highly, and Marine Alexander MC. They were killed in an IED blast, when others of their multiple were seriously wounded. Marine A said that he had heard about the incident, and he heard that the area was not cleared initially, and when the Marines returned, some body parts were displayed in trees around the area. That, he said, had quite a harsh effect on his Marines.*" (*ibid*, p 49E-F)

"*Marine A was a Sergeant in command at Omar. He had been in the Royal Marines at that time for 13.5 years, and was on his sixth operational tour. He told you that he had a relaxed style of leadership, both in the CP and on patrol, because the lads had enough stress, he said, "Without me jumping all over them. As long as they did their job". He told you about dark humour which comes into play in stressful situations. He said:*

> *"Most might seem inappropriate in a wider world, but when faced on a regular basis with people trying to kill you, dark humour provides a coping mechanism. Without it, there would be more stress.""* (*ibid*, p 50A-B)

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[91] Volume VI, Tab 5

[92] It was reported in the press at the time that the date Lieutenant Augustin and Marine Alexander MC were killed by an IED was 27th May 2011.

194. It is indeed difficult to see what possible relevance these traumatic matters had to the summing up and to the issues in the case as they then stood.

195. These events however (if they had been correctly analysed by anyone) each constituted *circumstances of an extremely grave character* which would inevitably have caused the Applicant to have *a justifiable sense of being seriously wronged*, thus falling squarely within the parameters of section 55(4) of the Coroners and Justice Act 2009. None of them went in any relevant way however to the single simple defence then being run of the Applicant believing the insurgent to be dead.

196. Thus although the Board were told about these matters by everyone and repeatedly enjoined to '*take them into account*' they were never directed **how to do so**. This is mystifying and a fatal flaw running throughout the case.

197. So what was the point of this evidence being summed up in the absence of a loss of control manslaughter direction? Logic and law both demanded, by reason of this evidence and the final speeches of both counsel inviting that it should somehow be '*taken into account*', a loss of control manslaughter direction which simply never arrived.

Mitigation

198. Again, after the conviction and in his speech in mitigation on 6th December 2013, Mr Berry QC relied on the very matters that should have demanded a loss of control direction in the first place, yet he now applies them only to mitigation. He says:

> "*… he was such a worthy member of* [the Marine Corps] *until this lapse of judgement I suggest* ***brought upon by extended and very considerable stress from fatigue and combat and the rest of it***." (Transcript 6.12.13,[93] pp 12H-13A)

Sentence

199. In his sentencing remarks, the JAG acknowledged "*the brutality of the conflict in Afghanistan*" (*ibid*, p 14D); that the "*offence is unique and unprecedented in recent history. You were in a tough operational environment*" (*ibid*, p 14G); that there were "*exceptional circumstances* [in] *this case*" (*ibid*, p 15B); and that the Applicant's "*duties were dangerous and life threatening*" (*ibid*, p 15E).

200. Startling also in the current context, are the following observations towards the end of the JAG's sentencing remarks, when he comes to list the mitigating factors:

> "*First,* ***provocation***. *The cumulative effect of the increased kinetic activity, together with the deaths and life changing injuries to fellow Marines had* ***an obvious effect on you***. *You were also affected by the story that the Taliban had hung a British serviceman's severed limb in a tree, although you did not personally see that. You were also in no doubt that the victim was an insurgent*

[93] Volume VI, Tab 7

> *who had been firing at CP Taalander moments before he was wounded.* ***Second, the stress of operations.*** *This was your sixth operational tour and your second to Afghanistan in under fourteen years of service.* ***We accept that you were affected by the constant pressure, ever present danger and fear of death or serious injury****.* ***This was enhanced*** *by the reduction of available men in your command post so that you had to undertake more patrols yourself and place yourself and your men in danger more often.* ***We also accept the psychiatric evidence presented today that when you killed the insurgent it was likely that you were suffering to some degree from combat stress disorder***." (*ibid*, p 16D-E)

201. The use of the term "***provocation***" here is important. There was no provocation in the ordinary sense of the word by the deceased doing or saying anything to "*provoke*" the Applicant. He was of course in no physical condition to do so. As such, the only sensible meaning that can here be attributed to the use of the word "*provocation*" is its wider legal meaning, now encompassed under statute by "loss of control".

Appeal

202. Similarly on the Applicant's appeal against sentence, Lord Thomas LCJ held on 22nd May 2014:[94]

> "*Second* [of the mitigating factors] *were the effects on him from the nature of the conflict in Afghanistan and the command he exercised.*
>
> ***Most serious was the effect of stress upon the appellant.*** *It is, in our view, self-evident that armed forces sent to a foreign and hostile land to combat an insurgency will be placed under much greater stress than armed forces sent to fight a regular army. There is the obvious difficulty that it is often not possible in a population that may be largely hostile or intimidated by the insurgents to detect the identity of the insurgents who shoot at regular troops of HM Armed Forces, plant improvised explosive devices or commit other clandestine actions.*
>
> *In addition there was the clear perception amongst HM Armed Forces that the insurgents in Afghanistan committed severe atrocities upon British soldiers; it matters not that some may contend that that was not the case. It was the perception that was material.* ***The effect of this on the appellant can be viewed as either an additional stress factor or (as the Court Martial found) a cause of provocation.***
>
> *In addition to the* ***considerable stress*** *of dealing with an insurgency in such conditions, it is very clear that* ***significant further stress*** *must have been placed upon the appellant because the remote location of his command post to which we have referred in [39] above meant that* ***he was not seen regularly by those more senior to him. He had therefore little face to face contact with those commanding him and they could not assess the effect of these conditions upon him.***

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[94] Volume VI, Tab 8

> *Although training is important, it is difficult to see how such training can be sufficient in the absence of regular visits by a senior commanding officer to talk face to face and to observe the effects on those exercising command under him.*" (*ibid* at [69]-[72])

203. Lord Thomas LCJ continued:

> "*On all the evidence before us it is clear that in the events surrounding the murder of the insurgent the appellant acted entirely out of character* ***and was suffering from combat stress disorder. It is very unfortunate that the only medical evidence before the Court Martial and before us was obtained over two years after the murder.*** *We have accorded particular attention to the view of the Court Martial that thousands of other service personnel experienced the same or similar stresses and still acted properly and humanely. However, in assessing the evidence of stress and its effect on the appellant, we attach particular importance to the evidence in relation to the remoteness of the command post at which the appellant had been stationed for five-and-a-half months and the limited contact with those commanding him. His mental welfare had not been assessed in the way in which it would ordinarily be assessed by a commanding officer and there is evidence that he was becoming somewhat paranoiac about the Taliban's "gunning" for him. Taking into account the whole of the evidence, we conclude that* ***combat stress arising from the nature of the insurgency in Afghanistan and the particular matters we have identified as affecting him ought to have been accorded greater weight as a mitigating factor.***" (*ibid* at [75])

204. From the above passages it is clear that the Lord Thomas LCJ too found that the single most significant mitigating factor in the case arose from the stressful conditions that the Applicant found himself in.

205. There is every reason to think that a Court Martial Board, faced with an exemplary soldier such as this, would have wanted to accept this evidence if it had been placed before them in its correct legal context of loss of control manslaughter. They would have wanted if possible a lesser alternative to murder.

206. Further, the geographical remoteness of this base, the failures of command, the insufficient training, and the suggestions of paranoia, were all identified subsequently as significant factors in the Adjustment Disorder by both Professor Greenberg and Dr Orr.

207. Due to the inadequate and unsatisfactory single ground of appeal of conviction pursued by our predecessors, none of these issues were ever argued at all in relation to the safety of the murder conviction. The sole ground then raised was whether a trial by Court Martial is Article 6 ECHR compliant (i.e. whether it constitutes a fair trial).

208. Moreover, this issue we observe had already been decided against the defence by previous binding authority. This was made clear in the appeal judgment which gave Mr Berry's argument very short shrift (*ibid* at [18]). It was in effect a complete waste of the appeal against conviction.

209. Accordingly, the CMAC was only ever able to consider these issues by way of mitigation on the appeal against sentence.

Conclusion

210. From the above chronological narrative, it is plain that loss of control manslaughter was signposted as an issue throughout and that it cried out for a legal direction. To recap:

a. In the Applicant's police interviews;
b. In his evidence-in-chief;
c. In his cross examination;
d. In his re-examination;
e. In closing speeches;
f. In summing up;
g. In mitigation;
h. In the sentencing remarks of the JAG; and even
i. On appeal against sentence.

211. There plainly was sufficient evidence raised at trial demanding that this defence should have been left by the JAG to the Board to consider. It was never ventilated before speeches in the usual way, nor was it raised at any time as an issue by any party.

212. We submit that the three requisite elements to establish this statutory defence were present and were made out on the evidence. To repeat:

a. The Applicant shot the insurgent because he had lost his self-control;
b. That loss of self-control was attributable to qualifying triggers, *viz* things done by the Taliban and the stress of his deployment, and the full and awful circumstances of his situation, which taken together constituted circumstances of "*an extremely grave character*" and caused the Applicant to have "*a justifiable sense of being seriously wronged*"; and
c. That a person of the Applicant's sex and age, with a normal degree of tolerance and self-restraint in the circumstances, might have reacted in the same or a similar way.

213. Although as we have said, the ultimate blame in failing to direct on this lies with the JAG, it was not solely his responsibility to be alive to the issue, as the most recent authority makes very clear:

> "*… **a judge must be assisted by the advocates**. It is generally desirable that the possibility of such an issue arising should be notified to the judge as early as possible in the management of the case, even though it may not form part of the defence case. **If, at the conclusion of the evidence, there is a possibility that the judge should leave the issue to the jury when it is not part of the defence case, the judge must receive written submissions from the advocates so that he can carefully consider whether the evidence is such that the statutory test is met**.*
>
> *A judge must then in that assessment have regard to the three components of the defence of loss of control under the 2009 Act (and not the former law), undertake a rigorous evaluation of the evidence against those components and set out the*

> *conclusion in a reasoned ruling.* ***Provided that is done****, bearing in mind the advantages a trial judge has over an appellate court, an appellate court will accord to a* ***reasoned decision*** *of a trial judge (examining the components of the defence of loss of control) the ambit of judgment in the evaluation of the evidence that is open to the judge when making a decision based on that evaluation. In such circumstances, an appellate court will not readily interfere with that judgment.*" (*Gurpinar*[95] at [15]-[16])

214. This latest demand for **written** submissions is noteworthy, even though *Gurpinar* is very recent. The complaint we make is that no such process of any kind whether oral or written was ever considered or undertaken in this case by anyone.

215. In response to our requests Mr Berry QC wrote to us as follows on 2nd October 2015:[96]

> "***Of course I was alive to the statutory defence of "Loss of Control." However, any loss of control which he admitted related only to a point AFTER he had concluded firmly that the insurgent was dead and so was not relevant as a defence.***
>
> *As you would expect, many hours were spent with the defendant examining every moment of the footage and soundtrack.* ***During that time there were frequent occasions when we touched on the question of when and if he lost control. This, after all, was the central question of the case. So I probed the circumstances very carefully*** *to test his recollection and* ***to see whether there was a possibility that the loss of control occurred <u>at a different point in time</u>*** *than that claimed. He didn't budge an inch thereby confirming that the way he wished to run his defence was the correct one in all the circumstances.*"

216. We find Mr Berry's reasoning (with respect) once again simply impossible to understand. It is we think wholly fallacious.

217. Mr Berry maintains that he could not have pursued loss of control if the primary defence were rejected, because it was inconsistent with the Applicant's "*unwavering instructions*". But loss of control would arise **if, and only if,** the primary defence were first rejected – as it indeed was.

218. Manslaughter by reason of loss of control was a direct alternative and did not require any admission by the Applicant nor instructions from him that he was guilty of manslaughter.

219. It is also impossible to comprehend Mr Berry's apparent fixation with '***the point in time***' at which his client lost control. Surely the only relevant time was the moment when he actually pulled the trigger? So what on earth need was there for this '*frequent probing*' which Mr Berry claims to have done?

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[95] Volume VII, Tab 9
[96] Volume V, Tab 3, p 47

220. It will be recalled that the Applicant, his wife and Defending Officer do not recall this probing, nor is there mention of it remarkably in the conference notes of the old legal team (and / or their pupils).

221. Nor do we understand his claim to us that "***This, after all, was the central question of the case***". If so, why was it never raised by him to the JAG as a matter of law let alone developed by him in evidence or speeches?

222. In one sense however, the fact that loss of control was never deliberately developed by the Applicant or his counsel, makes the picture more compelling. His evidence of loss of control and the traumatic events of Herrick 14 which would have served as the qualifying triggers came out naturally all by itself and unvarnished. Therefore it is all the more likely to be true.

223. It has caused a miscarriage of justice that the Board were deprived of their opportunity to consider the alternative verdict of manslaughter by reason of loss of control, once they had rejected the primary defence. At that stage, the Board returned the only other verdict that was available to them as directed: Guilty of murder. This failure renders the murder conviction unsafe.

Fresh evidence

224. We have now obtained fresh evidence, in the form of the Telemeter Report and new witnesses in relation to the failings of his commanders, which are also now relevant to this issue of loss of control. We shall deal with these in turn.

The Telemeter Report

225. All of these matters raised above going to the defence of loss of control, are now best understood in light of the internal review called "*Operation Telemeter*" that was commissioned by Vice Admiral Sir Phillip Jones KCB and carried out by Brigadier Huntley RM, who reported on 11th March 2015.[97]

226. By ministerial statement of Mark Lancaster MP, Under Secretary State for Defence made in Parliament on 16th September 2015,[98] the Ministry of Defence took the exceptional (and very proper) course of making this new evidence available to us and the CCRC (and obviously if appropriate also to the CMAC hereafter). The remit of the review was "*to examine the events ancillary to the murder*"[99] of the unknown Taliban insurgent. The Report however it should be noted remains secret and classified.

227. We shall put the point into context in this way. As has often been said, the Court Martial system recognises that those with military service are best placed to judge their peers. The training and discipline of professional British soldiers are of course such that a high

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[97] Volume II, Tab 8
[98] See footnote 20, supra
[99] "*Telemeter – Internal Review*", para 4 (Volume II, Tab 8)

level of self-control is normally to be expected of them. And it would normally be taken as a given that the chain of command above the Applicant would be performing optimally and would not fail him.

228. However, the findings of this review, plus the new witness statements we have obtained from Colonel Lee and RSM Moran, demonstrate that the alleged killing cannot properly be understood – and especially not by a Court Martial Board – without an appreciation of the context of just what was going on **within J Company** at this time.

229. About this the evidence at trial was of course silent. The Report itself did not yet exist at the time of the Court Martial, and Colonel Lee and RSM Moran had not yet come forward (the reasons for this appearing below). This is therefore important new evidence.

230. We do not rehearse the Telemeter Report's findings in full here, as it is appended [but not to this version of the Report]. We merely highlight those of its findings which are relevant to the question of whether the Applicant lost his self-control on 15th September 2011.

231. We do this most conveniently by reproducing the following extracts [which are omitted in this version of the Report], from an agreed summary which was proposed by Ministry of Defence lawyers to us on 13th November 2015 (in fact for the purpose of transmission to Professor Greenberg to inform his report). The emphasis here is not ours but instead it exists in the original. We have however added in footnotes a few translations of the technical terms:

[omitted]

232. It is worth recalling here that Lord Thomas LCJ had said in his judgment on the Applicant's appeal against sentence at [39]:[100]

> "***At our specific request, enquiries were made*** *about steps that were taken by those commanding HM Armed Forces to address the obvious problems of stress in combatting an insurgency of the kind for which HM Armed Forces had been deployed to Afghanistan and in particular in relation to operation Herrick. It is apparent* ***from the information supplied to us*** *that the appellant received training in how to deal with stress during his pre-deployment training; this included a Trauma Risk Identification and Management briefing. We were told that he would not have received any further training in the five-and-a-half months in which he was deployed to CP Omar. It was his commander's responsibility to check on his mental welfare. However, given the remote and austere nature of the terrain with which HM Armed Forces had to contend in that part of Helmand Province and the dangers inherent in moving around the area, contact with his commander was limited.*"

[100] Volume VI, Tab 8

233. These Telemeter findings, which go much further than the fruits of the appeal court's enquiries, provide further confirmation that loss of control should have been a substantive issue in this case.

234. Whilst the report itself did not exist at the time of the court martial, nonetheless if proper professional enquiries had been made by the old defence team, there was in fact a plethora of other material potentially available, that could equally well have lent strength to a defence of loss of control.[101]

235. The Applicant had not undergone any TRiM assessment at all whilst deployed in Helmand. This is confirmed by the Telemeter report. Given that the purpose of the TRiM procedure is to help soldiers deal with combat trauma, the fact that no such facility was available at all at CP Omar until (fortuitously) 3 days before the incident when Marine B who was so trained happened to arrive, explains why his mental illness went undetected for so long. And it increases the likelihood that he lost his control.

236. Much of the above material could have been put before the Board in other ways if various appropriate witnesses who were fully available had been proofed and called by the old defence team. There was simply no proper professional attempt made by the old team to scratch beneath the surface.[102] This failing is further considered hereafter in the chapter dealing with **incompetent representation** (**Ground 5**).

237. There was evidence available that spoke to these issues in the form of three witness statements that had been obtained but were not even used. Mr Berry chose not to call these witnesses, typically without consulting his client or obtaining his consent or endorsement.[103] Major Michael Payne, an Operations Officer for 42 Commando

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[101] For example, by playing to the court the Chris Terrill documentary entitled *Royal Marines: Mission Afghanistan* which portrayed graphically the horrendous conditions being suffered by 42 Commando in Helmand at this exact time and in this exact location. This series of documentaries (readily available on Amazon) was watched only by a relatively small television audience on Channel 5 in the winter of 2012. Or by calling as witnesses those of the Applicant's comrades who had been blown up by IEDs but lived to tell the tale, and who would gladly have supported him. They continue to do so vociferously and publicly to this day incidentally.

[102] For example, there was evidence in the unused material which does not seem ever to have been requested by the old defence , which would have gone to loss of control, such as item D610 on the Schedule of Unused Material dated 04/07/13, described as follows:

> "*Investigators workbook from Mr BRADLEY, book 1 dated 04/10/2012 contained on pages 6/7 details of those marines killed or injured between 15/05/11 and 19/09/11. This information could potentially be used by defence to highlight any claims of stress caused by enemy actions during the tour.*" (Volume IV, Tab 9, pp 44-45)

[103] In this regard, Mr Berry QC wrote, in Annex I to his letter to us dated 9th November 2015:

> "*We took the considered view that providing a significant amount of character evidence, in addition to that already obtained, would not have added any weight to the widely accepted view that Sgt Blackman was an outstanding Marine with an excellent career record. It is worth noting at this point that Morley, Saxby and Payne were warned to attend the trial, but were subsequently stood down on the basis that the evidence*

provided a very detailed statement regarding the traumatic events of Herrick 14,[104] Warrant Officer 1st Class Christopher Saxby in a brief statement mentions "*the pressures and frustrations of the situation*"[105] and Lieutenant Colonel Adrian Morley said that the Applicant was under "*a great deal of pressure*".[106]

238. Each of these witnesses (expanded where necessary) could have assisted on the issue of loss of control. But there were potentially available in addition as witnesses those many other comrades who had suffered life changing injuries on the tour but lived to tell the tale, and who would have provided graphic testimony to illustrate the horrors of this tour for the Applicant.

Colonel Oliver Lee

239. Nor would it have been necessary to wait for the Telemeter Report, to present evidence of the command failures that contributed to the incident in question, and which go far to dispel any notion that the Applicant's discipline and training as a Royal Marine might preclude loss of control, or even make it unlikely.

240. Colonel Lee's evidence[107] independently bears much resemblance to the findings of the Telemeter Report. Having been promoted at age 38, he was the youngest full colonel in the Royal Marines since the Second World War, and he resigned his commission in disgust over this case as he explains fully in his new statement.

241. Colonel Lee writes of the failures of command by Lieutenant Colonel Ewen Murchison who was until just a few days before the shooting the Applicant's Commanding Officer, and under whose poor leadership J Company had turned "*feral*" (*ibid* at para 93) and "*out of control*" (*ibid* at para 91). He describes how the counter-insurgency campaign in 42 Commando was not being properly managed, unlike in the other Commandos at the time. He describes how the Applicant's pre-deployment training was also wholly inadequate. Colonel Lee quotes his own successor, Colonel Fenton, who observed when he visited all nine companies under his command that J Company (being of course the Applicant's old Company) was "*psychologically defeated, bereft of ideas, unpredictable and dangerous*" (*ibid* at para 106).

242. Col Lee's powerful conclusions are as follows:

> "*I am not an apologist for Sergeant Blackman. I have seen the video camera footage of the incident. My sole issue has been and remains the narrowness with which the investigation, court martial, sentencing and appeal of Sergeant Blackman were conducted.* ***This narrowness has precluded the inclusion of a***

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they covered had been more than adequately drawn out from the prosecution." (Volume V, Tab 5, pp 86-87)

He misses the point however. They did not just go to character but also to loss of control.

[104] Volume III, Tab 5, pp 23-33

[105] Volume III, Tab 5, p 35

[106] Volume III, Tab 5, p 37

[107] Dated 26th November 2015 (Volume II, Tab 4)

> ***series of wider background factors that I believe to be of the utmost relevance.*** *These factors at minimum seem to me to represent significant mitigation; at maximum I imagine they might contribute to change Sergeant Blackman's crime from murder to manslaughter (though of course I am no lawyer).*
>
> ***At the heart of these factors is my view that the leadership and oversight of Sergeant Blackman by his commanders Lieutenant Colonel Murchison and Major Fisher was shockingly bad, and directly causal to Sergeant Blackman's conduct.***" (*ibid* at para 132-133)

243. Although it is true that little of this was known at the time of the Court Martial, Colonel Lee had at least made it his business to approach and travel to a conference with Mr Glenser just a few days after the appeal was heard, but some weeks before the reserved judgment in it was eventually handed down.

244. Following their meeting Mr Glenser told Colonel Lee by email that Mr Berry QC had decided not to raise new points at this stage.[108] It seems reasonable to detect in Mr Glenser's reply about "*not undermining the way the case has been presented thus far*" embarrassment by the defence team at their failure to exploit loss of control hitherto.

245. Notwithstanding the stage that had been reached, proper professional efforts could and should still have been made to introduce Colonel Lee's evidence by letter to the court, or alternatively by requesting a resumed hearing for the purpose. Moreover, this was a further opportunity for the Applicant's previous lawyers to reconsider – even now on appeal – whether loss of control should be raised – as *Coutts* emphatically says it can, even at this late stage.

246. *Coutts*[109] makes clear that the point can be taken on appeal, even where a tactical decision was made by the defence not to use it at trial, and even indeed by the same lawyers:

> "*... although it appears distasteful that a defendant can ask the judge not to leave a lesser alternative count to the jury and then, when convicted on the greater count, complain to an appellate court that the alternative count was not*

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[108] The email is exhibited as OL/7 (Volume II, Tab 5, p 18). It is dated 22nd April 2014 from Peter Glenser to Oliver Lee, Mr Berry QC, Mrs Hogg and Kirsty Sutherland. It reads:

"*Oliver,*

After much thought we have decided not to submit your piece to the court. We think that they have the general point about COIN and that, at this late stage, it might be thought that we were introducing something new ***which may undermine the way the case has been presented thus far****. I am however extremely grateful to you for coming to see us and producing the document in such a short timescale. Claire has asked me for a copy of it. Do you have a view about that?*

Do let me know if you are coming to London - lets meet for lunch or something. And again if meeting Ed Parker would help just shout.

Kind regards,

Peter"

[109] Volume VII, Tab 4

> *left, the interests of justice require, as Lord Clyde stated* [in *von Starck*[110]], *that the jury should be able to reach a sound conclusion on the facts in the light of a complete understanding of the law applicable to them.*" (*ibid* at [43] *per* Lord Hutton)

247. If they felt personally embarrassed, as they deservedly might here, the old legal team had a professional duty to advise their client that the ground of appeal was available and he might want to raise it through new lawyers. But this too of course they never did.

Regimental Sergeant Major Stephen Moran

248. The new evidence of the very experienced RSM Moran[111] which has been obtained by us, is likewise important to the same issue of the failures of command in J Coy which would have assisted a loss of control defence. It too dispels the notion that loss of control is incompatible with the training and discipline to be expected of a Royal Marine.

249. RSM Moran writes:

> "***I was especially concerned by what I saw in J Company.***
>
> *Their standard of soldiering appeared sloppy and unprofessional.* ***They lacked discipline, morale and standards.*** *On numerous occasions when passing their patrols in my convoy I had to stop and get out to lecture them about fundamental matters. This included patrolling too close to one another and failing to space out correctly, which is of course dangerous if one Marine were to step on an IED, failing to wear blast goggles as they are ordered to do routinely, likewise gloves, helmets, body armour and what we call protective nappies, which are pads designed to protect the private parts against an explosion. When I visited J company patrol bases I found slackness and disrespect and what I considered a blasé attitude. This extended to the operation rooms of these bases.* ***There was a crude attitude of "smash the enemy" which was altogether too gung ho for the counterinsurgency strategy we were meant to be operating.***
>
> *Twelve 45 commando Marines had been seconded to J company to bolster their manpower in the northern area and they were in PB* (Patrol Base) *Folad. When I visited them they opened up to me (they knew me of course well) and they complained of a* ***lack of leadership and clear direction*** *and told me they were left unsure as to what their task there was.*
>
> *I reported all this back to my chain of command and* ***I described it in terms as being reminiscent of the worst of the Americans in Vietnam. I used the phrase that J Company were out of control.*** *I know that Lt Col Lee in turn took up these concerns at brigade level. I gather nothing was done about it however. For my part I had heated discussions and email exchange with Regimental Sergeant Major Gilby of 42 commando and he knew my views about it.*

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[110] Lord Clyde's judgment is cited at para 147 above.
[111] Statement dated 19th November 2015 (Volume II, Tab 6)

> *I have been told of Sgt Blackman's complaint that he received only one visit from his commanding officer during his entire six months at CP Omar and very few from his regimental sergeant major. If he were wrong in this assertion it could easily be disproved by military records. In 45 commando by contrast Lt Col Lee and I separately visited as many of our 30 plus bases fortnightly at least. I estimate that we actually put ourselves potentially in harm's way four or five times each week by making these visits but that did not deter us. Sometimes we came announced and sometimes we just turned up unannounced.* ***Good leadership demands that those in command should make these regular visits****. It is essential that the ordinary soldiers should understand their commanders know their daily difficulties and are not remote figures who do not understand or sympathise with their problems.* ***It is essential to good morale and discipline and without it the soldiers in a remote outpost can easily become alienated and lonely, and forget their training. And it can lead to loss of control and loss of discipline by a soldier. If he is feeling isolated and if he is getting hammered by the enemy at the same time he can go into survival mode and essentially, become feral. We were indeed trained and warned against all this before our deployment to Afghanistan.***
>
> ***If it is true that Blackman received only one visit from his commanding officer in six months that is a terrible indictment. I can say that it would never have happened in 45 commando.***" (*ibid* at pp 2-4)

250. No criticism can be levelled in this one instance at the old defence team. It now appears that RSM Moran's evidence was deliberately suppressed and concealed from them (although we are bound to observe it seems unlikely that Mr Berry QC would have deployed it anyway, given his relaxed approach to this case in so many other ways).

251. RSM Moran states that he tried to convey this evidence to the Court Martial but disturbingly was 'warned off' from within his own Royal Marines. He writes:

> "*In October 2013 I read of the court-martial which had massive press coverage and I decided that it was my duty to make myself known to the defence so that they could at least know the background I have tried to set out in this statement.*
>
> *Accordingly I googled the Chambers number of Mr Tregilas-Davey whose name I had read in the papers. I thought he was the barrister defending Blackman but in fact I later discovered he appeared for Marine C. I spoke to a receptionist there who told me that he would get back to me. This did not happen and so a few days later I telephoned again. I was given another number to ring which was the court martial centre. At all events I spoke to a person whom I assumed to be a defence lawyer having asked to be put through to Blackmans legal team. Unfortunately I failed to get the name of this person. I introduced myself by name and rank and I described my position and asked for the call to be treated in confidence. I told him that I felt the appalling and unprofessional behaviour of J Company as a whole should be highlighted in the way I had witnessed it first-hand on numerous occasions. I said nobody seemed to have looked at failures of the chain of command. These were my actual words as best I recall. I said that J company*

command team had lost control and should be held to account, as I felt this would offer some serious mitigation for Sgt Blackman.

This person did not seem very interested and I felt he was fobbing me off. The call ended, but less than an hour later I received a call on my mobile from the then senior Regimental Sergeants Major in the Royal Marines who was Warrant Officer 1 Corps RSM McGill. He told me that he had just received a phone call regarding the call I had made to the court. He asked me what I thought I was doing. I told him my call was confidential but I would agree to discuss it with him as my superior and asked him how he had learned of it. He said that he had received a call from Regimental Sergeants Major Gilby who was Regimental Sergeants Major of 42 Commando during Herrick 14. He said that Gilby had received a call from the court-martial telling him that I was interfering in the case. He added that my call had been placed on loudspeaker and had been heard by many people. I was amazed at this and it seemed to me wholly inappropriate and wrong for WO1 McGill to have been informed in this manner and for WO1 Gilby to be interfering in these matters.

I decided to report this incident to my direct chain of command which was then 3 Commando Brigade commanded by Brigadier Stuart Birrell. I telephoned him initially as he was then out of the country and we met a few days later on his return. I explained what I had done and why, and to my surprise he said he was massively disappointed with me for not going through him, and he disagreed with my actions and even questioned my motives. He did however assure me that I would be given an opportunity to make my case if it was required, which I took to mean that the relevant parties at the court-martial would be informed of what I could say. Indeed he said would speak to the Commandant General about it. Nothing happened of course and I read in the papers about the conclusion of the case." (*ibid* at pp 4-5)

252. We do not make further submissions here on the circumstances which RSM Moran here describes of being actively discouraged from giving evidence, or more colloquially 'warned off'. It is not within our present remit we think. We respectfully remind the CCRC however of its own independent and overarching powers of investigation.

253. It is at this stage worth revisiting one aspect of Professor Greenberg's psychiatric report, endorsed as it is by Dr Orr. That is where he describes the direct and well-established link within the military between poor leadership and mental illness.[112]

254. Thus the failure of command issues gives credence not only to diminished responsibility but also to loss of control as well.

255. In addition, RSM Moran shows that, had the Applicant have been visited as regularly as he should by his Commanding Officer Lieutenant Colonel Murchison, there is a likelihood that his mental deterioration would have been noted and remedial action taken.

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[112] See Appendix A to Dr Greenberg's report (Volume II, Tab 2, p 42)

Conclusion

256. The overall significance of the evidence contained within the Telemeter Report and the new statements of Colonel Lee and RSM Moran can be summarised in this way.

257. A Military Board would necessarily and reasonably expect soldiers to behave to a high standard of self-control in accordance with training and discipline. When considering the evidence against the Applicant without any idea as to how J Company's training, morale, supervision, and conditions had all deteriorated due to their poor leadership, this Board was being left to consider matters in a vacuum.

258. In the first instance there was ample evidence called raising the issue of loss of control such that it should have been left to the Board.

259. In addition, there was much more evidence on this issue potentially available, had it been sought with due professional diligence by the old legal team.

260. For all these reasons the verdict of murder returned without consideration of the partial defence of loss of control is unsafe, and accordingly there is a real possibility that it will be quashed.

Appeal against Sentence

261. Finally, and in the alternative, even if the CMAC is not minded to quash the conviction, the new evidence affords the Applicant greater mitigation than was ever available to him previously. For example, at para 75 of his judgment on the appeal against sentence, Lord Thomas LCJ said:[113]

> "*We have accorded particular attention to the view of the Court Martial that thousands of other service personnel experienced the same or similar stresses and still acted properly and humanely.*"

262. It is reasonable to think his conclusion would have been affected in favour of the Applicant had he known what Colonel Lee and RSM Moran now say about poor leadership in this small group. Just as it would have been, had he known that Professor Greenberg and Dr Orr now say the Applicant was suffering from a genuine mental illness. These new matters justify, we submit, a further reduction to the minimum term.

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[113] Volume VI, Tab 8

GROUND 3B: UNLAWFUL ACT MANSLAUGHTER

On the evidence called, the Board ought to have been directed to consider unlawful act manslaughter as an alternative verdict based on the Applicant's own case.

263. It is submitted that once the Board were in fact sure that the insurgent had been killed by the Applicant – even if he honestly believed that he was already dead – they ought to have been directed to consider whether he committed an unlawful and dangerous act by discharging his firearm, thereby making him guilty of manslaughter.

264. It is no answer to this submission to assert that, had the Board considered this to be a possibility, they would simply have acquitted altogether. The very reason for directing the jury in appropriate cases that manslaughter is a middle verdict which is open to them, is that it is accepted that this provides the jury with a more complete set of tools with which to analyse the facts in the round, and prevents the "*neck or nothing*" binary approach. See cases cited *supra* in relation to **Ground 3**.

265. As it was, the Board was only given the starkest of choices. Guilty of murder or a complete acquittal – "*neck or nothing*."

266. As Lord Rodger held in *Coutts*:[114]

> "*The reality is that, in the course of their deliberations, a jury might well look at the overall picture, even if they eventually had to separate out the issues of murder, manslaughter and accident* [as in Coutts' case]. ***So, introducing the possibility of convicting of manslaughter could have changed the way the jury went about considering their verdict.***
> …
> *In my view therefore, in a case where the judge has wrongly omitted to direct the jury on a viable alternative verdict, the failure to give the direction must be regarded as a material misdirection. In Bullard v R. (1958) 42 Cr. App. R. 1, 7; [1957] A.C. 635, 644 the Privy Council considered that failure to give the appropriate direction on manslaughter in a case of murder would always be irremediable. In the absence of detailed argument on that particular point,* ***it is enough to say that a failure to give the necessary direction must usually make the verdict unsafe since the appeal court will have no sufficient basis for concluding that a reasonable jury would inevitably have convicted the appellant of murder if they had been given the appropriate direction.***" (*Coutts* at [89], [91])

267. In the instant case it was accepted that the Applicant shot the insurgent intentionally. Even on the defence case, desecrating an enemy's body was an unlawful act, and as he

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[114] Volume VII, Tab 4

rightly accepted at the time of the shooting itself, it constituted a breach of the Geneva Convention.[115]

268. Putting to one side the Geneva Convention, under the laws of England and Wales, if the Applicant shot the insurgent believing him to be dead, this of itself potentially constituted the following offences:

a. Performing a duty negligently contrary to section 15(2) of the Armed Forces Act 2006;
b. Conduct prejudicial to good order and discipline contrary to section 19(1) of the Armed Forces Act 2006; and
c. Disgraceful conduct of a cruel or indecent kind contrary to section 23(1) of the Armed Forces Act 2006.

269. Thus there was a wealth of unlawful acts here from which to choose. We submit that the failure by the JAG to leave unlawful act manslaughter to the Board was a material misdirection which also renders the verdict of murder unsafe, because the failure to do so left them with the "*neck or nothing*" binary choice.

[115] Article 34 of the 1977 Additional Protocol I to the Geneva Convention states that: "*The remains of persons who have died for reasons related to occupation or in detention resulting from occupation or hostilities… shall be respected.*"

GROUND 3C: GROSS NEGLIGENCE MANSLAUGHTER

On the evidence called, the Board ought to have been directed to consider gross negligence manslaughter as an alternative verdict based on the Applicant's own case.

270. Similarly, it is submitted that, applying the principle in *Coutts*[116] the Board ought to have been left to consider the alternative verdict of gross negligence manslaughter. Again, it would have been available to them only once they rejected the primary defence that the Applicant believed that the insurgent was already dead when he shot him.

271. Logically, this was a lesser alternative to unlawful act manslaughter as the Board would merely have to conclude that the Applicant had behaved in a grossly negligent fashion and that this behaviour caused or accelerated the death.

272. *Adomako* [1995] 1 AC 171, HL[117] makes plain that a very high degree of negligence is required to pass the criminal threshold. Whether it does or not is described as "*supremely a jury question*" (*ibid* at 187E, *per* Lord Mackay LC)

273. Discharging a firearm into the insurgent from point-blank range without checking properly if he was in fact already dead was well capable of satisfying this high test, if the Board had been invited to consider it as an alternative.

274. Lord Mackay LC gave the leading judgment. He held that the law as stated in the authorities of *Bateman* (1927) 19 Cr App R 8, CCA and *Andrews v Director of Public Prosecutions* [1937] AC 576, HL was "*satisfactory as providing a proper basis for describing the crime of involuntary manslaughter*" with *Andrews* being "*the most authoritative statement of the present law*" (*ibid* at 187A).

275. Lord Mackay LC cited with approval the judgment of Lord Hewart LCJ in *Bateman* at 10-12:

> "*In expounding the law to juries on the trial of indictments for manslaughter by negligence, judges have often referred to the distinction between civil and criminal liability for death by negligence. The law of criminal liability for negligence is conveniently explained in that way. If A has caused the death of B by alleged negligence, then, in order to establish civil liability, the plaintiff must prove (in addition to pecuniary loss caused by the death) that A owed a duty to B to take care, that that duty was not discharged, and that the default caused the death of B. To convict A of manslaughter, the prosecution must prove the three things above mentioned and must satisfy the jury, in addition, that A's negligence amounted to a crime. In the civil action, if it is proved that A fell short of the standard of reasonable care required by law, it matters not how far he fell short of that standard. The extent of his liability depends not on the degree of negligence, but on the amount of damage done. In a criminal court, on the*

[116] Volume VII, Tab 4
[117] Volume VII, Tab 1

contrary, the amount and degree of negligence are the determining question. There must be mens rea…

In explaining to juries the test which they should apply to determine whether the negligence, in the particular case, amounted or did not amount to a crime, judges have used many epithets, such as 'culpable,' 'criminal,' 'gross,' 'wicked,' 'clear,' 'complete.' But, ***whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment****.*" (*Adomako* at 183H-184D)

276. Lord Mackay LC cited with approval Lord Atkin's judgment in *Andrews* at 581-582:

"*... of all crimes manslaughter appears to afford most difficulties of definition, for it concerns homicide in so many and so varying conditions… In the present case it is only necessary to consider manslaughter from the point of view of* ***an unintentional killing caused by negligence****, that is, the omission of a duty to take care… As an instance I will cite Rex v. Williamson (1807) 3 C. & P. 635 where a man who practised as an accoucheur, owing to a mistake in his observation of the actual symptoms, inflicted on a patient terrible injuries from which she died. 'To substantiate that charge' - namely, manslaughter - Lord Ellenborough said, 'the prisoner must have been guilty of criminal misconduct, arising either from the grossest ignorance or the most criminal inattention.' The word 'criminal' in any attempt to define a crime is perhaps not the most helpful: but it is plain that the Lord Chief Justice meant to indicate to the jury a high degree of negligence.*" (*Adomako* at 185E-186B)

277. Lord Mackay cited the passage of Lord Atkin's judgment (*Andrews* at 583) dealing with the passage from Lord Hewart LCJ's judgment in *Bateman* cited above:

"*Here again I think with respect that the expressions used are not, indeed they were probably not intended to be, a precise definition of the crime. I do not myself find the connotations of mens rea helpful in distinguishing between degrees of negligence, nor do the ideas of crime and punishment in themselves carry a jury much further in deciding whether in a particular case the degree of negligence shown is a crime and deserves punishment. But the substance of the judgment is most valuable, and in my opinion is correct. In practice it has generally been adopted by judges in charging juries in all cases of manslaughter by negligence, whether in driving vehicles or otherwise. The principle to be observed is that cases of manslaughter in driving motor cars are but instances of a general rule applicable to all charges of homicide by negligence. Simple lack of care such as will constitute civil liability is not enough: for purposes of the criminal law there are degrees of negligence: and* ***a very high degree of negligence is required to be proved before the felony is established.*** *Probably of all the epithets that can be applied 'reckless' most nearly covers the case. It is difficult to visualise a case of death caused by reckless driving in the connotation of that term in ordinary speech which would not justify a conviction for manslaughter: but it is probably*

> *not all-embracing, for 'reckless' suggests an indifference to risk whereas the accused may have appreciated the risk and intended to avoid it and yet shown such a high degree of negligence in the means adopted to avoid the risk as would justify a conviction.*" (*Adomako* at 186D-G)

278. Lord Mackay explained that it was:

> "*... perfectly appropriate that the word 'reckless' should be used in cases of involuntary manslaughter, but as Lord Atkin put it 'in the ordinary connotation of that word.'*" (*ibid* at 187H)

279. Lord Mackay's own summary of the principles derived from *Bateman* and *Andrews* was as follows:

> "*... the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such breach of duty is established the next question is whether that breach of duty caused the death of the victim.* ***If so, the jury must go on to consider whether that breach of duty should be characterised as gross negligence and therefore as a crime. This will depend on the seriousness of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred. The jury will have to consider whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the patient, was such that it should be judged criminal.***" (*ibid* at 187B-C)

280. Undeniably the Applicant did have a duty of care to the insurgent from the time he took him prisoner. It was perfectly possible for the Board to have concluded that even if the Applicant wrongly believed the insurgent to be dead, he ought in fact to have checked if he was still alive. This possibility arose on the Applicant's own evidence where he had conceded in cross-examination that he may well have made a mistake that the insurgent was dead:

> "*A: ... Obviously I believed he was dead and, having not seen any movement in him for the last few minutes, he suddenly became very animated after I'd discharged my side-arm.*
> *Q: So what did you think to yourself?*
> *A: I questioned whether I was right in my mind, had I made a mistake.*" (Transcript 30.10.13,[118] p 40A-B)

281. Therefore, it was open to the Board to conclude that the Applicant breached his duty to the insurgent and that his conduct departed from the proper standard of care incumbent upon him to the extent that it should be judged criminal.

282. Accordingly, gross negligence manslaughter was another clear alternative verdict on the evidence, and the JAG ought to have directed the Board to consider it as an alternative to

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[118] Volume VI, Tab 2

murder. Once again the learned JAG failed in his duty. This failure left the Board once again with the "*neck or nothing*" binary choice.

283. His failure further renders the verdict of murder unsafe and there is a real possibility that the CMAC will quash it if this case is referred back to them.

GROUND 4: IMPROPER CROSS-EXAMINATION

The prosecution cross-examined the Applicant extensively on the contents of Marine C's diary. This was impermissible as it was not evidence against the Applicant, and the irregularity was not cured by the summing up. These are well-established Common Law principles.

284. Mr Perry QC, on behalf of the prosecution, cross-examined the Applicant, in great detail about the contents of Marine C's diary. We submit that this method of cross-examination is directly contrary to the principle set out in *Windass* [1989] 89 Cr App R 258,[119] CA and repeated in *Gray* reported at [1998] Crim LR 570, CA (of which a full transcript is appended[120]).

285. The relevant and very lengthy passage of the cross-examination is as follows:

> "*Q: If we just look at Marine C's journal, if I may. Divider 11.*
> *A: Yes.*
> *Q: If we just go to Thursday, 15th September.*
> *A: Do you know what page that one was on?*
> *Q: It is page 207.*
> *A: Yes.*
> *Q: We can see at page 207 where Thursday, 15th September begins.*
> *A: Yes.*
> *Q: Can you see that? And he has got the heading:*
> *"Death. 172 busy busy. Due to the change in plans of the schedule three-day op our only involvement was today in supporting a multiple from Taalander up to the W8ML border to search compounds of interest."*
> *A: Yes.*
> *Q: Is that correct?*
> *A: What, the statement?*
> *Q: Yes.*
> *A: I honestly can't recall what I did on that day two years ago.*
> *Q: All right. Let us see whether this brings it back to mind:*
> *"We set off from Omar shortly after and headed north to the east of them through Ops ..."*
> *Is that Boxrod(?)?*
> *A: Yes.*
> *Q: "Got up there, went firm while they crashed on and got back down without incident, so all good. Very good to see the lads, especially big Chris and Frankie. Later that day, mid-afternoon around 1500 hours, Taalander was hit with small arms for a sustained period enabling the PGSS to ping firing points and track the offending insurgents."*
> ***That is accurate, is it not?***
> *A: I believe so, yes.*

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[119] Volume VII, Tab 15
[120] Volume VII, Tab 8

Q: "One headed east to a particular compound just up a particular road from us so we were crashed out to get up there sharpish and try to nab him. We're out the door in ten minutes and heading up the western side of Cornwood(?) as fast as we could, straight for it. Going past another compound, a previous firing point, Wasonky(?). I was just waiting to get engaged especially on the way back. Once we got up there we went in hard and fast. We'd seen someone sneak out as we headed up at the Bitekek(?) compound so they probably ripped off up the road."
That is accurate, is it not?
A: Yeah, in a broad sense, yes.
Q: Yes:

> *"Once in I gripped the owner while the lads piled in to secure the compound. Half came in with me, half went with Marine A, round the front to check that out. Then me and Neths ..."*

That is Nethercott, is it not?
A: I believe so.
Q: "... went to town searching in the compound building while lads did the same outside in the courtyard. We did a right number on his gaffe. Turned the place over but all we turned up was an old Soviet-style single shot shotgun which they're allowed. We gave him a talking to and headed back. All we could."
That is accurate, is it not?
A: I believe so.
Q: Yes. There was Soviet-style single shot shotgun --
A: I didn't see the weapon personally. I didn't go into the compound; that was handled by Corporal Kingston. What was in there, you would you have to ask him.
Q: ***So up to this point, this journal appears to be a pretty accurate record, does it not?***
A: In a broad sense, yes.
Q: Yes. Then we come on to our incident:

> *"On the way back down to the CP it came over the company net that two men they'd tracked were up at a particular compound just west of us and were about to get smoked by an Apache helicopter. We went firm to watch, wait to see if we were needed and waited."*

That is accurate, is it not?
A: Yeah, we firmed the treeline.
Q: Yes. We can see that pretty much on the earlier videos, can we not?
A: Yes.
Q: ***So he has got that right:***

> *"When the strike went in it was [it is sound?] the Apache let loose with 30 millimetre and the geezer got smoked. As he'd been heading east at the time across a field we got tasked to carry out the battle damage assessment since we were only around 500 metres away."*

That is pretty accurate, is it not?
A: I assume so, yes.
Q: Well, do not assume --
A: Sorry, I mean --
Q: ***It is pretty accurate.***
A: I didn't mean to say "assume". Yes, it ...
Q: ***That is accurate in terms of the direction and also the distance.***

A: Direction of travel the insurgent was moving is incorrect but a lot of the detail does seem --
Q: Correct. "So we headed on up there and as soon as we crossed into the field he was in behind a particular compound. I pinged him. White dishdash."
Now the white dishdash, that is the garment that you are holding in the video, is it not?
A: Yes.
Q: "50 metres north of the treeline we were moving up in the middle of the field. The fucker was still moving. 138 30 millimetre rounds hadn't finished him off. I expected him to be in bits."
Now, that is pretty accurate, is it not?
A: Yes.
Q: "So we drew level with him and went firm. Then me and Marine A moved up out to him covering each other abound at the time as the others provided our protection."
Now, that is accurate, is it not?
A: Yes.
Q: "He was down and hanging out but still moving. I said as much to Marine A." ***That is accurate, is it not?***
A: Yeah, he was down and still moving, yeah.
Q: "As well as I had a head shot but we cracked on up to him." That is right, is it not?
A: Yes.
Q: Did he say that he could have got a head shot in?
A: Yes.
Q: Yes. ***So he has got that right as well:***

> *"I'd expected to brass him up there and then but I followed Marine A's lead. We got to him and he was in a very bad way."*

Well, you did get to him and he was a in a very bad way. Is that right?
A: Yes.
Q: ***So he has got that right.*** *Then he says you do the standard checks and he says that you searched him and he deals with that, does he not?* ***He has got that right?***
A: Sorry, I've lost the point on the page.
Q: If you go to the bottom of 209, "Did the standard check. Marine A searched him --"
A: Yeah, sorry, I'm there.
Q: And then he deals with that. Then he says this, "PGSS had us in full view as did the Apache, so Marine A was playing it straight". Now let us just take this in stages. The PGSS had you in full view, did it not?
A: I wasn't aware or unaware of it at that time whether it was watching us or anybody else.
Q: Right. But you would have been -- you could have been in full view to the PGSS?
A: We're in the middle of a field.
Q: Yes.
A: Yeah.
Q: And the PGSS had been looking in that direction because that is where the man had been seen.
A: Yeah.

Q: The Apache helicopter also had you in full view.
A: I assume so, I couldn't say for certain.
Q: He says:

> *"We recovered an old hanging out AK with two mags as well as a high explosive grenade."*

That is correct, is it not?
A: His assessment of the weapon I would say is wrong. It was not that in bad condition.
Q: ***All right. But it was that sort of weapon?***
A: It was an AK-47 variant.
Q: "Next he started assessing wounds while I had my pistol drawn on his head in case he tried anything. Any excuse to pop him I would. Piece of shit. I wanted to slot him bad but Marine A said no due to the PGSS feed goes direct live back to Bastion and it could wind me up on a murder charge."
There was a discussion about the PGSS going to Bastion, was there not?
A: I can't remember exact details of the conversation in the field. There may have been.
Q: ***Yes, there may have been, and discussion about a murder charge.***
A: May have been.
Q: Yes. Why would there have been discussion about a murder charge?
A: Because on the approach to the individual, if he had moved or done anything threatening we would have been well within our rights to shoot him. Once I'd -- we'd closed on him and begin to clear you just can't stand above someone and shoot them in the face if they're still alive. Obviously at that point we were fully aware he was still alive. I'd sent up that he was still alive.
Q: ***So there was a discussion about murder and there was a discussion about the PGSS feed going back to Bastion.***
A: I don't know if I used the term "murder". You know, I may have referenced we weren't going to shoot him because I -- you know, we --
Q: ***But that would be murder, would it not?***
A: Well, it would be, but I don't remember using that term.
Q: Yes, all right. Then he goes on:

> *"As I said, before he was fucked up though his brain just hadn't caught up with his body. He was dead but he just didn't know it yet. The high explosive incendiary rounds the Apache used had fragged up his entire left side head to toe and he had two or three nasties up his back, honking sucking chest wound. You could have fit three fingers in. His lungs and shit hanging out. I felt no pity for him though. Fucker had just been shooting up our boys at Taalander and God knows what before that."*

Now, the description of the injuries there, are they accurate?
A: They're pretty much from what you see on the video.
Q: ***Yes, so he has got that right as well.***
A: Yes.
Q: ***It appears to be quite an accurate account, does it not?***
A: A few minor inaccuracies but --
Q: ***A few minor inaccuracies but on the detail it looks as though he is doing quite well.***
A: Yeah.
Q: Then if we go on:

> *"So once we'd searched and de-armed him a couple of lands came over to drag him out of the middle of the fields, as we were mega-exposed, and into the treeline. Everyone else was firm in."*

So he's got that right as well, without the benefit of the video.

A: Yes.

Q: "This also meant we were out of the watchful eye of the PGSS balloon." Now, that is consistent with what you were saying about, "Getting over there where the PGSS can't see what we're doing to him". ***That is consistent with that, is it?***

A: It is, yeah.

Q: ***Yes. So it looks like he has that right as well, does it not?***

A: Yes.

Q: Yes, "Initially Marine A had sent up that this worthless piece of shit was alive, rightly or wrongly". ***Now, you have done that, have you not?***

A: Yes.

Q: In the field?

A: Yes, I --

Q: ***So he has that right?***

A: Yeah, I made no -- no attempt to hide the fact that he was alive.

Q: But then he says this, "But wasn't keen to call an alert out". ***Has he got that wrong?***

A: You can argue I wasn't keen to give medical aid. I think that's evident from the poor standard of medical aid throughout.

Q: ***So he has got that right? He has got that right?***

A: Yeah.

Q: ***So that is another matter he has got right:***

> *"He was nearly dead anyway. Don't think he'd have pulled through. Now we were in cover I was ready and waiting to pop him with a 9 millimetre. One in the heart should do it."*

Now, Marine C, who is compiling this, the Marine holding the pistol, who said, "I'll put one in his head".

A: Yeah.

Q: And later, "Shall I pop one in his heart?"

A: Yeah.

Q: ***So he appears to have that right as well, does he not?***

A: What he's -- what he's -- he's asserting he wanted to?

Q: Yes.

A: When --

Q: ***It is consistent with what we see on the video, is it not?***

A: Well, no. He doesn't discharge his firearm so ...

Q: No, he does not say that, does he?

A: But he wants to but ...

Q: Yes.

A: I mean, it's accurate to say he says he wants to in this, yes.

Q: ***It is accurate to say he wanted to.***

A: Well, it's written here so ...

Q: That is the impression he was giving to you, was it not?

A: Well, that's the impression you get from this.

Q: No, and that is the impression he was giving to you on the ground.

A: As I said, the initial statement, "One in the head" I took not to be meant as a realistic, "I'll shoot him in the head if you want".
Q: ***All right. Let us see what he goes on to say, "But I waited for the nod from Marine A".***
A: Yeah.
Q: ***Has he got that wrong?***
A: I -- no discussion or do not remember any discussion having that, one, we were going to shoot him. So you could say he's elaborating it or ...
Q: ***He says he kept pressing the point:***

> *"And although for a minute I thought we were actually going to treat and CASEVAC him, Marine A squared it and sent up that he'd snuffed it while we treated him."*

A: Yeah.
Q: ***Isn't that what we see on the video?***
A: I don't think there's any evidence on that video of him pressing the point. He references it once at the start of video 4, or sorry, midway through video 4. There's a reference later on which I am not privy to. I'd hardly call that pressing the point.
Q: No.
A: How he interpreted my decision or my assessment the insurgent was dead is for him to answer.
Q: The BDA does not show us everything.
A: No, it doesn't.
Q: It doesn't show us all conversations, does it?
A: No, it doesn't, but there's no evidence on there that he -- if it's stated -- you know, in this journal it says, you know, it's -- it assumes or it's stating that he, you know, he pressed the point quite a lot and if he's pressing the point quite a lot you'd expect to see on that video, "Are we going to --" you know, him state the fact that we're going to pop him more than -- on more than one occasion to -- directly to me. And that's not the case.
Q: What we see here is Marine C saying:

> *"For a minute I thought we were actually going to treat and CASEVAC him. Marine A squared it and sent it up that he'd snuffed it while we treated him."*

I am putting it to you that that is what we see on video clip 5. You say he has passed when it fact it is quite clear he was not.
A: I made the assessment at the time that he'd passed. I believed at the time when I made that assessment he'd passed. What's written in this journal is someone else's opinion, which is hard for me to comment on as I wasn't privy to it being -- sorry, being written or didn't know it existed until I was given it.
Q: ***But you can tell us whether it appears to be accurate, you see. That is what I am asking you.***
A: Certain aspects do.
Q: Yes.
A: But I believe it has been embellished or dramatised in certain areas.
Q: ***Well, let us see because, "There I was, pistol drawn". He was there, pistol drawn, was he not?***
A: Yeah.
Q: "Waiting for Marine A to get off the net." You were on the net, were you not?

A: Yes, I was.
Q: "So I could pay this little wanker and be done with it when Marine A came back over and pinged me out to take up arcs with the others."
That is what we see, is it not?
A: Yes. Again, I've made the assessment he's dead. I no longer needed the cover man covering him so I moved Marine C to a position where he was providing cover for the rest of the lads along the treeline where he's -- his -- the optics he had on his rifle, which were better than all the other rifles, could've been put to more use.
Q: ***Then he says this:***

> ***"As I walked off towards Steve*** [Corporal Kingston] ***and Nevs*** [Marine Nethercott]***, Marine A popped him one himself. I felt mugged off, but job done. Little fuck was dead at the end of the day."***

A: Yeah.
Q: He then goes on to deal with, "The end result was a good one".
A: Yes.
Q: Do you think the end result was a good one?
A: In certain respects, yes. One insurgent off the street; a weapon system that can't be used to kill our troops; a grenade that can't be used to kill our troops. I'd say that's a pretty good result at the end of the day. Like I've said, I've admitted that a lot of the -- what happened was -- I'm ashamed of, putting it like that, and things could have been done quite differently ..." (Transcript 30.10.13,[121] pp 107C-116F)

286. This significant passage of cross-examination in fact occupies a very large proportion of the total. This is itself important to note.

287. The questions were improper yet they were allowed to continue, without any objection from the defence or intervention from the JAG.

288. The case of *Windass*[122] is directly relevant in this regard. Windass and his girlfriend were charged with, *inter alia*, conspiring to steal. The trial judge had allowed into evidence the girlfriend's diary which tended to incriminate both her and the appellant. It was not a conspiratorial document but a private record, so whilst admissible against the girlfriend, it was not evidence against Windass.

289. Lord Lane LCJ allowed the appeal, on the basis that the trial judge improperly allowed Windass to be cross-examined on the diary entries and what they meant: His strictures are directly applicable to what Mr Perry did here, and inexplicably without objection from anyone.

> "*It seems to us that there are two objections which should properly be made to that line of cross-examination* [i.e. of Windass on his girlfriend's diary entries]. ***First of all it is quite improper to ask a witness to explain what a third party means by a document written by that third party.*** *No doubt if this witness had*

[121] Volume VI, Tab 2
[122] Volume VII, Tab 15

> *been more experienced, he would have said that was impossible, but then he would have run the risk of being thought to be too clever.* ***As it was, he found himself in the position of trying to explain to the jury what a third party meant by a document written by that third party without his collaboration.***
>
> ***Secondly, perhaps more importantly, it is, in our judgment, quite improper for counsel to take in his hand a statement*** [the diary] ***which is inadmissible vis-à-vis the witness whom he is cross-examining, let alone allowing the jury to have a copy of the statement in their hands whilst he is doing that, and then to ask the witness to explain, almost sentence by sentence, the highly damaging statements, inadmissible against him, which the maker of the document had written.***" (*ibid* at 262-263)

290. As to the proper course which the Crown should have taken instead, Lord Lane LCJ said this:

> "*It is of course perfectly possible and perfectly proper for questions to be put in cross-examination such as "Were you in such and such a public house on such and such a day? Were you with such and such a person?"* ***But to link it, as was done here, with the contents of a document inadmissible against the witness being cross-examined was, in our judgment, a matter which should not have occurred.***" (*ibid* at 263)

291. *Windass* was cited and relied upon in *Clarke and Hewins*, 15th February 2009, unreported,[123] CA. Clarke and Hewins were convicted of arson with intent to endanger life, along with a further defendant, Sullivan, whose appeal was abandoned at an early stage.

292. Clarke and Hewins each appealed against their convictions on various grounds, including that they were both cross-examined on documents which were inadmissible against each of them. Kennedy LJ held as follows:

> "*… whatever may have been the intention of prosecuting counsel the jury in reality must have been led to measure Clarke's answers against the inadmissible written record of what Sullivan said to the police.*" (*ibid* at p 26)

293. Hewins was cross-examined in relation to Sullivan's statements just as Clarke had been. Kennedy LJ characterised the questioning in this way:

> "*At times the object may well have been genuinely to see if the witness would agree, or to seek to strengthen the case against Sullivan, or to demonstrate collusion between the defendants,* ***but for the most part the object, and certainly the effect, can only have been to cause the jury to take into account inadmissible material when evaluating the evidence of the witness***." (*ibid* at p 32)

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[123] Volume VII, Tab 2

294. Although in summing up here, the JAG in due course directed that Marine C's diary was not evidence against any defendant other than himself, this direction was inadequate in the face of the extensive questions that the Board had heard earlier. They had been put over a long period of time and without objection. His direction was no more than to say this:

> "*Can I talk a little bit about the statements and evidence of the three co-defendants? Each of the defendants were interviewed a number of times under caution, and what each of them said is evidence only in his own case. You may not have regard to what was said by each within interview when considering the case against the other two defendants, even though they have each made references to each other in those interviews. The reason for that is that each defendant was interviewed separately, and during each interview, the other co-defendants were not present to make any comment on their own on what was said.* ***This also applies to Marine C's journal. It is evidence in C's case, but you may not have regard to it when considering the case against A and B.***
> …
> *All three* [defendants] *have given evidence, and you may consider what each of them said when considering all three cases. To the extent that when giving evidence each has adopted or accepted what he said in interview, or in Marine C's case, was in the journal, is evidence in the case as a whole and admissible for and against each defendant.*" (Transcript 6.11.13,[124] pp 43H-44C)

295. This direction is of course correct in so far as it goes, but it is economic to the point of being niggardly.

296. Lord Lane LCJ says in *Windass*[125] that an improper cross-examination of this kind can only be saved, if at all, by a "*rescue operation*" in summing up:

> "*It might perhaps have been rescued by the learned judge by the way in which he directed the jury as to the effect of that cross-examination. But unhappily in the present case the judge did not carry out any such rescue operation*" (*ibid* at 263)

297. The JAG's direction was at best perfunctory. Nor does he touch upon the **effect** of the cross-examination as he was bound to do if following *Windass*. Moreover, the Board were not made aware of the impropriety of this cross-examination from any quarter at any time, least of all by the JAG, and so they will have assumed at all times that it was entirely proper and above board by Mr Perry.

298. The JAG nowhere condemned it emphatically as he should have done. The Applicant thus did not receive the protection to which he was entitled.

299. Inexplicably, in response to our letters (and once again in blithe disregard of the binding authorities to which we referred him), Mr Berry flatly insists that there was no

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[124] Volume VI, Tab 5
[125] Volume VII, Tab 15

impropriety at all in the Crown cross-examination. He then asserts that it did not matter anyway. In Annex I to his letter of 9th November 2015 to us, he wrote:[126]

> "*You suggest that Mr Perry's cross examination was "inadmissible and improper."* ***We disagree****. At the stage he was being asked about it, the contents of Hammond's diary were not yet evidence in the case against Sgt Blackman. However, that did not mean that he could not be asked for his comments in cross examination.* ***In any event, we do not believe that, on balance, the passage in question is harmful to Sgt Blackman.***"

300. Ironically, it now transpires that the old legal team was in fact alerted to raising this as a ground of appeal by the Applicant himself.[127] He was justifiably complaining of it to Mrs Hogg in a prison conference of which the notes exist, after his conviction but before his appeal. Yet his own lawyers nonetheless failed to raise it on appeal.

301. When Marine C came to give evidence he pointedly did not adopt the contents of his diary as accurate. In fact, what he said was summed up by the JAG thus:

> "*Marine C identified the extract from his diary for 15 September. He said:*
>
> > *"By this stage of the tour I was using the diary primarily as a vent for my frustrations and emotions, my way of coping with the stresses and strains we were under. I had a month left of the tour. Mentally and emotionally at this point I was very drained, very frayed as in my emotions and senses always on edge. By then between 10 and 20 of my friends and colleagues had been killed or seriously injured. Anything like that is devastating when you know the individuals well. My diary was in effect my way of coping. I was often angry when writing, trying to make myself out to seem that I was coping a lot better.* ***It is filled with bravado and embellishment. This was not meant to be an accurate chronicle of events at that stage.****"*"
> > (Transcript 6.11.13,[128] p 51C-D)

302. Accordingly, the crucial diary content that the Crown relied on and repeatedly asserted as being accurate to the Applicant, was never adopted as true by the author. Therefore, at no stage did the diary become admissible evidence against the Applicant. Yet it had already been used to devastatingly prejudicial effect by Crown counsel.

303. The diary correctly analysed had no more evidential status than Marine C's (or any other defendants') interviews: they were all examples of out of court statements. It was held by Hutchison LJ in *Gray*[129] that:

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[126] Volume V, Tab 5, p 87

[127] The solicitor's notes of a conference between Mrs Hogg and the Applicant at HM Prison Lincoln dated 17th / 18th March 2014, to be found at Volume IV, Tab 9, p 49, read as follows:
"***Used diary of C to convict but not convict C, if ramblings shdnt be used against me****"*

[128] Volume VI, Tab 5

[129] Volume VII, Tab 8

> "*What is certainly inappropriate, as the case of Windass and the observations of Roch LJ in Hickey and others show, is to use the interview, or statement, or whatever other inadmissible document may be in question,* ***as though it were evidence in the case against the defendant being cross-examined****. Certainly in a case such as the present, where, as we have indicated, there can have been no sensible expectation that Gray was going to adopt what Evans had said, such cross-examination should be strictly avoided.*" (*ibid* at pp 14-15)

304. It is no argument now for the Crown to respond that the JAG's direction to the Board was sufficient, given that in *Clarke and Hewins*[130] Kennedy LJ held that:

> "*It is no sufficient answer for the prosecution to say, as they do, that the trial judge warned the jury that answers given by one defendant in the absence of the other are not evidence against that other.* ***In reality admissible and inadmissible evidence were so intertwined that it was impossible for the jury to apply the judge's warning as they should have done***." (*ibid* at p 36)

305. The vice of what occurred is well-illustrated in the following passage in the judgment in *Gray*[131] by Hutchison LJ:

> "*If it is not avoided, the judge's task in making the jury understand the evidential status of the interview or statement or whatever it may be is made very much harder, and* ***real prejudice may be caused to the case of the defendant against whom it is inadmissible***." (*ibid* at p 15)

306. It is of no consequence that Marine C was later acquitted of murder. He had available to him separately a strong defence on the evidence of not being involved in any joint enterprise with the Applicant. His acquittal cannot demonstrate that the Board rejected the contents of his diary in their entirety.

307. Those parts of the diary that Mr Perry QC was trying to establish as true through his cross-examination of the Applicant, were the ones that suggested the insurgent was alive at the time of the shooting. Of course the Applicant could not comment on what Marine C thought or believed and Mr Perry did not in reality expect him to. He saved that for cross-examining Marine C. What he did seek to do however was to introduce as evidence those parts of the diary suggesting that Marine C knew the insurgent was alive. Therefore, he was suggesting by extension, the Applicant must have realised that too.

308. There is a real danger that the Board may have disregarded some parts of the diary as bravado thereby acquitting Marine C, yet accepted the other inadmissible parts showing he was alive as evidence against the Applicant.

309. The impact of that cross-examination must have been considerable, given the sole issue in the Applicant's case. The Crown had to disprove the Applicant's assertion that he

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[130] Volume VII, Tab 2
[131] Volume VII, Tab 8

believed the insurgent was already dead. The prosecution undermined his defence very effectively here through the back door.

310. This diary evidence was inherently unreliable, inadmissible in law, and ultimately the spin put on it by Mr Perry QC was anyway not adopted by Marine C himself when he came later to give evidence.

311. In summary the prosecution was wrong to cross-examine the Applicant about the contents of the diary, Mr Berry QC was negligent not to object, and the JAG was wrong not to stop it.

312. Accordingly, the prejudice caused by this inappropriate cross-examination makes the murder conviction unsafe, and there is a real possibility that if this case is referred, the CMAC will quash it.

GROUND 5: INCOMPETENT REPRESENTATION

The Applicant did not receive a fair trial due to incompetent representation, such that the verdict is unsafe.

313. With regret, and in accordance with our professional duty as expressed in several of the authorities, we strongly raise the incompetence of the Applicant's previous representation as a ground of appeal.

The Law

314. As a general rule, the test is a high one before a conviction will be set aside as unsafe on account of incompetent representation. The leading authority on the point is *Day* [2003] EWCA Crim 1060,[132] in which Buxton LJ held as follows:

> "*… incompetent representation… cannot in itself form a ground of appeal or a reason why a conviction should be found to be unsafe. We accept that, following the decision of this court in Thakrar [2001] EWCA Crim 1096, the test is indeed the single test of safety, and that the court no longer has to concern itself with intermediate questions such as whether the advocacy has been flagrantly incompetent. But* ***in order to establish lack of safety in an incompetence case the appellant has to go beyond the incompetence and show that the incompetence led to identifiable errors or irregularities in the trial, which themselves rendered the process unfair or unsafe.***" (*ibid* at [15])

Particulars of Incompetence

315. We submit that the matters listed below demonstrate grave incompetence by the Applicant's former legal team, which did indeed lead to identifiable errors and irregularities in the trial, which themselves rendered the process unfair or unsafe (adopting the language of Buxton LJ in *Day* above).

316. Whilst it is important to note that they are listed here in no special order of importance, the list of failures we rely on are as follows:

a. **To obtain any proof of evidence or comments on prosecution evidence (let alone any signed proof; see para 318 *et seq*);**
b. **To instruct a forensic pathologist (see para 68 *et seq*);**
c. **To obtain a psychiatric report before conviction (see para 79 *et seq*);**
d. **To call any supporting defence witnesses on fact or character (see para 237 and 336);**
e. **To object to the improper cross-examination of the Applicant by the Crown on Marine C's diary (see para 284 *et seq*);**
f. **To investigate and to advise their client and to present any of the manslaughter alternatives to murder, namely loss of control, unlawful act manslaughter, gross negligence manslaughter, and diminished responsibility (see para 111 *et seq*);**

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[132] Volume VII, Tab 5

g. **To raise the absence of a manslaughter direction and the improper cross-examination on Marine C's diary as grounds of appeal against conviction (see para 246 *et seq* and para 300);**
h. **To use Colonel Lee as a witness on appeal (see para 243 *et seq*); and**
i. **To advise that a CCRC application should be mounted after the failed appeal, despite retaining conduct of the case and remaining in contact with the Applicant and his wife until the summer of 2015 (see para 371).**

317. It will be clear that many of these failures have already been addressed at length above, because they came in already under most of the other grounds. We will not repeat points already made. More does need to be said about certain of them however, within the present context of incompetent representation.

No proof of evidence

318. The impact of failing to obtain a written proof of evidence was described in this way by Buxton LJ in *Day*:[133]

> "*We should say immediately that the omission to produce a single, detailed and coherent account of the client's evidence, agreed and signed by him, was a* ***major failing in this case****. Such a document not only clarifies what the client's evidence will be should he be called at the trial, but also serves as an agreed guide for the preparation of the trial.* ***It also, as the present case graphically illustrates, avoids future disputes as to what the client's instructions had in fact been.***" (*ibid* at [28])

319. The present case too demonstrates a dispute between the Applicant and his wife and Defending Officer on the one hand, and the previous legal team on the other, as to whether manslaughter and its alternative verdicts were ever advised and explained, whether properly or at all, or instructions given.

320. The context here it is worth remembering throughout, is an important murder case, said to be the first murder trial of a British serviceman since the Second World War. It involved the elite regiment of the Royal Marines. The eyes and ears of the world's press were upon it from first to last.

321. This then was the context in which those defending now claim it was good enough to rely on a short prepared statement about one page long handed to the police during an early interview, as their **sole** proof of evidence from first to last. They never saw fit to obtain

[133] Volume VII, Tab 5

any other.[134] Neither did they obtain written comments on the prosecution statements and exhibits from him in the usual way.

322. It seems inconceivable, if a competent proof of evidence and comments had been prepared in the usual way, that the old legal team would not have been alerted to the manslaughter options. A detailed history of the Applicant's experiences during Herrick 14 would surely have rung warning bells about loss of control. A full history of his medical situation including the recent loss of his father and his treatment in a psychiatric ward in Taunton in October 2012, would surely have brought home to them the need to obtain a psychiatric report **prior** to conviction, and for that report to consider the possibility of diminished responsibility.

323. Mr Berry now suggests it was good enough for them to simply rely on the defendant's own initial reluctance to seek a psychiatric report.[135] Whilst the Applicant and his wife and Defending Officer challenge Mr Berry's stated recollection on this point,[136] in any event we suggest that any competent professional representatives facing this same situation should have insisted on a report regardless.

324. A proof of evidence would have revealed that the Applicant had killed a significant number of enemy combatants during his military career and had himself witnessed many soldiers dying traumatic deaths on the battlefield. This was very relevant because in fact he had often seen battlefield corpses moving and twitching after death by way of involuntary muscle spasms (a phenomenon which is now confirmed by the pathologist Dr Fegan-Earl in his report).[137]

325. The Applicant could and should have been asked about this in detail by Mr Berry, in order to explain his belief that the insurgent **appeared** dead to him. This was after all his only defence.

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[134] In Annex I to Mr Berry's letter to us dated 9th November 2015, he writes:
"***Mrs Hogg attended the police station with Sgt Blackman when he was arrested and interviewed with regard to murder. She spent a considerable amount of time with him discussing the events in question. Those discussions resulted in a signed prepared statement which you have. They constitute his signed instructions.***" (Volume V, Tab 5, p 79).
Further comment by us here would be superfluous.

[135] In Annex I to the old defence team's letter to us dated 9th November 2015, Mr Berry QC wrote:
"*I asked him whether he thought there was any point in seeing a psychiatrist who might say that what had happened (In Afghanistan) had affected him so that he behaved in a way that he wouldn't otherwise (ie killing the insurgent). His reply was "No". He then stated that a psychiatric assessment could not provide evidence that he had behaved out of character.*" (Volume V, Tab 3, p 45)

[136] "*He said that as he had never been someone accused of a serious crime, he very much put his case into the hands of his legal team.*" (Report of Professor Greenberg at paragraph 10.14; Volume II, Tab 2, p 12)

[137] Volume II, Tab 1, p 13

326. He in fact had started to say it to Mr Perry QC for the Crown under cross-examination:

> "*Q: But on a more general level what was your thinking? What was going on in your brain?*
> *A: Yeah. I thought initially had I made a mistake, and then, you know,* ***I've seen dead bodies animated,*** *but not as animated,* ***but move or appear to move after death.***" (Transcript 30.10.13,[138] p 127B)

327. Mr. Perry clearly realised that further probing on this issue was not going to help him and so he quickly changed the subject.

328. However, Mr Berry QC now wholly failed to expand on this in re-examination. He ignored the point completely. This was yet one more omission by him. If he had held a proof of evidence, perhaps Mr Berry too would have realised the importance of the point.

329. The Applicant has set out in a statement dated 27th November 2015 what he could have said if he had been re-examined on the point. When deployed in Iraq in 2003 he and his troop shot and killed a number of Iraqi troops, some of whom were still moving and twitching after death:[139]

> "*The first man I killed was an Iraqi soldier during the invasion in 2003. I shot him six times including one head shot. Twenty minutes later while searching him his leg continued to twitch, which I found quite strange at the time. Later that same day we (the troop I was in at the time) engaged ten to fifteen Iraqi troops in the open with medium and heavy machine guns killing them all… Again later when searching the dead, many of which had suffered catastrophic injuries to their body, some still twitched…* [On a later occasion] *my section (6 Marines plus me) was tasked to assist another call sign that was in contact with the enemy. On arrival we set up our heavy machine gun and with one of my men firing, began to give supporting fire. While this was going on I also helped search enemy dead and wounded. One of the later* (sic) *who was missing half of his head continued to open and close his mouth, which I remember finding very disturbing, despite no longer breathing or having a pulse. This had been checked by the other team's medic.*"

330. Thus the Applicant had highly relevant evidence which his own counsel failed to elicit in support of his main defence to murder. That was his own hard experiences of battlefield deaths, which runs counter we suggest to the layman's perception and expectation. This came about because his own team simply did not trouble to elicit it from him in a proof of evidence or at trial. This trial was conducted almost exclusively upon the Applicant's early short prepared statement to the police. Other important issues were simply overlooked. This was professionally negligent.

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[138] Volume VI, Tab 2
[139] Volume IV, Tab 3, p 7

Failure to take instructions

331. Mr Berry QC has confirmed that he did not seek, let alone procure his client's signed endorsement, if it were true that manslaughter alternatives had been advised and considered, and rejected. However even today it is still unclear just what Mr Berry is claiming about this. We asked in a letter dated 13th September 2015:[140]

> "*it would be normal practice in such circumstances to obtain an endorsement from the client if having been fully advised, he deliberately chose not to run manslaughter. Is there any endorsement here?*"

Mr Berry QC responded in his letter of 2nd October 2015:[141]

> "*I do not accept that it is appropriate to obtain an endorsement in these circumstances nor would I do so.*"

332. These failures are the more astonishing in light of the defence team's own private view of the prosecution case as "*overwhelming*" as emerges from their conference note of 10th June 2013:[142]

> "***Evidence against him is overwhelming.***
> *If they feel that, he was at death's door and if they waited a moment he would have been dead,* ***they may want a way out.***"

333. This must mean that the defence team privately amongst themselves saw the prosecution case as "*overwhelming*", but were nonetheless hoping for what would effectively amount to a perverse verdict by the Panel. This note is dated some 4 months before the court martial began but there was certainly nothing in the nature of the case which changed over that period.

334. It will be noted from their latest witness statements that the Applicant and his wife say they were only ever given bullish advice by their old legal team.[143] In this context the failure to advise the Applicant let alone to develop the manslaughter options is the more reprehensible.

335. So also is Mr Berry's abandoning loss of control unilaterally and without instructions in his closing speech (see para 186 *et seq*).

336. In addition, Mr Berry did not consult or obtain instructions, let alone obtain any signed endorsement from his client, nor is there a note recoding his client's consent, when he unilaterally chose not to call any of the then available defence witnesses, Major Payne,

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[140] Volume V, Tab 2, p 30
[141] Volume V, Tab 3, p 46
[142] Conference note dated 10th June 2013 (Volume IV, Tab 9, p 39)
[143] At para 11 of the Applicant's statement dated 20th November 2015 (Volume IV, Tab 1, p 2) and at para 12 of Mrs Warner-Blackman's statement dated 4th December 2015 (Volume IV, Tab 4, p 10)

Warrant Officer 1st Class Saxby and Lieutenant Colonel Morley. The Applicant says in his witness statement he knew nothing of this. So also the Defending Officer.

Failure to obtain psychiatric evidence

337. We turn now to the failure to obtain psychiatric evidence. Notwithstanding our earlier submissions on the point it needs to be included prominently in this further context of incompetent representation.

338. The failure to obtain any psychiatric evidence was obliquely criticised by Lord Thomas LCJ, in the judgment on the Applicant's appeal:[144]

> "*The appellant's defence had been that he considered the insurgent was dead when he discharged the 9mm round.* ***No psychiatric evidence was before the Court Martial during that part of the proceedings which led to the appellant's conviction****…*" (*ibid* at [36])

> "*On all the evidence before us it is clear that in the events surrounding the murder of the insurgent the appellant acted entirely out of character and was suffering from combat stress disorder.* ***It is very unfortunate that the only medical evidence before the Court Martial and before us was obtained over two years after the murder****…*" (*ibid* at [75])

339. In the conference notes dated 25th October 2012[145] there is the following entry:

> "***Events that predated the incident***
> *Fact his father had recently died.*
> *Death of troop commander.*
> ***Issy advised that these facts will only become relevant if he needs to plead guilty to something.***"

340. Her observation that "*these facts will only become relevant if he needs to plead guilty to something*" is itself bizarre and incorrect advice.

341. No effort was made to obtain a psychiatrist's report on the Applicant before conviction. Yet after the conviction and before the appeal, the instruction by them of a forensic **psychologist** in addition to a psychiatrist was also contemplated – for what purpose is a

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[144] Volume VI, Tab 8

[145] This was a conference at Mr Glenser's chambers attended by Mrs Warner-Blackman, Mrs Hogg and Mr Glenser, but not the Applicant who was then in custody (Exhibit CWB/1; Volume IV, Tab 5, p 15).

mystery.[146] Having failed to do what was needed at the proper time, it seems they were now going overboard.

342. That the Applicant's legal team took so "*limp*" an approach to psychiatric evidence (to coin Mr Berry's own phrase) is especially surprising in light of the article published by Mr Glenser and Mrs Hogg very soon after the conference of 10th June 2013, at which the possibility of a psychiatric defence was first briefly raised and then dismissed. It will be remembered this is the same conference that began according to the note of it, with the defence team privately describing the evidence as "*overwhelming*" (see para 331 *et seq*).

343. Their article in *Criminal Law & Justice Weekly*, Vol 177, 27th July 2013 is entitled "*Legal Aid Cuts – Doing Ex-servicemen a Disservice*".[147] The thrust of the article is summed up in its tag line: "*Veterans must not lose access to solicitors specializing in military matters*".

344. In that article, Mr Glenser and Mrs Hogg proudly hold themselves out as specialising in military law with a "*particular interest in PTSD* [Post-Traumatic Stress Disorder] *and its links with offending*".

345. In ironic echoes of the present case, they write that "*PTSD… can present real difficulties to the practitioner*". They write that:

> "***Reluctance to discuss the symptoms in detail is a hallmark of PTSD and part of a coping mechanism of psychological denial. In some cultures – the military is perhaps an obvious example – discussing such personal matters is not the cultural norm.*** *Indeed it is often necessary to concentrate on the grim task in hand rather than deal with the emotional realities of a situation.* ***Over time these specialist solicitors*** *build up knowledge of which unit has been deployed where at any given time.* ***They will know how intense the operation was*** *(in military speak,*

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[146] Mrs Warner-Blackman produces this email from within a longer email chain as her Exhibit CWB/2 (Volume IV, Tab 5, p 18). It is from Mrs Issy Hogg to her dated 4th April 2014 (a matter of days before the appeal hearing):

> "*Claire,*
> *Anthony* [i.e. Mr Berry QC] *is still in Liverpool on his murder and is coming down on Wednesday ready for Thursday so I'm afraid a visit to Lincoln* [prison] *is out of the question. I'm waiting for confirmation that we can meet in chambers at 5pm on Wed evening. I will chase Anthony to provide you with an answer before we meet.*
> *I have asked Steve to talk to the police about your personal stuff.*
> ***I have sent an email to the forensic psychologist but have not heard from her. I will chase. I should point out to you that as we were not, and never would be, running the defences of insanity or diminished responsibility, her evidence would not have been admissible in a trial.***
> *I'll get back to you with further information when I have it. I'm currently in Dusseldorf, flying back on the 0710 tomorrow.*
> *Kind regards,*
> *Issy*"

[147] Volume IV, Tab 9, p 46

> *how "kinetic" a tour was) and* ***consequently will be particularly alert to their clients' mental health needs****…*
> ***All of this expertise saves time and therefore money****. It is also in serious danger of being lost.*"

346. This article, we are driven to submit, demonstrates their negligence from their own mouths. It stands in stark contrast to the way they were actually preparing the Applicant's defence at the self-same time as they were writing and publishing this article.

347. It is basic good practice when defending in the majority of murder cases nowadays to obtain a psychiatric assessment. (See *Ravalia* below at para 361 *et seq*). Whilst certain murders by their nature might not demand it (e.g. a failed bank robbery) others almost invariably would (e.g. a domestic murder). Today's case, involving an unprecedented killing by an upright soldier under conditions of enormous combat stress, surely did demand it without hesitation.

348. There is some statutory support to be derived in this regard from the provisions of section 3(6A) of the Bail Act 1976:[148]

> "*(6A) In the case of a person accused of murder the court granting bail shall, unless it considers that satisfactory reports on his mental condition have already been obtained, impose as conditions of bail—*
> *(a) a requirement that the accused shall undergo examination by two medical practitioners for the purpose of enabling such reports to be prepared; and*
> *(b) a requirement that he shall for that purpose attend such an institution or place as the court directs and comply with any other directions which may be given to him for that purpose by either of those practitioners.*"

349. The fact that the Bail Act requires a court granting bail to an individual accused of murder to impose a condition of two psychiatric examinations illustrates this is an obvious step for competent defending representatives to take. Here there were other clear signposts pointing in the same direction and known to the old legal team, including the nature of the case itself, the recent bereavement of his father, and his being placed in a mental ward in Taunton under a psychiatrist for a week after his arrest. Yet they were ignored.

350. Moreover, we have found a letter written to Mrs Hogg by the solicitors, Richard Griffiths & Co, dated 16th October 2013[149] which told her that they had obtained psychiatric reports on their client Marine C (Hammond). In other words, the solicitors for the secondary party had rightly bothered to obtain psychiatric reports before trial (which in fact were not used) whereas the solicitors for the main defendant who fired the shot sought none. And continued to seek none despite being alerted.

351. It is trite to say those suffering from a mental illness are usually the last to be aware of it. In addition, there is doubtless a culture within the Royal Marines not to want to

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[148] Of course it is the Armed Forces Act 2006 that applied here and it is right to say that a similar provision does not exist in that act.
[149] Volume IV, Tab 9, p 47

acknowledge such a thing, for it will appear as a weakness or a vulnerability and may impact negatively upon a career path. We gratefully adopt the description used by Mrs Hogg and Mr Glenser in their article, where they speak in this context of – "*a coping mechanism of psychological denial.*"

352. It was only following the Applicant's conviction for murder that a psychiatric report was now hurriedly obtained from Dr Orr. In his second report dated 4th December 2015 he explains the fetters which were then put upon him. Clearly he did not have the advantages of the new materials since unearthed by Professor Greenberg. Despite these handicaps Dr Orr's first report revealed evidence of psychiatric illness.

353. Dr Orr's first report was summarised by Lord Thomas LCJ in the judgment on the Applicant's appeal,[150] as follows:

> "*Dr Michael Orr, an experienced consultant psychiatrist, provided a report for the purpose of sentence. His examination of the appellant was on 22 November 2013, more than two years after the incident. He concluded, despite that time interval, that there was evidence of accumulated frustration with some aspects of his past and recent military experience. Secondly there was the likelihood that his resilience had been compromised, first, by a reactivation of his bereavement reaction following his father's death and, secondly, by the emergence of some symptoms of a combat stress disorder characterised by paranoid interpretations of combat situations whilst on patrol and the increasing intensity with which the appellant had taken this as a personal matter. The appellant had told Dr Orr that whereas patrols sent out by him under the command of corporals had got off lightly, the patrols he led were involved in contact and he was shot at. He had become a "little paranoid" that the insurgents were "gunning specifically" for him.*
>
> *Dr Orr pointed out that combat stress disorder could result in misconduct stress behaviour. Such behaviour was not the sole province of poorly trained or undisciplined soldiers, but could be committed by good or heroic soldiers under significant combat stress.*" (*ibid* at [37]-[38])

354. We requested from the old legal team Dr Orr's letter of instruction but it turns out there was none.[151] He was instructed orally and apparently very hurriedly by Mrs Hogg. Dr Orr was never asked to consider diminished responsibility, as he now explains.

355. The matter can be tested thus. If a **new** defence legal team had somehow come in immediately post-conviction and prior to sentence, what should they have done with Dr Orr's then first report? We submit they should have been alerted by it to instruct him anew to make a much fuller investigation and to invite him specifically to consider diminished responsibility.

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[150] Volume VI, Tab 8

[151] "*Mrs Hogg instructed Dr Orr in person*" according to Annex I to the old defence team's letter to us dated 9th November 2015 (Volume V, Tab 5, p 80)

356. If appropriate thereafter, they should have raised this as a **ground of appeal** against conviction, alongside the multiple failures of the JAG to direct on the other manslaughter alternatives.

357. In reality of course, the old defence team would have been personally embarrassed by such further enquiries and such grounds of appeal. That may serve to explain why it was never done. It was their plain professional duty to have done it nonetheless or alternatively to have handed over the case to new lawyers.

358. Unusually also, the CMAC felt it necessary to conduct certain enquiries of their own, which they recite in the appeal judgment:

> "***At our specific request, enquiries were made*** *about steps that were taken by those commanding HM Armed Forces* ***to address the obvious problems of stress*** *in combatting an insurgency of the kind for which HM Armed Forces had been deployed to Afghanistan and in particular in relation to operation Herrick. It is apparent from the* ***information supplied to us*** *that the appellant received training in how to deal with stress during his pre-deployment training; this included a Trauma Risk Identification and Management briefing. We were told that he would not have received any further training in the five-and-a-half months in which he was deployed to CP Omar. It was his commander's responsibility to check on his mental welfare. However, given the remote and austere nature of the terrain with which HM Armed Forces had to contend in that part of Helmand Province and the dangers inherent in moving around the area, contact with his commander was limited.*
>
> *This was, in our view, a very unfortunate circumstance. It was not possible two years after the killing of the insurgent to diagnose whether the appellant was in fact suffering from combat stress disorder, but the circumstances to which we have referred may have meant that any combat stress disorder was undetected.*" (*ibid* at [39]-[40])

359. If the Applicant's old legal team had done their job competently and professionally, these matters cried out to have been researched and put before the court by them from the off. It should not have been left to the court itself on the off chance to initiate such enquiries.

360. Colonel Lee had volunteered to Mr Glenser to provide the same evidence from his own authoritative standpoint but he was rebuffed. And Mr Berry of his own volition chose not to call Major Payne, Warrant Officer Saxby and Lieutenant Colonel Morley. They could (and indeed many others could) all have given similar accounts.

361. We refer to Professor Greenberg's report (now endorsed by Dr Orr) which concludes that the Applicant was suffering from a recognised mental condition which raised the defence of diminished responsibility.

362. It is submitted that the failure to obtain psychiatric evidence was itself so serious that it renders the murder conviction unsafe. See *Ravalia* [1998] EWCA Crim 2926.[152]

363. Ravalia's unsuccessful defence to the alleged murder of his wife was provocation (as it was then called). There are strong echoes of the present case in the facts. No psychiatric evidence was called to raise diminished responsibility on his behalf. Prior to his trial, the Crown had obtained and disclosed a psychiatric report which found that Ravalia was being treated for depression but it did not find that his conduct could be explained by mental illness or mental abnormality.

364. Following his conviction, Ravalia obtained reports from two new consultant psychiatrists whose opinion was, as stated by the Court of Appeal:

> "*… that the appellant was probably suffering from an abnormality of mind at the time of the killing which would have diminished his responsibility for his actions and which would have made it more difficult for him to control his behaviour when faced with provocative conduct. The diagnosis is "the abnormality of mind was a depressive disorder, which can be classified as a disease." At the same time those two psychiatrists did not elicit any ongoing psychiatric symptomatology at the present time.*" (*ibid* at p 3)

365. On appeal it was successfully argued that Ravalia's previous representatives had been incompetent in failing to obtain psychiatric evidence, and failing properly to advise him as to the availability of diminished responsibility. Roch LJ observed:

> "***The solicitor had not taken a full proof of evidence from the appellant. In particular, he had failed to acquaint himself with the appellant's account of what had occurred in the months leading up to the killing and the appellant's account of his own mental state during that period.*** *He thus deprived himself of the opportunity of learning that the appellant had consulted his general practitioner in October 1991, complaining, amongst other things, of depression. Learning of that visit would have led a competent practitioner to make enquiries of the general practitioner and to obtain the general practitioner's notes…*
>
> ***Mr Milmo*** **[counsel for the Crown]** ***accepted that the appellant's lawyers were not qualified to express a view about the appellant's mental condition***. ***They had neither the necessary information, because they had not made the necessary enquiry, nor did they have the necessary expertise.***" (*ibid* at p 7)

366. Our present case mirrors this. The self-same criticisms apply to the old legal team in our case.

367. Here too if our predecessors had obtained a psychiatric report it could not in any way have prejudiced the Applicant. For as Roch LJ rightly observed there:

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[152] Volume VII, Tab 13

"*... there would have been no obligation on the defence to disclose that report were it to have been unfavourable or of no practical use in furthering the appellant's case.*" (*ibid* at p 8)

368. Other observations in *Ravalia* are equally applicable to the defence failings in our case. In particular, Roch LJ said as follows:

"*Mr Milmo* [counsel for the Crown] *accepted that the solicitor, in acting for the appellant, had undertaken a case which was beyond his competence.* ***The solicitor had not taken a full proof of evidence from the appellant. In particular, he had failed to acquaint himself with the appellant's account of what had occurred in the months leading up to the killing and the appellant's account of his own mental state during that period.*** *He thus deprived himself of the opportunity of learning that the appellant had consulted his general practitioner in October 1991, complaining, amongst other things, of depression. Learning of that visit would have led a competent practitioner to make enquiries of the general practitioner and to obtain the general practitioner's notes...*" (*ibid* at p 7)

"*Mr Milmo accepted that the appellant's lawyers were not qualified to express a view about the appellant's mental condition. They had neither the necessary information, because they had not made the necessary enquiry, nor did they have the necessary expertise.* ***Mr Milmo told us that his experience, which coincides with that of this Court, is that the obtaining of an independent psychiatric opinion by those acting for the defence in cases of domestic homicides, is an almost invariable practice. Mr Fitzgerald described the obtaining of such a report as a basic and necessary step. In the circumstances of this case we would agree***...*"* (*ibid* at p 7)

"*In any event, even that risk* [of sentence] *should not have deflected the defence's lawyer from obtaining an independent psychiatric report on the appellant* ***because there would have been no obligation on the defence to disclose that report were it to have been unfavourable or of no practical use in furthering the appellant's case***...*"* (*ibid* at p 8)

"*...* ***we are satisfied that the conduct of the appellant's case was such that he did not have a fair trial in that the possible existence of evidence, which would have helped the defence of provocation and may have founded a defence of diminished responsibility, was not considered by those acting for the appellant. On the contrary, the appellant's lawyers seemed to have reached the conclusion that the appellant was not suffering, and had never suffered, from any mental condition relevant to his case or to the defence of provocation. His lawyers relied on their own assessments of him*** *based, in Mr Frisby's case, on seeing the appellant in one consultation on 17th November 1992, and in Mr Khan's case on seeing the appellant at that consultation and again in conference in early March 1993...*" (*ibid* at p 8)

"***This sorry state of affairs*** *is added to by the fact that counsel say they were unaware that the appellant had been asking his solicitor to obtain a psychiatric report or that the appellant had been to his doctor on 21st October 1991*

> *complaining of depression.* ***Counsel had not seen, nor had they asked for, the appellant's general practitioner's notes or the medical records of the appellant kept whilst he was on remand in prison.***" (*ibid* at pp 8-9)

369. Their own failures should have been obvious to the old legal team at least by the time of them reading Dr Orr's report of November 27th 2013. If they felt personally embarrassed (as well they might) by now confronting the need to raise this as a ground of appeal against conviction, it was incumbent on them to have advised their client to seek fresh representation. It was not acceptable for them simply to have stayed silent – as they did deafeningly until the present day.

Conclusion

370. All the above failings could still have been salvaged prior to the appeal, if appropriate and timely action had been taken. A further 18 months or so have of course been wasted since then and the Applicant has remained in prison, pending our recent instruction which results in this present application to the CCRC.

371. This extra delay too has occurred directly as a result of the old team's failure to advise him about the CCRC route. Instead they wrongly advised him that the domestic route had now been exhausted and only Strasbourg remained.[153]

372. This fifth and final ground of appeal of incompetent representation by the old legal team therefore inescapably follows as the culmination of those other grounds which we have already advanced.

373. Their errors were so fundamental that the Applicant has not had a fair trial, and his conviction for murder is accordingly unsafe, and there is a real possibility that if referred back to them, the CMAC will quash that conviction.

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[153] Mrs Warner-Blackman produces the following email dated 1st August 2014 to her from Mrs Hogg as her Exhibit CWB/3 (Volume IV, Tab 5, p 21). Mrs Hogg wrote as follows:

> "*Claire,*
> *I have heard from the Court of Appeal and I am afraid they have refused our application for leave to appeal to the Supreme Court.* ***This means we have now exhausted the domestic route and will need to discuss the issue of Strasbourg.***
> *Whilst disappointing, I'm afraid it was to be expected.*
> *Speak soon.*
> *Kind regards,*
> *Issy*"

PROCEDURAL MATTERS

Appendices

374. The appendices[154] to this Report are detailed in the table of contents, above. The "core documents"[155] are included excepting only the Criminal Appeal Office summary and Single Judge's ruling. These are not relevant now, as the single point previously taken on appeal against conviction (that the court martial was not human rights compliant) was always chimerical and has been dismissed.

Priority

375. **We submit this is a case where the CCRC should exercise its discretion to give this case Level 1 Priority.[156] We set out our reasons below.**

376. If there is further delay, there will be a risk of our being unable to secure or obtain relevant evidence if a new court martial is ordered, or of relevant evidence deteriorating. Although the prosecution case is preserved by video footage, the defence case turns rather not on documentary evidence, but entirely on memory and oral evidence. Well over four years have passed already since the shooting of the insurgent on 15th September 2011. If this application succeeds the Applicant may face a retrial, at which his evidence and the witnesses called on his behalf will be of crucial importance, and their quality is liable to diminish with each passing day.

377. This is a case which, as is well-known, has garnered very strong support from within the Armed Forces, Parliament, the Press and the wider British public. Given the great public interest in this high profile case and the widespread perception that there has been here a miscarriage of justice, there is a public expectation that matters will now be resolved expeditiously. If not, public confidence in the administration of justice risks being gravely undermined.

378. Furthermore, if the CMAC were to substitute a conviction for manslaughter – which is one likely outcome if the case were referred – the Applicant will have served his probable sentence, and indeed longer, by the date of the hearing. If that happens it brings the law into disrepute, especially in this case.

379. We have noted that this is not, strictly speaking, a matter referred to in the relevant Formal Memorandum. Nevertheless, we submit that it is a matter relevant to the exercise of the CCRC's discretion, which ought to be guided by the relevant Formal Memorandum but not shackled by it.

380. If the CCRC will be assisted at any time by a meeting with us (or indeed if necessary our client or his wife or the Defending Officer) to discuss any of these matters, we shall of course gladly so arrange and hold ourselves in readiness.

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[154] Volumes II to VII
[155] As set out in Appendix 1 to the CCRC Formal Memorandum on Stage 1 decisions.
[156] Applying the Formal Memorandum on Priority Ranking and Ordering of Cases.

ENDS