IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*, v. Chief Warrant Officer (CW2) LAMONT S. JESSIE, United States Army, *Appellant*.	REPLY BRIEF ON BEHALF OF APPELLANT USCA Dkt. No. 19-0192/AR Crim. App. Dkt. No. 20160187

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

I.

WHETHER THE ARMY COURT ERRED BY CONSIDERING MILITARY CONFINEMENT POLICIES BUT REFUSING TO CONSIDER SPECIFIC EVIDENCE OF APPELLANT'S CONFINEMENT CONDITIONS.

II.

WHETHER THE ARMY COURT CONDUCTED A VALID ARTICLE 66 REVIEW WHEN IT FAILED TO CONSIDER APPELLANT'S CONSTITUTIONAL CLAIMS.

III.

WHETHER APPELLANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY A CONFINEMENT FACILITY POLICY THAT BARRED HIM FROM ALL FORMS OF COMMUNICATION WITH HIS MINOR CHILDREN WITHOUT AN INDIVIDUALIZED ASSESSMENT DEMONSTRATING THAT AN ABSOLUTE BAR WAS NECESSARY.

Statement of the Case

On February 25, 2019 CW2 Jessie, appellant, petitioned this Court for a grant of review. On July 16, this Court granted that petition. (JA 1). Appellant filed his brief on August 13 and the Government responded on September 25. Appellant's reply brief follows.

1. Whether the Army Court Erred by Considering Military Confinement Policies but Refusing to Consider Specific Evidence of Appellant's Confinement Conditions.

a. Summary of the Argument

The parties agree that this Court has recognized multiple instances where the Courts of Criminal Appeals [CCAs] *must* receive additional evidence when addressing constitutional or statutory violations. There is no principled basis for requiring consideration of evidence going to some constitutional violations but not others; nor does the Government offer one. The suggestion that requiring CCAs to consider evidence of *all* constitutional violations would open a "Pandora's Box" rings hollow because it is the Government, not Appellant, who asks this Court to depart from established precedent.

b. Both parties agree that nearly twenty years of precedent requires the CCAs to consider allegations of constitutional violations.

The Government recognizes the well-established precedent requiring CCAs to entertain evidence of constitutional violations. As the Government stated:

> There are exceptions in which the service courts *must*, necessarily, consider additional material and others in which this Court has held that a service court *may*." (Gov't Br. 9–10) (citing *United States v. Erby*, 54 M.J. 476, 478 (C.A.A.F. 2001) (must consider supplemental material for Eighth Amendment and Article 55 claims); *United States v. Boone*, 49 M.J. 187, 193 (C.A.A.F. 1998) (must for ineffective assistance of counsel claims); *United States v. Gay*, 75 M.J. 264, 269 (C.A.A.F. 2016) (may for solitary confinement); *United States v. Pena*, 64 M.J. 259, 264 (C.A.A.F. 2007) (may for mandatory supervised release).

(Gov't Br. 9–10).

As an initial matter, these "exceptions" undercut the Government's argument that Appellant's failure to raise this issue in his clemency matters precludes the CCA's consideration of additional matters. Indeed, *Erby* expressly rejected this same reasoning. 54 M.J. at 477. The common theme of these cases is that claims of a constitutional magnitude "must" be considered and those that are not constitutional "may" be considered.[1] The Government does not offer a reasoned explanation for why this Court should sanction mandatory consideration of some constitutional violations, *i.e.*, the Sixth and Eighth Amendments, while allowing the Army Court unfettered discretion to minimize others, *i.e.*, the First and Fifth Amendments.

[1] That is, unless they go to clemency. *United States v. Healy*, 26 M.J. 394 (C.A.A.F. 1988).

In fact, the Government's attempt to distinguish this case from *White* is undermined by *White*'s very holding—a holding that the Government itself cites. (Gov't Br. 10–11). As the Government recognizes, in *White* this Court stated, "our holding is limited to the question whether the facts asserted by appellant constitute a constitutional or statutory violation." *United States v. White*, 54 M.J. 469, 475 (C.A.A.F. 2001). (Gov't Br. 10–11). Nothing about *White* suggests a court's review is limited to specific constitutional rights and the Government fails to put forth any basis for doing so.

c. The Government mistakes Appellant's claim as a request for injunctive relief.

While acknowledging that *Healy* does not control post-trial attachments relevant to sentence appropriateness, the Government argues this case is not really a case about sentence appropriateness case but is instead akin to *Healy*, which was a clemency request disguised as sentence appropriateness. (Gov't Br. 11, 23-24). This is unpersuasive for two reasons. First, it overlooks that Appellant's claims are constitutionally grounded in the First and Fifth Amendments. This case has nothing to do with clemency. Second, this argument makes precisely the same error that the Army Court did by suggesting this was a "subterfuge" for injunctive relief. *Jessie*, slip op. at *11. (Appellant's Br. 23). Injunctive relief is no longer available because the facility changed its policy before the Army Court heard oral

argument. (Appellant's Br. 23–24). Appellant's sole claim was, and continues to be, that he has been confined in a manner that violated his fundamental constitutional rights and the nature of that confinement increased "the severity of the adjudged and approved sentence[.]" *White*, 54 M.J. at 472.

d. If Pandora's Box has not opened in the last two decades, it is unlikely to open now.

The "Pandora's Box," or parade of horribles the Government alludes to is an empty argument. It is the Government who asks this Court to diverge from its decades-old precedent. (Gov't Br. 25). Appellant asks for nothing more than the status quo. In 2001 this Court decided *Erby* and *White*. The past eighteen years have not resulted in an explosion of post-trial punishment cases before the CCAs and there is no reason to think there will be now. (Gov't Br. 25).

2. Whether the Army Court Conducted a Valid Article 66 Review When It Failed to Consider Appellant's Constitutional Claims.

a. Summary of the Argument

The Government's argument that the sentence is correct in law is rooted in the erroneous belief that prison policies cannot unlawfully increase a sentence. The same cases cited by the Government suggest otherwise. The Government's sentence appropriateness analysis makes the same mistake the Army Court made by reading *Gay* to provide for discretion in *whether* to resolve, not *how* to resolve,

sentence appropriateness claims. Instead, the Government misinterprets the fundamental holding of *Gay* and ignores Appellant's argument that Article III jurisprudence relies on the presumption that military courts can and will address constitutional violations, particularly when raised on direct appeal.

b. There is a meaningful distinction between "correct in law" and "sentence appropriateness."

Boone, *Erby*, and *White*—the same cases discussed above and acknowledged by the Government—ground the mandate to review constitutional claims in *both* the sentence appropriateness *and* legal correctness clauses of Article 66(c), and recognize that such claims may be supported by evidence outside the traditional record of trial. Yet the Government pays scant attention to the Army Court's abdication of *both* its sentence appropriateness *and* its legal correctness mandates. (Appellant's Br. 24–26).

The thrust of the argument the Government does make is that, "As a general matter, the collateral administrative consequences of a sentence, such as early release programs, do not constitute punishment for purposes of the criminal law." (Gov't Br. 13–14) (citing *Pena*, 64 M.J. at 265). Therefore, according to the Government, the policy cannot relate to the correctness in law of the sentence because his punishment was not impermissibly increased. (Gov't Br. 15). *Pena*, however, makes clear that administrative policies can certainly unlawfully increase

a sentence. 64 M.J. at 266. As this Court stated, "The terms and conditions of Appellant's Mandatory Supervised Release, as initially conveyed to him, potentially raised *serious* questions as to whether Appellants sentence had been increased" and "we do not disregard the possibility that the [program] could be imposed in a manner that increases the punishment above the punishment adjudged by a court-martial." *Id*. at 266. *Pena* simply failed to make out his case in the record. Appellant, on the other hand, has more than made his case.

c. Gay dealt with discretion to attach extra-record materials, not the discretion to ignore sentence appropriateness.

Even assuming Appellant was advancing a purely sentence appropriateness claim, the Government does not address Appellant's argument that *Gay* only supports discretion in the ultimate resolution of whether the sentence is appropriate, not whether the CCA must address the alleged error in the first place. (Appellant's Br. 27–30). It is telling that the Government does not cite *United States v. Baier* despite Appellant's emphasis that *Baier* made explicitly clear that "Article 66(c) *requires* that the members of the Courts of Criminal Appeals independently determine…the sentence appropriateness of each case they affirm." 60 M.J. 382, 384–85 (C.A.A.F. 2005) (Appellant's Br. 29–30).

Instead, the Government mistakenly claims Appellant relied on *Gay* "to assert that complaints of post-trial confinement conditions unrelated to the Eighth

Amendment are entitled to resolution by the service courts." (Gov't Br. 9). While this is surely true of *Gay*'s holding, the Government misses Appellant's broader structural concern. *Gay*, read in conjunction with *Healy*, stands for the proposition that "the CCAs have discretion in *how* they resolve such claims, not in *whether* they do." (Appellant's Br. 28).

The Government's insistence that this case is similar to *Trebon* and *Milner* underscores its misunderstanding. (Gov't Br. 22–23). In both cases, the CCA looked at the evidence presented, considered it, and determined that it did not render the sentence inappropriate. *United States v. Trebon*, 2017 CCA LEXIS 473, *11 (A.F. Ct. Crim. App. July 14, 2017) (concluding the confinement conditions at issue were "rationally and reasonably imposed to serve a legitimate purpose"); *United States v. Milner*, 2017 CCA LEXIS 84, *13–14 (A.F. Ct. Crim. App. Feb. 7, 2017) ("After reviewing all of the submitted matters, we are not persuaded that the conditions of Appellant's post-trial confinement rise to the level of being so oppressive or disgraceful as to warrant sentence relief"). The Army Court, however, did not even consider the evidence.

The Government fails to recognize this distinction and, in doing so, provides no argument that *Gay* supports the novel conclusion a CCA may simply choose not to address a claimed constitutional error. At minimum, therefore, this case must be remanded for the Army Court to fulfill its "its affirmative obligation to consider

sentence appropriateness[.]" *United States v. Bodkins*, 60 M.J. 322, 324 (C.A.A.F. 2004).

d. The Government's position unnecessarily disturbs Congress's intended "uniform" code and the Supreme Court's well-settled understanding of the scope of the military courts' review.

The Government suggests that Article III courts can vindicate anything at issue here, but that notion undermines the express purpose of a "uniform" code and would prove illusory even for those who attempted as much. (Appellant's Br. 30–32). "[I]mplicit in the congressional scheme embodied in the Code is the view that the military court system generally is adequate to and responsibly will perform its assigned task. We think this congressional judgment must be respected and that it must be assumed that the military court system will vindicate servicemen's constitutional rights." *Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975). The Government sets forth no reason to upset the uniform system Congress intended in favor of a circuit-by-circuit consideration of the constitutional rights of our confined servicemembers.[2] *See Burns v. Wilson*, 346 U.S. 137, 140 (1953). (Appellant's Br. 30).

[2] Indeed, the Article III courts have been inconsistent even in the degree of deference they apply to military cases. *Compare*, *e.g.*, *Dodson v. Zelez*, 917 F.2d 1250, 1252–53 (10th Cir. 1990) (applying the deference test articulated by the United States Court of Appeals for the Fifth Circuit in *Calley v. Callaway*, 519 F.2d 184 (5th Cir. 1975)), *with Brosius v. Warden*, 278 F.3d 239, 245 (3d Cir. 2002) (applying the deference standard that the court would have used in habeas

Moreover, the Government ignores the fact that relief in Article III courts is unavailable unless, and until, military appellate courts consider such matters. Abstention and exhaustion doctrines are routinely invoked by Article III courts to decline to entertain constitutional claims until military courts have done so first, particularly while an appellant's case remains on direct appeal.[3] *See Noyd v. Bond*, 395 U.S. 683, 693–94 (1969) (applying exhaustion doctrine to deny relief to servicemember because his direct appeal afforded military courts the opportunity to entertain his claims first). This underscores the impracticality of Article III relief in cases such as this one—involving immediate and ongoing constitutional harms. By the time inmates, such as Appellant, have completed the direct appeal, the harm is all too likely to have been mooted by their release from confinement.

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review of a state court conviction under 28 U.S.C. § 2254(d)). In *United States ex rel. New v. Rumsfeld*, the United States Court of Appeals for the District of Columbia Circuit described the case law as so "tangled" and marked by "uncertainty" that it left the court with "serious doubt whether the judicial mind is really capable of applying the sort of fine gradations in deference that the varying formulae may indicate." 448 F.3d 403, 406–08 (D.C. Cir. 2006). This is hardly the path to uniformity Congress sought to achieve with the passage of the UCMJ.

[3] *See*, *e.g.*, *Piotrowski v. Commandant*, No. 08-3143-RDR, 2009 U.S. Dist. LEXIS 119892, *13–14 (D. Kan. Dec. 22, 2009); *Tatum v. United States*, No. RDB–06–2307, 2007 U.S. Dist. LEXIS 61947, *6–*7 (D. Md. Aug. 7, 2007); *Fricke v. Sec'y of the Navy*, No. 03-3412-RDR, 2006 U.S. Dist. LEXIS 36548, *9–*11 (D. Kan. June 5, 2006); *MacLean v. United States*, No. 02-CV-2250-K, 2003 U.S. Dist. LEXIS 27219, *13–15 (S.D. Cal. Jun. 6, 2003).

e. The Government does not address the ability of the Army Court to assess post-trial delay claims without first having addressed the Fifth Amendment violation.

The Government declines to address the fact that the CCA's refusal to address Appellant's constitutional violations also precluded it from meaningfully addressing his post-trial delay claims. (Appellant's Br. 33). Appellant's arguments, as well as those set-forth by the dissent from the Army Court, remain unrebutted. *United States v. Jessie*, ARMY 20160187, 2018 CCA LEXIS 609, slip op. at *22 (A. Ct. Crim. App. Dec. 28, 2018) (Schasberger, J., dissenting). (Appellant's Br. 33–34). The Army Court failed to fulfill its statutory mandate to assess post-trial delay in accordance with *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006) and the Government tacitly acknowledges as much.

3. Whether Appellant's Constitutional Rights Were Violated by a Confinement Facility Policy That Barred Him from All Forms of Communication with His Minor Children without an Individualized Assessment Demonstrating That an Absolute Bar Was Necessary.

a. Summary of the Argument

The Government declines the opportunity to put forth a reasoned basis for a policy that is "more restrictive than any other federal or state jurisdiction." *Jessie*, slip op. at *24 (Hagler, J., dissenting). Indeed, the facility has since abandoned the policy it once stridently enforced. Instead of defending the policy, the government proceeds under the auspices that Appellant's conditions of confinement are merely

routine and "incident" to those of any imprisoned citizen. (Gov't Br. 20). The Government's suggestion the CCA is poorly equipped to address the nuances of prison administration ignores the fact this policy is an anomaly, and has been wholly abandoned by the Army. But the Army's abandonment of its policy is surely telling.

b. The Government provides no basis for supporting what appears to be the most restrictive policy in the Nation.

It is also telling that the Government brief does not argue or provide facts to support its claim that "the policy in this case was crafted to serve the interests of protecting children and rehabilitating child sex-offenders."[4] Appellant agrees with the Government that the facility "need not adopt the best or least restrictive policy." (Gov't Br. 33). Such policies must nevertheless be rationally related to the goals the facility purports to advance and, in this case, there is nothing in the record to support the conclusion that the policy was rationally based. Indeed quite the opposite.

The facility has abandoned the policy, which it was wise to do, but not before the inappropriate punishment that was a result of the policy had been meted

[4] Of course the Government provided an affidavit from the facility, but that affidavit has been debunked and the policy abandoned. (Gov't Br. 33).

out to the Appellant. Appellant was prohibited from interacting with his children in any way for over two and half years.

The Government nonetheless argues that the prison conditions are merely incident to Appellant's confinement. (Gov't Br. 20). This ignores the point made by Appellant, and the dissent from the Army Court, that the policy appears to be the strictest in the Nation and far exceeded the traditional collateral consequences of a criminal conviction. (Appellant's Br. 41); *see Jessie*, slip op. at *24 (Hagler, J., dissenting). Indeed, the Government has no explanation for the fact the Department of the Army's other policies suggest this policy is grossly out of line with the traditional consequences of confinement. (Appellant's Br. 10).

c. Courts are more than competent to identify constitutional violations.

The Government also suggests this appeal is an invitation to the CCAs "to wade into administrative areas unknown" and that courts are "ill-equipped" to address the "complex and intractable" problems with confinement facilities in the United States. (Gov't Br. 15, 25). This might be so in some cases, but this is not one of those. This case is easy. Indeed, the heightened standard established by *Turner v. Safley*, 482 U.S. 78 (1987) gives deference to prison administrators, but it does not provide the absolute bar the Government thinks it does. *Turner* recognizes a role for the courts in cases precisely like this one. Where the facility has demonstrated itself unwilling or unable to persuasively defend its policy, the

policy deviates from the norms of the rest of the correctional community, and the policy increases the punitive quality of confinement, the CCAs certainly have the authority and expertise to step in and modify the sentence accordingly. Indeed, the Army Court and, the Army Court alone, has the authority to address sentence appropriateness and, in light of the facility's change to the policy, the Army Court is the only court capable of providing redress at this time.

d. The suggestion that indirect communication with one's children is a "windfall" offends the Constitution.

The Government suggests relief would result in a windfall to Appellant because it would result in "freedom of association with his minor children[.]" (Gov't Br. 23). The Government reiterates this position when it suggests ruling in favor of Appellant "would be to restore him to the full multitude of rights, liberties, and privileges he currently lacks as a consequence of his lawful conviction." (Gov't Br. 25). "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner*, 482 U.S. at 84. Constitutional rights, regardless of confinement, are the rule and not the exception. If the Government is going to deprive an inmate of a fundamental right, it must at minimum be able to articulate a reasoned basis for doing so. Thus far, it has failed to do so.

Conclusion

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the Army Court's decision and remand for a proper review pursuant to Article 66(c).

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Jessie,* Army Dkt. No. 20160187, USCA Dkt. No. 19-0192/AR, was electronically filed brief with the Court and Government Appellate Division on October 2, 2019.

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APPENDIX TO REPLY BRIEF

MacLean v. United States

United States District Court for the Southern District of California

June 5, 2003, Decided ; June 6, 2003, Filed

CASE NO. 02-CV-2250-K (AJB)

Reporter
2003 U.S. Dist. LEXIS 27219 *

NORBERT BASIL MACLEAN, III, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.

Prior History: *Maclean v. United States, 2002 CCA LEXIS 182 (N-M.C.C.A., Aug. 12, 2002)*

Core Terms

court-martial, coram nobis, writ of coram nobis, coram nobis petition, district court, Writs, convicting, military, Appeals, courts, commanding officer, sentence, vacate, instant petition, cases, lack of jurisdiction, convened

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For USA, respondent: U S Attorney CV, U S Attorneys Office, Southern District of California, Civil Division, San Diego, CA.

Judges: JUDGE JUDITH N. KEEP.

Opinion by: JUDITH N. KEEP

Opinion

ORDER DISMISSING PETITION FOR WRIT OF CORAM NOBIS FOR LACK OF JURISDICTION.

On November 14, 2002, petitioner, Norbert Basil MacLean, III, filed a Petition for Writ of Coram Nobis ("petition"). On January 13, 2003, respondent, the government, filed a return to the petition ("return"). Thereafter, petitioner filed a traverse to the return on February 7, 2003, and the government filed a reply to the traverse on March 12, 2003.

I. Background

In 1992, petitioner, a cryptologic technician for the United States Navy, was assigned to Commander, Naval Security Group Command, and also had additional temporary duty at the Naval Security Station in Washington, D.C. See petition at 2. On October 31, 1992, during a court-martial convened by the Commandant, Naval District Washington D.C., petitioner pled guilty to writing bad checks **[*2]** in violation of Uniform Code of Military Justice ("UCMJ") Article 123a, *10 U.S.C. § 123a*, during a general court-martial presided over by a military judge. See id. at 3; petition, exhibit 1 at 2; petition, exhibit 2 at 6. As a consequence of pleading guilty, petitioner was sentenced to confinement for 40 months, forfeiture of all pay and allowances, reduction in his pay grade to grade E-1, and petitioner was also dishonorably discharged from the Navy. See id at 3.

After petitioner appealed the October 31, 1992 court-martial, the United States Navy-Marine Corps Court of Military Review ("NMCCMR") affirmed the petitioner's court-martial findings and sentence in an unpublished written decision dated June 10, 1994. See id. One of the issues addressed by the NMCCMR's written decision was petitioner's claim that his court-martial was not valid because his commanding officer had a personal interest in prosecuting petitioner. With regard to this claim, the NMCCMR specifically stated:

> In his second supplemental assignment of error, the appellant "maintains that because he had filed an *Article 138* complaint against his commanding officer, **[*3]** the commanding officer had a personal interest in . . . [his] prosecution, and that the commanding officer's action in the pretrial process support[s] that position." Appellant's Brief of 31 March 1994, at 6. Even if we agreed with appellant that his commanding officer had more than an official interest in the appellant's prosecution, he did not convene this court-martial. It was convened by

> the officer exercising general court-martial jurisdiction over both the appellant and the appellant's commanding officer. There is nothing in the appellant's allegations to support the conclusion that the convening authority was in any way disqualified or that the unlawful command influence affected this court-martial. *See United States v. Allen, 31 M.J. 572, 591-94 (N.M.C.M.R. 1990)*, aff'd, *33 M.J. 209 (C.M.A. 1991)*, *cert. denied*, *503 U.S. 936, 112 S. Ct. 1473, 117 L. Ed. 2d 617 (1992)*.

Petition, exhibit 2 at 11. Petitioner did not pursue an appeal of the NMCCMR decision with the U.S. Court of Appeals for the Armed Forces. See id.

On May 13, 2002, eight years after the NMCCMR decision, petitioner filed a Petition for Extraordinary Relief in Nature of Writ of Error **[*4]** Coram Nobis ("military court coram nobis petition") with the re-named Navy-Marine Corps Court of Criminal Appeals ("NMCCA"). See id. at 4. In this coram nobis petition before the NMCCA, petitioner raised the issue of whether the Commandant, Naval District Washington, D.C., the authority that convened his court-martial, had jurisdiction to court-martial him. See id., exhibit 1 at 4. This was a legal issue that petitioner had not raised during his appeal eight years earlier. See government's return at 2. In a written decision dated August 12, 2002, the NMCCA found that "petitioner ha[d] failed to demonstrate the lack of jurisdiction [by the Commandant, Naval District Washington, D.C.] or any other error worthy of a writ of coram nobis," and accordingly denied the petition for writ of coram nobis. See petition, exhibit 1 at 4. After petitioner appealed the August 12, 2002 NMCCA decision, the United States Court of Appeals for the Armed Forces denied petitioner's writ-appeal in a decision dated October 28, 2002. See id., exhibit 1 at 5.

Presently, petitioner asks for a writ of coram nobis from this court based on two claims. First, petitioner contends that there is **[*5]** evidence of apparent actual vindictive prosecution by the commanding officer who caused the court-martial charges to be levied against him and that this violated petitioner's constitutional rights because the commanding officer acted in a quasi-prosecutorial role throughout his pre-trial proceedings. See id. at 13-24. Second, petitioner argues that the Commandant, Naval District Washington, D.C., was without jurisdiction to bring and try his court-martial. As for remedy, petitioner seeks a writ from this court that directs the United States to: (1) vacate the general court-martial of petitioner; (2) reinstate petitioner back into active Naval service; and (3) award petitioner back-pay. See id. at 5.

II. Legal Standard for a Writ of Coram Nobis

"The writ of error coram nobis is a judicially created, extra-statutory proceeding" available for challenging federal criminal convictions under the federal All Writs Act, *28 U.S.C. § 1651*. *Yasui v. United States, 772 F.2d 1496, 1498 (9th Cir. 1985)* (italicizes removed); see also *United States v. Morgan, 346 U.S. 502, 506, 74 S. Ct. 247, 98 L. Ed. 248 (1954)*. The federal All Writs Act provides as follows: **[*6]**

> *§ 1651*. Writs
>
> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

28 U.S.C. § 1651 (2003).

The writ of coram nobis is an extraordinary procedure that is limited to cases where no statutory remedy is available or adequate. See *Hirabayashi v. United States, 828 F.2d 591, 604 (9th Cir. 1987)*. For instance, the writ of coram nobis can be used by a petitioner who wishes to collaterally attack his or her criminal sentence but cannot bring a *28 U.S.C. § 2255* petition because the petitioner has fully served his or her sentence and hence is no longer in custody. See *Morgan, 346 U.S. at 503-504*. "[T]he coram nobis writ allows a court to vacate its judgments for errors of fact . . . in those cases where the errors [are] of the most fundamental character, that is, such as rendered the proceeding itself invalid.'" *Hirabayashi, 828 F.2d at 604* **[*7]** (italicizes removed), quoting *United States v. Mayer, 235 U.S. 55, 69, 35 S. Ct. 16, 59 L. Ed. 129 (1914)*. The writ has also been used "to correct egregious legal errors in prior convictions." *Yasui, 772 F.2d at 1499, n.2*. Because the writ is extraordinary and hence disfavored, the writ of coram nobis is available only where the following conditions are met: "(1) a more usual remedy is not available; (2) valid reasons exist for not attacking the conviction earlier; (3) adverse consequences exist from the conviction sufficient to satisfy the case or controversy requirement of Article III; and (4) the error is of the most fundamental character." *Hirabayashi, 828 F.2d at 604*.

III. Discussion

A. Parties' Arguments

The government asks this court to dismiss the instant petition because according to the government, this court has no jurisdiction to issue a writ of coram nobis over petitioner's court-martial conviction. In his petition, petitioner invokes the All Writs Act, *28 U.S.C. § 1651(a)*, as the basis for this court's jurisdiction to issue a writ of coram nobis. See petition at 1-2. The government, however, contends **[*8]** that this court has no jurisdiction to hear and grant a writ of coram nobis because "[t]he All Writs Act is not, in and of itself, an independent source of district court jurisdiction." Return at 8, citing *Lights of America, Inc. v. United States District Court, 130 F.3d 1369, 1370 (9th Cir. 1997)* (stating that "the Supreme Court has long held that the All Writs Act is not itself a source of jurisdiction" because the All Writs Act is intended to vest jurisdiction only where it already exists). Specifically, the government contends that the language of the All Writs Act, which sets forth that Article III courts may issue all writs necessary or appropriate in aid of their respective jurisdictions,' has been interpreted to mean that a district court can issue a writ of coram nobis only over a criminal conviction heard before that particular court. See return at 10, citing *United States v. Morgan, 346 U.S. 502, 505 n.4, 74 S. Ct. 247, 98 L. Ed. 248 (1954)*. The government argues that as a result of the language of the All Writs Act, federal courts have declined to issue writs of coram nobis for lack of jurisdiction in cases where petitioners sought to use the writ to attack **[*9]** state court convictions. See return at 10, citing *Sinclair v. Louisiana, 679 F.2d 513, 514 (5th Cir. 1982)* (stating that "[i]t is well settled that the writ of error coram nobis is not available in federal court to attack state criminal judgments") (citations omitted); *United States v. Tucor International, Inc., 35 F.Supp.2d 1172, 1177 (N.D. Cal. 1998)*. In summary, the government contends that this court plainly has no jurisdiction over the instant court-martial conviction where petitioner was convicted by the United States military court system and he pursued both a direct appeal and a writ for coram nobis before the military courts. See return at 11-12.

Petitioner's first and general response is that *28 U.S.C. § 1331* and *Article III, §§ 1* and 2, of the United Constitution provide this court with jurisdiction over his coram nobis petition because he raises federal constitutional issues. See traverse at 5-6. Specifically, in addressing case law regarding this issue, petitioner states that the government "has failed to cite any authority to support the argument that a writ of error coram nobis cannot be issued by a **[*10]** federal district court in a court-martial case." Id. at 6. Then, petitioner goes on to cite two categories of cases he believes support his assertion of jurisdiction: (1) cases that recognize that court-martials and other military decisions can be collaterally attacked in federal district courts; and (2) cases that recognize and discuss the power of federal courts to grant the writ of coram nobis. See id. at 7-10 (citations omitted). However, petitioner is unable to cite even one case that holds that a federal district court has jurisdiction to issue a writ of coram nobis over a court-martial conviction that was adjudicated in the United States military courts.

B. Analysis

Petitioner's arguments about this court's jurisdiction are not persuasive because petitioner tries to present the instant petition not as what it actually is, a coram nobis petition, but rather as something akin to a civil action. In his traverse, petitioner is correct when he notes that *28 U.S.C. § 1331* authorizes that "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." However, **[*11]** the problem with applying *§ 1331* to the instant petition is that a petition for coram nobis cannot be treated as a new civil action that has freshly arisen under the Constitution or laws of the United States. Rather, the Supreme Court has stated that a petition for coram nobis "is a step in the criminal case and not, like habeas corpus where relief is sought in a separate case and record, the beginning of a separate civil [p]roceeding." *United States v. Morgan, 346 U.S. 502, 506 n.4, 74 S. Ct. 247, 98 L. Ed. 248 (1954)*. Because coram nobis petitions are treated as a step in a criminal case, the Ninth Circuit has suggested that such a petition must be brought in the convicting court. See *Hirabayashi v. United States of America, 828 F.2d 591, 604 n.14* (noting that petitioner had satisfied government's argument that a petition for coram nobis must be brought in the convicting court because the petition was brought in the Western District of Washington, the district in which petitioner was convicted); *Madigan v. Wells, 224 F.2d 577, 578 n.2 (1955)* (noting that if the instant case was brought as a petition for coram nobis, the petition would have to be brought "only **[*12]** in aid of the jurisdiction of the Texas court in which the conviction was had"). Consistent with the Ninth Circuit, the Tenth Circuit has specifically held

that a coram nobis petition "attacking a federal criminal conviction should be brought in the district court that rendered the conviction, at least so long as a remedy is available there." *Carter v. Attorney General of the United States, 782 F.2d 138, 141 (10th Cir. 1986)*.

Even if this court were deemed to have jurisdiction under *§ 1331* in the threshold sense because constitutional issues are raised by the petitioner, that does not necessarily mean this court has power to issue the coram nobis remedy of vacating petitioner's court-martial. The court notes that when a federal prisoner brings a *§ 2255* petition that raises federal issues of law, that does not ineluctably vest jurisdiction in any federal district court the petitioner chooses to file in. To the contrary, the petition must be filed in the sentencing court because only the sentencing court has power to "vacate, set aside, or correct" the sentence. *28 U.S.C. § 2255*; see also *Hernandez v. Campbell, 204 F.3d 861, 864 (9th Cir. 2000).* **[*13]** Especially where the Supreme Court in Morgan characterized a petition for coram nobis as being similar to a *§ 2255* petition, this court cannot find that it has jurisdiction to issue a writ of coram nobis and vacate petitioner's court-martial. Simply put, this court is not the convicting court.

Moreover, petitioner is not left forlorn of remedy simply because this court finds that it has no jurisdiction over his coram nobis petition. In Carter, the Tenth Circuit did suggest that a non-convicting court may have jurisdiction over a coram nobis petition if a remedy is not available in the convicting court. See *Carter, 782 F.2d at 141*. However, petitioner cannot make a convincing argument that he is bereft of a remedy considering the fact that he brought a petition for coram nobis before the Navy-Marine Corps Court of Criminal Appeals ("NMCCA") and that court granted review of that coram nobis petition. In addition, subsequent to the NMCCA's review, petitioner appealed the NMCCA's denial of the petition to the Court of Appeals for the Armed Forces and the appellate court also reviewed and denied the petition. Particularly since petitioner had the option of appealing **[*14]** the court of appeal's denial of his military court coram nobis petition to the Supreme Court but did not choose to, it would be unwarranted and inappropriate for this court to allow petitioner another review through a collateral district court coram nobis petition. See *28 U.S.C. § 1259* (stating that "[d]ecisions of the United States Court of Appeals for the Armed Forces may be reviewed by the Supreme Court by writ of certiorari in . . . [c]ases in which the Court of Appeals for the Armed Forces granted a petition for review). Allowing petitioner to file another petition for coram nobis would have the effect of permitting him to jump around from court to court simply because petitioner was not satisfied with the result he obtained before one set of courts.

Hence, this court dismisses the instant Petition for Writ of Coram Nobis for lack of jurisdiction. Although petitioner argues that the government must show through case law that this court does not have jurisdiction over a coram nobis petition that seeks to vacate a court-martial, it is the party invoking jurisdiction who has the burden of establishing jurisdiction. See *Scott v. Breeland, 792 F.2d 925, 927 (9th Cir. 1986).* **[*15]** Because petitioner and his pro bono counsel fail to establish that this court has the power to vacate petitioner's court-martial where this court is not the convicting court and because plaintiff has already had a coram nobis petition thoroughly considered by the military courts, the court **DISMISSES** the instant petition for lack of jurisdiction.

IV. Conclusion

For the foregoing reasons, the court **DISMISSES** the instant Petition for Writ of Coram Nobis. The court **DIRECTS** the clerk of the court to terminate this petition.

IT IS SO ORDERED.

DATE June 5, 2003

JUDGE JUDITH N. KEEP

United States District Court

Southern District of California

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Fricke v. Sec'y of the Navy

United States District Court for the District of Kansas

June 5, 2006, Decided ; June 5, 2006, Filed

CASE NO. 03-3412-RDR

Reporter
2006 U.S. Dist. LEXIS 36548 *; 2006 WL 1580979

MICHAEL W. FRICKE, Petitioner, v. SECRETARY OF THE NAVY, et al., Respondents.

Subsequent History: Mandamus dismissed by *Fricke v. Sec'y of the Navy, 2007 U.S. Dist. LEXIS 69740 (D. Kan., Sept. 19, 2007)*

Affirmed by *Fricke v. Sec'y of the Navy, 2007 U.S. App. LEXIS 28656 (10th Cir. Kan., Dec. 11, 2007)*

Prior History: *United States v. Fricke, 48 M.J. 547, 1998 CCA LEXIS 181 (N-M.C.C.A., 1998)*

Core Terms

military, court-martial, military court, personal jurisdiction, confinement, convening, sentence, mandamus, fair consideration, involuntary, armed

Counsel: [*1] Michael Fricke, Petitioner, Pro se, Leavenworth, KS; Thomas M. Dawson, Leavenworth, KS.

For Secretary of Navy, Commandant, United States Disciplinary Barracks, Ft. Leavenworth, Kansas, Respondents: Jackie A. Rapstine, Office of United States Attorney -- Topeka, Topeka, KS.

Judges: Richard D. Rogers, United States District Judge.

Opinion by: Richard D. Rogers

Opinion

MEMORANDUM AND ORDER

This matter is before the court on a petition seeking habeas corpus relief under *28 U.S.C. § 2241*, and mandamus relief under *28 U.S.C. § 1361*. The court has reviewed the record, finds it ready for decision, and denies all relief.

Procedural Background

Petitioner was commissioned as an officer in the United States Navy in April 1978. Petitioner states he was "passed over" in 1992 and 1993 for promotion to Lieutenant Commander, and thus fell within the involuntary separation provisions in *10 U.S.C. § 632*. Petitioner was apprehended at his place of duty by agents of the Naval Criminal Investigative Service on October 8, 1993, and told he would be taken before an Article 32 inquiry for the alleged premeditated murder of his **[*2]** wife in 1988. A military magistrate judge approved the continuation of petitioner's pre-trial confinement. Following an Article 32 inquiry in December 1993, the investigating officer recommended a general court-martial. On February 9, 1994, a general court-martial convened for trial on this premeditated murder charge.

Pursuant to a plea agreement, petitioner entered a guilty plea on August 30, 1994. Petitioner's sentence included confinement for life, a dishonorable discharge, forfeiture of all benefits, and a fine. The convening authority suspended confinement in excess of thirty years and all forfeitures and fines for ten years. The United States Navy-Marine Corps Court of Criminal Appeals (NMCA) affirmed petitioner's conviction and sentence. *United States v. Fricke, 48 M.J. 547 (N.M.Ct.Crim.App. 1998)*. The United States Court of Appeals for the Armed Forces (CAAF) affirmed the conviction, but set aside the sentence and remanded for a DuBay [1] hearing as to whether the conditions of petitioner's pre-trial confinement constituted punishment for which petitioner was entitled credit against his sentence. *United States*

[1] *United States v. DuBay, 17 C.M.A. 147, 37 C.M.R. 411 (C.M.A. 1967)*.

*v. Fricke, 53 M.J. 149 (C. **[*3]** A.A.F.)*, *cert. denied*, *531 U.S. 993, 121 S. Ct. 484, 148 L. Ed. 2d 457 (2000)*.

Petitioner filed the instant action to seek his release, pursuant to *28 U.S.C. § 2241*, from confinement pursuant to the judgment of a military tribunal alleged to be lacking personal jurisdiction over petitioner at the time of his court-martial. Petitioner also seeks mandamus relief, *28 U.S.C. § 1361*, for an order requiring military authorities to correct petitioner's record to reflect his involuntary and honorable separation from service as of December 1, 1993, pursuant to *10 U.S.C. § 632(a)*, to expunge his military conviction, and to restore all rights.

When petitioner initiated this action in February 2004, the proceeding that had been remanded for a DuBay hearing was still pending. In August 2004, the NMCA found the expanded record did not support petitioner's claim of unlawful pretrial punishment, and **[*4]** denied pretrial credit to petitioner's sentence. While that appeal was still pending, petitioner sought leave to add a claim that no personal jurisdiction for the 1994 general court-martial existed because petitioner should have been involuntarily separated from the service by operation of law in December 1993, prior to the convening of his General Court Martial in February 1994. The NMCA denied petitioner leave to include this new claim, indicating petitioner's conviction was final and this new issue was outside the limited scope of CAAF's remand. Petitioner then asserted this jurisdictional claim to the CAAF in a petition for writ of error coram nobis. The CAAF summarily denied the petition.

Standard of Review

Habeas corpus relief can be granted under *28 U.S.C. § 2241* to a federal prisoner who demonstrates he "is in custody in violation of the Constitution or laws or treaties of the United States." *28 U.S.C. § 2241(c)*. A United States District Court has limited authority to review court-martial proceedings for such error. Its scope of review is initially limited to determining whether the claims raised by the petitioner were **[*5]** given full and fair consideration by the military courts. *Lips v. Commandant, United States Disciplinary Barracks, 997 F.2d 808 (10th Cir. 1993)*, *cert. denied*, *510 U.S. 1091, 114 S. Ct. 920, 127 L. Ed. 2d 213 (1994)*. If the issues have been given full and fair consideration in the military courts, the district court should not reach the merits and should deny the petition. Id.

An issue is deemed to have been given "full and fair consideration" when it has been briefed and argued, even if the military court summarily disposes of the matter. *Watson v. McCotter, 782 F.2d 143, 145 (10th Cir.)*, *cert. denied*, *476 U.S. 1184, 106 S. Ct. 2921, 91 L. Ed. 2d 549 (1986)*. "It is not open to a federal civil court to grant the writ simply to re-evaluate the evidence." *Burns v. Wilson, 346 U.S. 137, 142, 73 S. Ct. 1045, 97 L. Ed. 1508 (1953)*; *Khan v. Hart, 943 F.2d 1261, 1263 (10th Cir. 1991)*. The fact that the military court did not specifically address the issue in a written opinion is not controlling. *Lips, 997 F.2d at 812, n.2*. Instead, "when an issue is briefed and argued" before a military court, the law in this circuit holds "that the military tribunal has given the claim **[*6]** fair consideration, even though its opinion summarily disposed of the issue with the mere statement that it did not find the issue meritorious or requiring discussion." Id., *citing*, *Watson, 782 F.2d at 145*. Petitioner bears the burden of showing the military review provided was "legally inadequate" to resolve his claims. *Watson, 782 F.2d at 144*, *citing* *Burns, 346 U.S. at 146*.

Discussion

Petitioner claims his court-martial conviction and sentence should be vacated because he was, as a matter of law, no longer a service member and subject to the jurisdiction of the Uniform Court Martial Jurisdiction when his general court-martial convened in February 1994. Petitioner points to *10 U.S.C. § 623* as mandating the involuntary separation of officers twice passed over for promotion, and claims operation of this statutory directive should have resulted in his discharge from the armed services as of December 1, 1993.

Respondents first argue federal review of petitioner's application should be denied because federal habeas review is barred because petitioner's conviction and sentence were not yet final **[*7]** when he filed his petition. This concern, however, was rendered moot by the military court's final denial of relief in the remanded proceeding.

Respondents next claim petitioner waived review of his personal jurisdiction claim by failing to present it in his direct military appeal. It is well recognized, however, that jurisdictional claims can be raised at any time. *See* *Huerta v. Gonzales, 443 F.3d 753, 756 (10th Cir. 2006)*(*citing* *Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 93-94, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)*). Indeed, respondents alternatively

contend federal habeas relief should be denied because the military courts fully and fairly considered petitioner's claim that he was no longer subject to the Uniform Code of Military Justice when his general court-martial convened in February 1994. The court finds merit to this contention.

Prior to Burns, a federal court's review of a military conviction was generally limited to an examination of whether the court-martial's jurisdiction was proper. *See In re Grimley, 137 U.S. 147, 150, 11 S. Ct. 54, 34 L. Ed. 636 (1890)* ("It cannot be doubted that the civil courts may in any case inquire into the jurisdiction **[*8]** of a court-martial, and, if it appears that the party condemned was not amenable to its jurisdiction, may discharge him from the sentence."). Nonetheless, Burns reiterated that a civil court's review of a military prisoner's habeas application did not allow for re-evaluation of evidence regarding an allegation that had been fully and fairly considered in a military decision. *Burns, 346 U.S. at 140*.

Although Burns extended that limited review to other claims of constitutional significance arising in a military proceeding, the "full and fair" standard as developed by later courts arguably applies to this court's consideration of petitioner's personal jurisdiction claim. Accordingly, where a military court has not manifestly refused to consider a claim, this court's review of petitioner's military conviction "is appropriate only if the following conditions are met: (1) the asserted error is of substantial constitutional dimension; (2) the issue is one of law rather than of disputed fact already determined by the military tribunal; (3) there are no military considerations that warrant different treatment of constitutional claims; and (4) the military courts failed **[*9]** to give adequate consideration to the issues involved or failed to apply proper legal standards." *Lips 997 F.2d at 811*.

In the present case, petitioner asserts a fundamental jurisdictional claim involving no factual dispute. It also appears the military courts adequately considered petitioner's personal jurisdiction claim and applied proper legal standards.

Petitioner clearly presented his jurisdictional claim to the CAAF in his petition for writ of error coram nobis. [2] That court's summary denial of relief constitutes its full and fair consideration, and its rejection, of petitioner's claim of entitlement to a discharge by operation of law by the date as provided in *10 U.S.C. § 632*. *Compare*, *Vanderbush v. Smith, 45 M.J. 590, 598 (Army Ct.Crim.Appl. 1996)*(relief granted on petitioner's writ of extraordinary relief; charges dismissed for lack of personal jurisdiction upon finding petitioner had received valid discharge from military service), *aff'd*, *47 M.J. 56 (1997)*.

[*10] The court also finds petitioner has failed to demonstrate that CAAF's decision involved an improper application of relevant law.

Personal jurisdiction over the accused at the time of trial clearly is an essential element for vesting court-martial jurisdiction. The military lacks jurisdiction to prosecute if the accused is not subject to the Uniform Code of Military Justice (UCMJ) at the time of the court-martial. *See Solorio v. United States, 483 U.S. 435, 439, 107 S. Ct. 2924, 97 L. Ed. 2d 364 (1987)*(jurisdiction of court-martial depends on accused's status as a member of the armed forces). "All servicemen, 'including those awaiting discharge after expiration of their terms of enlistment' are subject to the Code of Military Justice." *Desjardins v. Department of Navy, 815 F.Supp. 96, 98 (E.D.N.Y. 1993)* (*quoting* *10 U.S.C. § 802(a)(1)*).

Discharge from military service for purposes of court-martial jurisdiction, however, requires the delivery of a valid discharge certificate, a final accounting of pay, and completion of a clearing process. *10 U.S.C.A. § 802(c)* (service member is subject to UCMJ "until such person's active service **[*11]** has been terminated in accordance with law or regulations promulgated by the Secretary concerned"); *10 U.S.C. § 1168* (a service member is not released from active duty until he has received his discharge papers). *See Garrett v. United States, 625 F.2d 712, 713 (5th Cir. 1980)* (no release from military service until receipt of discharge papers)(citing *10 U.S.C. § 1168*), *cert. denied*, *450 U.S. 918, 101 S. Ct. 1363, 67 L. Ed. 2d 344 (1981)*. *See also Smith v. Vanderbush, 47 M.J. 56, 57-58 (1997)* (no unconditional right to be discharged upon expiration of term of service, "authority to retain service members past their period of obligated service for purposes of trial by court-martial is a longstanding feature of military law"). Here, petitioner

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[2] *See Noyd v. Bond, 395 U.S. 683, 695 n.7, 89 S. Ct. 1876, 23 L. Ed. 2d 631 (1969)* (All Writs Act, *28 U.S.C. § 1651*, applies to military courts). *See also* U.S. Court of Appeals Armed Forces Rules 4 and 18, *10 U.S.C. foll. § 867* (CAAF can entertain original petitions for extraordinary relief, including writs of error coram nobis); Rule 19(d)(writ of error coram nobis can be filed at any time).

alleges no receipt of discharge papers, and demonstrates no satisfaction of any of the formal requirements for discharge of his active service prior to the convening of his general court-martial, and there is nothing in the record suggesting any discharge paperwork or processing was initiated or completed prior to February 1994.

Next, petitioner's central claim, that *§ 632* **[*12]** operated to fully effect an involuntary separation and discharge, notwithstanding the undisputed circumstances of petitioner confinement and pending court-martial investigation at the time, is obviously compromised by *§ 639* which specifically provides for the continuation of a service member's active duty for the purpose of completing disciplinary action. [3]

And finally, because court-martial jurisdiction attaches when "action with a view to trial" takes place, *Allen v. Steele, 759 F.2d 1469, 1471 (9th Cir. 1985)*, petitioner's reliance on an involuntary separation date in December 1993 is defeated where prior to that date **[*13]** the military clearly and authoritatively signaled its intent to impose its legal process on petitioner and petitioner failed to allege lack of the personal jurisdiction for the convening of his general court-martial in February 1994. There is no dispute that petitioner was on active duty when he was taken into confinement in October 1993 for investigation of the premeditated murder charge, and that petitioner remained in confinement through the convening of his general court-martial in February 1994. *See e.g.*, id. (military officials' actions, before accused serviceman's term of enlistment ended, of interviewing him twice regarding rape and perjury allegations, conducting ongoing investigation, requesting drafting of charges, sending message requesting that he be contacted and issued orders to return to his base, and contacting him and telling him to report, taken together, were sufficient to cause court-martial jurisdiction to attach even though his term of enlistment had expired).

The court thus finds petitioner has not demonstrated that he is entitled to habeas corpus relief under *§ 2241*.

Petitioner also seeks extraordinary relief under *28 U.S.C. § 1361* **[*14]** , which grants a United States District court original jurisdiction of any action in the nature of mandamus to compel "an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." The "remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 34, 101 S. Ct. 188, 66 L. Ed. 2d 193 (1980)*. To qualify for mandamus relief, a petitioner must establish: a clear right to the relief sought; a plainly defined and peremptory duty on the part of the respondent to do the action in question; and that no other adequate remedy is available. *Johnson v. Rogers, 917 F.2d 1283, 1285 (10th Cir. 1990)*. Petitioner has not demonstrated that any of these requirements are satisfied in the present case. For the reasons already stated, the court specifically finds petitioner has not demonstrated a clear and indisputable right to the correction of his record to reflect his honorable discharge from the armed services as of December 1, 1993, pursuant to operation of *10 U.S.C. § 632*. *See Weston v. Mann (In re Weston), 18 F.3d 860, 864 (10th Cir. 1994)* **[*15]** (mandamus is a drastic remedy available only upon a showing of a clear and indisputable right to the relief requested).

Conclusion

For the reasons stated herein the court denies petitioner all relief sought under *28 U.S.C. §§ 1361* and *2241*.

IT IS THEREFORE ORDERED that petitioner's application for a writ of habeas corpus, and application for a writ of mandamus, are denied.

DATED: This 5th day of June 2006, at Topeka, Kansas.

s/ Richard D. Rogers

United States District Judge

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[3] *Section 639* reads: "When any action has been commenced against an officer with a view to trying such officer by court-martial and such officer is to be separated or retired in accord [with *§ 632*], the Secretary of the military department concerned may delay the separation or retirement of the officer, without prejudice to such action, until the completion of the action."

Tatum v. United States

United States District Court for the District of Maryland

August 7, 2007, Decided

Civil Action No.: RDB-06-2307

Reporter
2007 U.S. Dist. LEXIS 61947 *; 2007 WL 2316275

WAYNE TATUM, Pro se Plaintiff, v. UNITED STATES OF AMERICA, et al., Defendants.

Subsequent History: Affirmed by *Tatum v. United States, 272 Fed. Appx. 251, 2008 U.S. App. LEXIS 7273 (4th Cir. Md., 2008)*

Prior History: *United States v. Tatum, 34 M.J. 1115, 1992 CMR LEXIS 501 (N-M.C.M.R., 1992)*

Core Terms

military, court-martial, exhaust, motion to dismiss, Naval, subject matter jurisdiction, administrative remedy, Records, property interest, summary judgment, jurisdictional, discharged, benefits, deprived, federal court, dishonorable, requirements, collateral, balancing, threshold, enlisted, charges

Counsel: **[*1]** Wayne Tatum, Plaintiff, Pro se, Reisterstown, MD.

For United States Of America, Defendant: James A Frederick, Goodell DeVries Leech and Dann, Baltimore, MD.

Judges: Richard D. Bennett, United States District Judge.

Opinion by: Richard D. Bennett

Opinion

MEMORANDUM OPINION

Plaintiff Wayne Tatum ("Tatum" or "Plaintiff"), proceeding in proper person, initiated this action seeking injunctive relief and declaratory relief from the United States of America, as well as Secretaries Robert M. Gates of the Department of Defense and Donald C. Winter of the Department of the Navy, in their respective official capacities (collectively, "the United States" or "Defendants"). Plaintiff requests the vacation of his prior courts-martial convictions, the expungement of his military records, and the reinstatement of certain military benefits. Pending before this Court is Defendants' Motion to Dismiss or, *in the Alternative,* Motion for Summary Judgment. The parties' submissions have been reviewed and no hearing is necessary. *See* Local Rule 105(6) (D. Md. 2004). For the reasons that follow, Defendants' Motion to Dismiss is GRANTED pursuant to *Federal Rule of Civil Procedure 12(b)(1)* for want of subject matter jurisdiction.

BACKGROUND

From **[*2]** November 3, 1970 to December 2, 1993, Plaintiff Wayne Tatum was a member of the United States Marine Corps. (Am. Compl. PP 8-9.) On February 20, 1987, he re-enlisted in the Marine Corps and was assigned to Marine Aircraft Group 26, Second Marine Aircraft Wing in Jacksonville, North Carolina. (*Id.* PP 14-15.)

On December 15, 1989, court-martial charges were brought against Tatum. [1] (Defs.' Mem. Supp. Mot. Dismiss 3.) In light of the ongoing court-martial proceedings, Tatum was not discharged when his three year re-enlistment period ended on February 20, 1990. (Am. Compl. P 15.) On May 23 and July 17-21, 1990, a General Court-Martial acquitted Tatum of all the charges against him except the failure to support his dependents in violation of Articles 132 and 134 of the Uniform Code of Military Justice, *10 U.S.C. §§ 932* and *934*. [2] (*Id.* P

[1] He was accused of sexually and physically abusing a minor. (*See* Defs.' Mem. Supp. Mot. Dismiss Ex. B.)

[2] While neither of the parties submits that there were any concurrent non-military prosecutions against Tatum, this Court notes that the Board of Correction of Naval Records described

16.) As a result of this conviction, Tatum was sentenced to "a bad conduct discharge and ordered to forfeit $ 500.00 monthly from his pay for four (4) months." (*Id.* P 17.) In *U.S. v. Tatum, 34 M.J. 1115 (1992)*, **[*3]** the United States (Navy-Marine) Court of Review, dismissed the guilty verdicts on these counts and set aside Plaintiff's sentence. (Am. Compl. P 20.)

Meanwhile, two additional charges were brought against Tatum via court-martial on December 27, 1991. (Defs.' Mem. Supp. Mot. Dismiss 3-4.) These charges alleged that Plaintiff filed false travel reimbursement claims. (Defs.' Mem. Supp. Mot. Dismiss Ex. D, at 1a.) On April 27, 1992, the same day *U.S. v. Tatum* was decided, a General Court-Martial convicted Plaintiff of these charges. (Defs.' Mem. Supp. Mot. Dismiss 4.) On November 18, 1992, after serving his sentence of four months confinement at hard labor, Tatum went on appellate **[*4]** leave. (Defs.' Mem. Supp. Mot. Dismiss Ex. I, at 1.) However, he was later recalled from this leave "after military authorities were advised [Plaintiff] had written bad checks in the amount of about $ 1000." (*Id.*) Plaintiff did not return from his appellate leave as requested. (*Id.*) As a result, he was listed as "an unauthorized absentee" from July 6, 1993 to November 18, 1993. (*Id.*)

On November 18, 1993, Tatum "requested execution of the bad conduct discharge." (*Id.* at 1-2.) Accordingly, on December 2, 1993, he was dishonorably discharged from the Marine Corps. (Am. Compl. P 9.) Almost five years later, Tatum filed a petition on October 22, 1998 before the Board of Correction of Naval Records seeking to have his dishonorable discharge recharacterized as an honorable discharge. (Defs.' Mem. Supp. Mot. Dismiss 4 & Ex. I, at 2.) On April 6, 1999, the Board of Correction of Naval Records rejected his petition. (Defs.' Mem. Supp. Mot. Dismiss Ex. I, at 1.)

Approximately six and a half years after his petition had been rejected, on September 5, 2005, Tatum filed the subject Complaint in this Court against the United States as well as Former Defense Secretary Donald Rumsfeld and Former Secretary **[*5]** of the Navy Gordon R. England acting in their respective official capacities. [3] On October 23, 2006, Plaintiff amended his Complaint without leave of this Court as a matter of course. (Paper No. 8.) Plaintiff's First Amended Complaint contains a single prayer for relief asking that this Court order Declaratory and Injunctive Relief. Specifically, Tatum asks that this Court vacate and expunge his convictions by courts-martial, restore his back-pay due and other benefits, and reimburse him for attorney's fees and costs incurred in the instant action. (Am. Compl. P 85.) On December 19, 2006, Defendants filed the subject Motion to Dismiss or, *in the Alternative,* Motion for Summary Judgment, alleging that this Court lacks subject matter jurisdiction over Tatum's claims because he did not exhaust his military remedies. [4] (Paper No. 14.)

STANDARD OF REVIEW

I. Motion to Dismiss

Defendants have moved to dismiss Plaintiff's Complaint for lack of subject matter jurisdiction pursuant to *Rule 12(b)(1) of the Federal Rules of Civil Procedure*. As an initial matter, "[t]he plaintiff has the burden of proving that subject matter jurisdiction exists." *Evans v. B.F. Perkins Co., 166 F.3d 642, 647 (4th Cir. 1999)*; *see Richmond, Fredericksburg & Potomac R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991)* (citations omitted). Generally, when reviewing a motion to dismiss where the jurisdictional allegations of the complaint are purported to be defective, "the district court may regard the pleadings as mere evidence on the issue and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Velasco v. Gov't of Indon., 370 F.3d 392, 398 (4th Cir. 2004)*; *see also Richmond, Fredericksburg & Potomac R. Co., 945 F.2d at 768*.

Furthermore, "[u]nlike the procedure in a *Rule 12(b)(6)* motion where there is a presumption reserving the truth finding role to the ultimate factfinder, the court in a *Rule 12(b)(1)* hearing weighs the evidence to determine **[*7]** its jurisdiction." *Adams, 697 F.2d 1213, 1219*. A *12(b)(1)* motion should only be granted "if the material jurisdictional facts are not in dispute and the moving

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a related criminal complaint that resulted in "a hung jury." (Defs.' Mot. Dismiss Ex. I.) In addition, the Board of Correction of Naval Records also noted that Plaintiff "later pled no contest to a fourth degree sexual offense. . . ." *Id.*

[3] On February 5, 2007, the caption was amended to reflect the new Secretary of Defense, Robert M. Gates, and the new Secretary of the Navy, Donald C. Winter. (*See* Paper No. 22.)

[4] Plaintiff filed a Motion for Summary Judgment on April 16, 2007. (Paper No. 28.) However, this Court grants Defendant's Motion to Dismiss on jurisdictional grounds. Consequently, Plaintiff's **[*6]** Motion for Summary Judgment will be DENIED.

party is entitled to prevail as a matter of law." Moffett v. Computer Scis. Corp., 457 F. Supp. 2d 571, 578 (D. Md. 2006) (quoting Richmond, Fredricksburg & Potomac R. Co., 945 F.2d at 768).

DISCUSSION

The United States contends that this Court lacks subject matter jurisdiction over Tatum's claims because he has failed to exhaust the administrative remedies available to him in the military justice system. Plaintiff responds that "[his] case concerns the fundamental question of whether the U.S. Marine Corps has continuing jurisdiction over [him] to subject him to a subsequent court-martial. Resolution of this jurisdictional question . . . is within an Article III court's jurisdiction." (Am. Compl. P 29.)

By necessity, "[m]ilitary law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment." Parker v. Levy, 417 U.S. 733, 744, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974); *see also* Burns v. Wilson, 346 U.S. 137, 140, 73 S. Ct. 1045, 97 L. Ed. 1508 (1953). This separation is due to not only differences in the nature of military service and civilian **[*8]** life, but also the structure of the United States Constitution. "Congress is empowered under Art. I, § 8, to make Rules for the Government and Regulation of the land and naval Forces. . . . Congress [has not] conferred on any Art. III court jurisdiction directly to review court-martial determinations." Schlesinger v. Councilman, 420 U.S. 738, 746, 95 S. Ct. 1300, 43 L. Ed. 2d 591 (1975) (citing Noyd v. Bond, 395 U.S. 683, 694, 89 S. Ct. 1876, 23 L. Ed. 2d 631 (1969); Ex parte Vallandigham, 68 U.S. (1 Wall.) 243, 249-53, 17 L. Ed. 589 (1864)). However, federal courts have long allowed for collateral attacks on the jurisdictional grounds or illegality of courts-martial. [5] *See* id. at 746-47; Dynes v. Hoover, 61 U.S. (20 How.) 65, 15 L. Ed. 838 (1857); Wise v. Withers, 7 U.S. (3 Cranch) 331, 2 L. Ed. 457 (1806).

The mere fact that a defendant in a court-martial may collaterally attack the legality of the court-martial, **[*9]** does not mean that this Court will have subject matter jurisdiction over the relief sought in that collateral attack. *See* Councilman, 420 U.S. at 752-53. In Williams v. Wilson, 762 F.2d 357, 359 (4th Cir. 1985), the United States Court of Appeals for the Fourth Circuit adopted the framework for determining when a federal court should review a military decision that was first promulgated in Mindes v. Seaman, 453 F.2d 197, 201-02 (5th Cir. 1971). [6] This test consists of two threshold requirements and a four-part balancing test. "First, there must be an 'allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violations of applicable statutes or its own regulations.'" Guerra v. Scruggs, 942 F.2d 270, 276 (4th Cir. 1991) (quoting Mindes, 453 F.2d at 201). "Second, the plaintiff must have exhausted the 'available intraservice corrective measures.'" Id. (quoting Mindes, 453 F.2d at 201)). If these two initial requirements are met, the Court then proceeds to a four-part balancing test. The four elements of this test include:

> 1. The nature and strength of the plaintiff's challenge to the military determination. . . .
>
> 2. The potential injury to **[*10]** the plaintiff if review is refused.
>
> 3. The type and degree of anticipated interference with the military function. Interference per se is insufficient since there will always be some interference when review is granted, but if the interference would be such as to seriously impede the military in the performance of vital duties, it militates strongly against relief.
>
> 4. The extent to which the exercise of military expertise or discretion is involved. Courts should defer to the superior knowledge and expertise of professionals in matters such as promotions or orders directly related to specific military functions.

Id. (quoting Mindes, 453 F.2d at 201-02) (quotation marks omitted).

In the case at bar, Tatum has satisfied the first of the two threshold **[*11]** requirements of the Mindes test,

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[5] *See generally* Joseph W. Bishop, Jr., *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions,* 61 COLUM. L. REV. 40, (1961) (criticizing dictum in *Ex parte Milligan* that "the power of Congress in the government of the land and naval forces . . . is not at all affected by the fifth or any other amendment" ***71 U.S. (4 Wall.) 2, 138, 18 L. Ed. 281 (1866)*** (Chase, J. concurring)).

[6] There is some confusion in other federal courts of appeal about the continuing viability of *Mindes* in light of United States v. Stanley, 483 U.S. 669, 683, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (1987). *See, e.g.,* Wright v. Park, 5 F.3d 586, 590-91 (1st Cir. 1993). However, four years after the issuance of the *Stanley* decision, the United States Court of Appeals for the Fourth Circuit reaffirmed its reliance on the *Mindes test in* Guerra v. Scruggs, 942 F.2d 270, 275-76 (4th Cir. 1991).

because he claims that he was wrongfully court-martialed and discharged in violation of his Fifth and Eighth Amendment rights. However, as to the second threshold requirement, this Court must analyze whether he has exhausted his administrative remedies within a reasonable time period. The fact that Tatum couches his claims in constitutional terms is of no moment in this Court's analysis of whether he exhausted those administrative remedies. *See* Nationsbank Corp. v. Herman, 174 F.3d 424, 429 (4th Cir. 1999) (noting that the Court of Appeals' "consistent and unambiguous line of cases rejecting the contention that constitutional claims should be exempt from the exhaustion requirements"); Am. Fed'n of Gov't Employees v. Nimmo, 711 F.2d 28, 31 (4th Cir. 1983) (holding that "exhaustion is particularly appropriate when the administrative remedy may eliminate the necessity of deciding constitutional questions."). In addition, the inability of an administrative board or court to grant a plaintiff full relief is not dispositive on the issue of exhaustion. *See* Guerra, 942 F.3d at 277 (citing Sanders v. McCrady, 537 F.2d 1199, 1201 (4th Cir. 1976)).

The undisputed **[*12]** facts in this case are that Tatum waited five years after being dishonorably discharged before filing a petition before the Board of Correction of Naval Records to recharacterize his discharge. Within six months of the filing of that petition, the Board of Correction of Naval Records rejected his petition. Tatum then waited another six and a half years before filing the subject Complaint in this Court. Considerations of efficiency and agency expertise in military courts weigh heavily against Tatum as a result of an eleven-year delay in seeking to address the ramifications of his dishonorable discharge. Tatum did not seek to resolve his status in a timely manner, nor did he seek to resolve his status through the United States Court of Appeals for the Armed Forces. *See* Thompson v. United States, 60 M.J. 880, 883 (N-M. Ct. Crim. App. 2005) (allowing for the use of a writ of *coram nobis* to set aside an earlier conviction by court-martial). As he failed to exhaust his administrative remedies, he has not satisfied the threshold requirement for this Court's review of a military decision as clearly set forth by the United States Court of Appeals for the Fourth Circuit in Williams, 762 F.2d at 359. **[*13]** Accordingly, this Court lacks subject matter jurisdiction and the motion of the Defendants to dismiss shall be GRANTED pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

As the Plaintiff is proceeding in proper person, this Court alternatively notes that even if he had been able to meet the threshold exhaustion requirement, he does not satisfy the four-part test set forth in the Mindes opinion. As to the first factor--the nature and strength of the claims--Tatum invokes both the Fifth and Eighth Amendments. [7]

Plaintiff's allegation that his Fifth Amendment rights were violated is a weak claim, because he cannot show that he had a valid property or liberty interest or that he was ultimately deprived of that interest without due process. "Procedural due process imposes constraints on governmental **[*14]** decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth Amendment." Mathews v. Eldridge, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). Therefore, in order to have a significant challenge to the military's determination of his case, Tatum must show a violation of a liberty or property interest. Property interests "are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits that support claims of entitlement to those benefits." Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). In *Guerra,* the United States Court of Appeals for the Fourth Circuit has held that the plaintiff did not have a property interest in his position in the Army, because the armed forces have discretion to discharge enlisted personnel pursuant to 10 U.S.C. § 1169. [8] 942 F.2d at 278 (citing Rich v. Sec'y of the Army, 735 F.2d 1220, 1226 (10th Cir. 1984)). The fact that the Secretary of the Navy retained the discretion to proscribe procedures for discharging Tatum vitiates any claim to a property right he had in his enlisted status and benefits. The **[*15]** Fourth Circuit also held in *Guerra* that even an enlisted individual had a property interest in his position at one time, it would not exist once the term of enlistment expired. *Id.* Thus, Tatum has not shown the deprivation of a property

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[7] The Fifth Amendment to the United States Constitution provides, in relevant part, that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. V. The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

[8] 10 U.S.C. § 1169 provides: "No regular enlisted member of an armed force may be discharged before his term of service expires, except - (1) as prescribed by the Secretary concerned; (2) by sentence of a general or special court-martial; or (3) as otherwise provided by law."

interest.

Just as he does not have a *property* interest protected by the Fifth Amendment, Tatum does not have a *liberty* interest protected by the Fifth Amendment. "Liberty" includes "the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge . . . and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.'" Roth, 408 U.S. at 572 (quoting Meyer v. Neb., 262 U.S. 390, 399, 43 S. Ct. 625, 67 L. Ed. 1042 (1923)). While an individual holds a right to a good name in the abstract, "a critical element of a claimed invasion of a reputational liberty interest . . . is the falsity of the government's **[*16]** asserted basis for the employment decision at issue." Guerra, 942 F.2d at 278 (citation omitted). Here, Tatum has failed to show that the stated reason for his dismissal--his conviction by court-martial--is untrue, despite ample opportunity to make such a showing at his court-martial proceeding. As a result, he has not been deprived of a liberty interest. Accordingly, Tatum has not brought a serious challenge to the prior military proceedings against him on Fifth Amendment grounds.

Likewise, Tatum has not made a significant challenge pursuant to the Eighth Amendment. There is simply no disproportionate punishment present. Neither of the parties argues that four months' incarceration and a dishonorable discharge are cruel or unusual punishments for being found guilty of essentially defrauding the military, to which Tatum swore an oath of allegiance. As a result, Plaintiff has not made out a significant collateral challenge to his prior military proceeding, and the first factor in the Mindes balancing test--the nature and strength of Tatum's challenges to the Marine Corps' decision--weighs in favor of this Court not granting him relief.

With respect to the second factor in the Mindes balancing **[*17]** test, there is simply no ongoing injury to a plaintiff who waits six and a half years before filing an action in this Court. While his previous loss of back pay and military benefits may have constituted specific injuries, he has waived his rights. Thus, the second factor also disfavors Tatum.

The third Mindes factor is the type and degree of anticipated interference with the military function. In *Chappell v. Wallace,* the Supreme Court explained the need for discipline and duty as follows:

> The inescapable demands of military discipline and obedience to order cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex[ive] with no time for debate or reflection. . . . This becomes imperative in combat; for that reason, centuries of experience has [sic] developed a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns. Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between military personnel and their superior officers; **[*18]** that relationship is at the heart of the necessarily unique structure of the military establishment.

462 U.S. 296, 300, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983); *accord* Horn v. Schlesinger, 514 F.2d 549, 553 (8th Cir. 1975) (noting that in challenges to military retention and promotion, federal courts "are in an area involving judgments as to military character, a field foreign to [federal courts'] normal competence"). This traditional trepidation to review decisions of a uniquely military character is clearly applicable to the matter before this Court. It is not the function of this Court to interfere with the established relationship between military personnel and their officers and conduct a review eleven and a half years after the fact. As a result, the Plaintiff could not satisfy the third factor in the Mindes balancing test.

The final Mindes factor is the extent to which military expertise and discretion were involved in Tatum's discharge. Tatum's submissions to this Court make it clear that he is calling for the use of military discretion in this case. He cites a number of cases tried by military courts to establish the proposition that the military should be compelled by this Court to use its discretionary ability **[*19]** to reclassify the nature of his discharge. Simply put, the nature of his request and much of the law cited to support it shows that this decision falls squarely within the discretion of the military and is not a process into which federal courts should interject themselves. Therefore, the fourth Mindes factor weighs against this Court granting Tatum any relief.

Accordingly, Plaintiff has failed to meet the jurisdictional requirements to challenge his discharge from the Marine Corps in this Court.

CONCLUSION

For the reasons stated above, the Plaintiff's failure to exhaust his administrative remedies in a timely manner precludes this Court's exercise of jurisdiction over his claims, and the Motion to Dismiss shall be GRANTED. Furthermore, the *pro se* Plaintiff could not satisfy the criteria for this Court's jurisdiction even if he had exhausted the available administrative remedies. A separate Order follows.

Richard D. Bennett

United States District Judge

Dated: August 7, 2007

ORDER

For the reasons stated in the foregoing Memorandum Opinion, IT IS this 7th day of August 2007, HEREBY ORDERED that:

a. Defendants' Motion to Dismiss (Paper No. 14) is GRANTED;

b. In light of this Court's Order granting **[*20]** the Defendants' Motion to Dismiss, the Plaintiff's Motion for Temporary Restraining Order (Paper No. 7) and Motion for Summary Judgment (Paper No. 28) are DENIED;

c. This case is DISMISSED WITH PREJUDICE;

d. The Clerk of the Court CLOSE THIS CASE; and

e. The Clerk of the Court transmit copies of this Order and the foregoing Memorandum Opinion to the *pro se* Plaintiff and counsel for the Defendants.

Richard D. Bennett

United States District Judge

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Piotrowski v. Commandant, USDB

United States District Court for the District of Kansas

December 22, 2009, Decided; December 22, 2009, Filed

CASE NO. 08-3143-RDR

Reporter
2009 U.S. Dist. LEXIS 119892 *

JOSEPH F. PIOTROWSKI, Petitioner, v. COMMANDANT, USDB, Respondent.

Subsequent History: Magistrate's recommendation at, Habeas corpus proceeding at Piotrowski v. United States, 2013 U.S. Dist. LEXIS 186811 (N.D. Fla., Nov. 27, 2013)

Related proceeding at Piotrowski v. United States, 2014 U.S. Claims LEXIS 1481 (Fed. Cl., Dec. 30, 2014)

Prior History: Piotrowski v. Commandant, USDB, 2009 U.S. Dist. LEXIS 18660 (D. Kan., Mar. 5, 2009)

Core Terms

military, court-martial, convening, military court, sentence, unexhausted, allegations, exhausted, pretrial, prosecute, confinement, Army, defense counsel, collateral, charges, fair consideration, appellate court, convictions, prosecutorial misconduct, guilty plea, new claim, proceedings, entertain, recommend, grounds, courts, Amend, federal court, habeas corpus, improvident

Counsel: **[*1]** Joseph F. Piotrowski, Petitioner, Pro se, Cross City, FL.

For Commandant, USDB-Ft. Leavenworth, Respondent: D. Brad Bailey, LEAD ATTORNEY, Office of United States Attorney - Topeka, Topeka, KS.

Judges: RICHARD D. ROGERS, United States District Judge.

Opinion by: RICHARD D. ROGERS

Opinion

ORDER

This petition for writ of habeas corpus was filed pursuant to 28 U.S.C. § 2241 by petitioner while he was confined at the United States Disciplinary Barracks, Fort Leavenworth, Kansas, serving a sentence imposed in military court-martial proceedings [1].

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Mr. Piotrowski had served in the Army for 24 years when the following incidents occurred. In August 2000, he drove while intoxicated from his home in North Carolina to MacDill Air Force Base, Florida. Eyewitnesses saw him driving at a high rate of speed and weaving from lane to lane before he sideswiped one vehicle and, after swerving, hit it a second time. In this incident, he endangered the lives of two adults and their child in the other vehicle. He then accelerated away from the scene and was observed driving in excess **[*2]** of 90 miles per hour. Approximately 30 minutes later, he nearly hit a law enforcement officer's vehicle as he was passing it, which endangered the officer. Mr. Piotrowski was pulled over after he failed to properly stop at an intersection. He was clearly intoxicated, and was taken into custody. The Army was notified, and the next day his commander, wife, and parents met at the county jail and secured his release. His license was suspended, and he was scheduled for trial in Hillsborough County Court. A few days later, Mr. Piotrowski officially requested retirement from the military; however, his request was delayed apparently due, at least partly, to these and another legal problem.

On February 11, 2001, the day before his first state trial for Driving Under the Influence of Alcohol (DUI), Mr. Piotrowski took a bus to Jacksonville, Florida, and set out for home in a recently purchased jeep. He drove without a valid driver's license, drank alcohol while

[1] Petitioner filed a notice of change of address (Doc. 7) to Cross City Correctional Institution, Cross City, Florida.

driving, and became intoxicated. He was observed by a law enforcement officer in his vehicle in a restaurant parking lot, unconscious in the driver's seat with the key in the ignition. Witnesses told the officer Mr. Piotrowski had recklessly **[*3]** driven in the parking lot 20 minutes earlier. He was asked to perform several sobriety tests, which he failed. He refused to take a breathalyzer test. He was taken into custody and placed in the Sumter County Jail [2].

The next day Mr. Piotrowski appeared in Hillsborough County Court, pled guilty, and was convicted of DUI. He was fined, given probation, and required to attend DUI rehabilitation school. He also pled no contest in Hernando County to improper passing and leaving the scene of an accident, and paid a fine.

He attended the school. Nevertheless, on April 18, 2001, Mr. Piotrowski again drove without a valid license this time from his home to a mall. After shopping at the mall, he consumed at least one half pint of whiskey immediately prior to driving. Approximately 30 minutes later, with a blood alcohol content nearly 3 times the legal limit, he ran a stop sign in a residential neighborhood and hit a vehicle driven by a pregnant woman. As a result of the impact, the woman and her 6-month old fetus died at the scene. These events culminated **[*4]** in the court-martial convictions he seeks to challenge in this action.

Mr. Piotrowski was prosecuted by the United States Army, and subsequently by the State of Florida, mainly for offenses arising out of the fatal crash on April 18, 2001. Prior to his military court-martial, he entered into a pretrial agreement (PTA) with the convening authority, which included a Stipulation of Fact". [3] He was convicted in court-martial consisting of a military judge upon his pleas of guilty to involuntary manslaughter, 3 counts of drunken driving, conduct unbecoming an officer, and reckless endangerment. He was sentenced on August 8, 2001, to 13 & frac 12; years imprisonment and dishonorable discharge.

Petitioner's case was forwarded to the Army Court of Criminal Appeals (ACCA) for mandatory review under Article 66 of the Uniform Code of Military Justice (UCMJ) [4]. He was represented during his direct appeal not only by different military defense counsel but also by privately retained civilian defense counsel. He raised nine "assignments of **[*5]** error", oral arguments were heard, and he was granted relief on one claim. On January 31, 2006, the ACCA substantially affirmed the convictions and 12 years of the sentence. The claims raised in the original petition before this court "mirror" some, but not all, of petitioner's claims presented to the ACCA [5].

Mr. Piotrowski then appealed **[*6]** to the Court of Appeals for the Armed Forces (CAAF), which granted his request for appellate review. However, after a "full briefing" by both sides, the CAAF summarily denied relief on February 8, 2007.

In May 2003, while serving his military sentence at the USDB, Mr. Piotrowski was transferred to the State of Florida and tried on charges of vehicular homicide and DUI manslaughter. He was found guilty by a jury. On May 14, 2003, he was sentenced to a 15-year consecutive sentence on each charge. His thirty-year state term was ordered to run concurrent to his military sentence.

Petitioner filed the instant pro se federal habeas corpus petition on June 11, 2008. The court's initial order herein held the Petition was "mixed" in that petitioner's claim of ineffective assistance of counsel had not been exhausted. Mr. Piotrowski was given time to show cause why his "mixed petition" should not be dismissed or to dismiss his unexhausted claim and proceed only upon exhausted claims. In response, he filed a motion to "sever Ground Nine", his ineffective assistance of counsel claim, and to "proceed on his exhausted claims." The court accordingly dismissed petitioner's

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[2] Mr. Piotrowski eventually pled guilty in court-martial to two counts of drunken driving based upon these events in August 2000 and February 2001.

[3] The foregoing recitation of facts is taken from the "Stipulation of Fact" entered in United States v. Piotrowski on August 2, 2001. Record of Trial (ROT) at 505.

[4] As respondent explains in the Answer and Return, this review was "not cursory". Instead, pursuant to *Article 66(c)*, the ACCA was required to "independently review the entire record of trial *de novo* and independently arrive at a decision that the findings and sentence are correct 'in law and fact'" and "review for error whether or not errors are assigned by the appellant." A&R (Doc. 14) at 9. In addition, pursuant to *United States v. Grostefon, 12 M.J. 431, 436-37 (1982)*, military review courts are required to consider all issues personally specified by the accused.

[5] Mr. Piotrowski's claims in his Petition numbered (1), (2), (3), (4), (5), (6), and (8) are identical to seven of the nine claims he lists as raised on appeal to the ACCA. He lists the same seven claims as among the nine raised on appeal to the CAAF, where he also raised his current claim (7).

unexhausted claim and ordered **[*7]** respondents to show cause on petitioner's other claims.

CLAIMS

Mr. Piotrowski raised 11 grounds in his Petition: (1) his pretrial agreement should be declared void and his plea improvident because, contrary to his understanding, the State of Florida prosecuted him for the "same manslaughter offenses . . . covered by his army pretrial agreement"; (2) the military judge erred by denying a defense motion to dismiss a specification under the preemption doctrine; (3) the military judge erred by failing to instruct court members to disregard portions of trial counsel's sentencing argument; (4) the military judge erred by instructing court members to disregard portions of defense counsel's sentencing argument; (5) the military judge erred by permitting petitioner's then-current spouse and his ex-spouse to testify as rebuttal witnesses; (6) his pretrial agreement should be declared void because the convening authority failed to recommend the Naval Brig in Charleston as his place of confinement; (7) his pretrial agreement should be declared void because the prosecuting attorney in his Army court-martial testified at his Florida trial and disclosed statements made during his providency inquiry; **[*8]** (8) the court-martial lacked jurisdiction in that the record of trial does not contain sufficient evidence to demonstrate an appropriate exercise of court-martial convening power by Brigadier General (BG) Ferrell; (9) the pretrial agreement should be declared void and his plea improvident because his defense counsel was ineffective; (10) the military judge gave incorrect responses during the panel's deliberations to members' questions regarding petitioner's retirement; and (11) the punishment petitioner received was cruel and unusual in that he was tried twice and sentenced to 43 1/2 years for an offense that allegedly averages 10 years nationally.

LEGAL STANDARDS

The federal civil courts have jurisdiction over habeas corpus actions filed under *§ 2241* by prisoners convicted in the courts-martial. See *Burns v. Wilson, 346 U.S. 137, 139, 73 S. Ct. 1045, 97 L. Ed. 1508 (1953)*. However, review of these actions is very limited [6]. Historically, review "was limited to the question of jurisdiction." *Fricke v. Secretary of Navy, 509 F.3d 1287, 1289 (10th Cir. 2007)*(citations omitted). In Burns, the Supreme Court extended the scope of review of court-martial proceedings, deciding that "civil courts could consider constitutional **[*9]** claims regarding such proceedings if the military courts had not 'dealt fully and fairly' with such claims [7]." *Id.; Templar v. Harrison, 298 Fed.Appx. 763, 764 (10th Cir. 2008)*(The court's review of court-martial proceedings is limited generally to jurisdictional issues and to determination of whether the military gave full and fair consideration to each of the petitioner's constitutional claims.)(citing *Fricke, 509 F.3d at 1290*; see also *Burns, 346 U.S. at 142*)). Where the military courts have given "full and fair consideration" to the claims presented in a petition, a federal court may not grant habeas relief "simply to re-evaluate the evidence," and should deny the petition. *Lips, 997 F.2d at 810-11* (quoting *Burns, 346 U.S. at 142*). If an issue was presented to the military courts, the issue will be viewed as having received full and fair consideration, even if that court's opinion summarily disposed of the issue [8]. *Watson v. McCotter, 782 F.2d 143, 145 (10th*

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[6] This court does not simply function as another appellate court that reviews all errors raised by a military prisoner. Nor is a military appellate court a "lower court". Civilian district court review is more limited in military cases because "the military has its own independent criminal justice system governed by the Uniform Code of Military Justice." *Lips v. Commandant, United States Disciplinary Barracks, 997 F.2d 808, 810 (10th Cir.)*, cert. denied, ***510 U.S. 1091, 114 S. Ct. 920, 127 L. Ed. 2d 213 (1993)***.

[7] In Burns, a plurality of the United States Supreme Court stated that the district court may not review challenges to military courts-martial de novo unless the military courts have "manifestly refused to consider those claims." *Burns, 346 U.S. at 142*.

[8] The Tenth Circuit has noted additional factors, that are not the focus in this case:

> Some prior decisions from this court elaborate four factors to be considered before granting habeas review of military cases. See, e.g., *Roberts v. Callahan, 321 F.3d 994, 996 (10th Cir. 2003)*("1. **[*11]** The asserted error must be of substantial constitutional dimension. 2. The issue must be one of law rather than of disputed fact already determined by the military tribunals. 3. Military considerations may warrant different treatment of constitutional claims. 4. The military courts must give adequate consideration to the issues involved or apply proper legal standards." (quotation and ellipses omitted)). Here, the dispute concerns whether (petitioner's) claim received full and fair consideration, and thus our analysis focuses on that inquiry.),(cert. denied, *540 U.S. 973, 124 S. Ct. 447, 157 L. Ed. 2d 323 (2003)*.

Templar, 298 Fed.Appx. at 764, FN2.

Cir.), cert. denied, *476 U.S. 1184, 106 S. Ct. 2921, 91 L. Ed. 2d 549 (1986)*; *Lips, 997 F.2d at 812* (The fact that the military court did not specifically address the issue in a written opinion is not controlling.). An issue received full and fair consideration **[*10]** if it was "briefed and argued". See id. The burden is on the petitioner to establish that the review in the courts-martial was "legally inadequate". *Watson, 782 F.2d at 144* (citing *Burns, 346 U.S. at 146*).

Finally, it has long been settled that a federal court "will not entertain petitions by military prisoners unless all available military remedies have been exhausted." *Schlesinger v. Councilman, 420 U.S. 738, 758, 95 S. Ct. 1300, 43 L. Ed. 2d 591 (1975)*; *Noyd v. Bond, 395 U.S. 683, 693, 89 S. Ct. 1876, 23 L. Ed. 2d 631 (1969)*(recognizing "general rule that habeas corpus petitions from military prisoners should not be entertained by federal civilian courts until all available remedies within the military court system have been invoked in vain"). If a claim was not presented to the military courts, the federal habeas court considers the claim **[*12]** waived and not subject to review. *Watson, 782 F.2d at 145*; *Templar v. Harrison, 2008 U.S. Dist. LEXIS 23760, 2008 WL 754925 (D.Kan. Mar. 19, 2008)*, aff'd, *298 Fed.Appx. at 763*); see also *Roberts, 321 F.3d at 995*.

The court has carefully considered the Petition, the Answer and Return, the Traverse, and all other pleadings and materials filed by the parties including the military and state court records. Applying the foregoing legal standards, the court denies this habeas corpus petition for reasons that follow.

EXHAUSTED CLAIMS

GROUNDS (2), (4), AND (5)

In his Traverse, Mr. Piotrowski "admits he received full and fair consideration" on his claim, Ground (2), regarding the preemption doctrine. He also admits his claims, Grounds (4) and (5), that the judge erred by instructing members to disregard portions of defense counsel's arguments and by permitting his ex-wives to testify at sentencing "have little merit" and need not be reviewed by this court. Petitioner alleges no facts indicating the military courts refused to consider these claims. Nor has he met his burden of demonstrating either that military review was not full and fair or that the military applied improper legal standards in determining these claims. The **[*13]** record confirms that these claims were briefed and argued before the military courts. The court concludes that grounds (2), (4) and (5) were fully and fairly considered by the military courts and, under *Burns*, must be denied.

GROUND (3)

The court has considered petitioner's claim, Ground (3), that the military judge erred in failing to instruct court members to disregard portions of trial counsel's argument during sentencing. The court finds that this claim was briefed and argued before the military courts, and thus was fully and fairly considered by those courts. No argument is made that incorrect legal standards were applied. Accordingly, this claim is denied.

GROUND (6)

The court has considered petitioner's claim, Ground (6), that the PTA should be declared void and his plea improvident because the convening authority failed to recommend the Naval Brig in Charleston as his place of confinement. The record shows this claim was briefed and argued in the military courts. Petitioner has not met his burden of showing it was not fully and fairly considered. Nor does he show that incorrect legal standards were applied. Accordingly, under *Burns*, it is denied.

In any event, the military court **[*14]** records plainly controvert this claim. The record shows that a convening authority made the agreed-upon recommendation twice. Making the recommendation was all the PTA required, and the convening authority's actions fulfilled that obligation. His recommendation was rejected by the authorities who actually had discretion to determine Mr. Piotrowski's place of confinement. The record further shows that during the plea proceeding, the military judge carefully explained to Mr. Piotrowski that the decision as to where he would serve confinement "is not made by the convening authority", the convening authority would "recommend to the Department of the Army" who does actually make that decision, the recommendation was "not binding on the Army", there was "a substantial chance" he would serve his confinement elsewhere, and all officers serve some confinement at Fort Leavenworth. ROT 81-82.

GROUND (7)

The court has considered petitioner's ground (7) that the PTA should be declared void and his plea improvident because the military prosecutor testified at his Florida state trial, and disclosed statements made in his providency inquiry. This claim was not presented as a

separate issue to the ACCA; **[*15]** however, it was clearly presented to the CAAF as Issue VIII in petitioner's Supplement to Petition for Grant of Review (ROT 766) prepared by counsel. The record shows this claim was "briefed and argued" to a military tribunal. ROT 785-86. It follows that Ground (7) must be denied under *Burns*.

In any event, respondent correctly points out that this ground is the same as petitioner's Ground (1), or at least it was presented as such to the military court. Before the CAAF, counsel for Mr. Piotrowski stated this claim was "raised separately to highlight the fact that Appellant was never told" his providency inquiry would be used "to prosecute him for the same offenses" in state court. Id. at 785. As support for this ground, counsel stated the "same arguments and law cited under Issue I are incorporated herein." No allegations were made to the CAAF in support of this claim that are different from those made in support of Issue I [Ground (1) herein]. The court has thus considered these arguments in connection with Ground (1). Any different fact allegations or arguments now made in support of Ground (7) were not presented to the military courts. Accordingly, they are unexhausted [9], and are **[*16]** dismissed without prejudice.

GROUND (1)

In his federal habeas petition, Mr. Piotrowski states ground (1) as follows: " whether (his) pretrial agreement should be **[*17]** declared null and void and his plea improvident because, contrary to (his) understanding and belief, the State of Florida prosecuted him for the same manslaughter offenses that were covered by his army pretrial agreement." In the "Brief on Behalf of Appellant" filed in the ACCA (ROT 725), petitioner's Assignment of Error I was identically worded. Petitioner argued to the ACCA that his understanding was "supported by the fact that no Florida prosecution was undertaken" until Florida prosecutors learned he could be released before expiration of his full military term. ROT 729. Petitioner attached his affidavit dated March 11, 2004, to his Brief before the ACCA, in which he averred:

> A meeting was held in July 2001 at the office of then Captain Patrick Leduc, my Defense Attorney, my mother, Carolyn Olp, my Step father Gene Olp and myself to discuss my options for a 10 year pretrial agreement. CPT Leduc advised me that if I didn't accept this pretrial agreement that I would be charged with two counts of manslaughter which is 10 years of confinement for each count totalling 20 years, one count for Angela Beasley the victim and one count for the fetus. I was told there is no Federal law for **[*18]** the death of a Fetus and that with the other charges I would be looking at 80 years total. He stated that my best bet would be to fall on my own sword, or words to that affect (sic). CPT Leduc also stated that if I received 10 years or more the State of Florida would not come after me, or words to that affect (sic). . . . (My parents and I) believed that by receiving this pretrial agreement for 12 years would prevent an indictment from the State of Florida for the same charges." I believed CPT Leduc's advice was for what was known as fact, already determined from a prior agreement between the military and the State of Florida. I signed the pretrial agreement at that time. It was always my understanding that if I received more than 10 years from the military the State of Florida would be satisfied with the outcome and not prosecute me. To confirm my belief, I received from CPT Leduc a case summary from the State of Florida Sheriff's Office . . . (that) indicated that after consulting with CPT Birdsong and Sharon Vollrath of the State Attorney's Office, it was determined that the United States Army will be prosecuting me, or words to that affect(sic).

ROT 746-47.

Mr. Piotrowski alleges **[*19]** before this court that his understanding there would be no Florida prosecution was "the fundamental basis underlying his willingness to enter the pretrial agreement", and he would not have signed the agreement but for this understanding. He reasons that his military sentence exceeded 10 years, so his prosecution by Florida violated the pretrial

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[9] If petitioner is actually claiming that CPT Birdsong should not have been allowed to testify at his state trial, that question was one for the Florida courts. Birdsong was subpoenaed by the State and allowed to testify by the state judge. Even if he was not a proper witness, petitioner does not explain how it impugns his military convictions.

If petitioner is claiming that the Stipulation of Fact from his court-martial should not have been admitted as evidence at his state trial, the admissibility of evidence in that trial likewise was a question for the Florida court. Petitioner did not object to this evidence on the ground that its use was prohibited by his military PTA. The state court permitted its admission based upon the judge's authority to take judicial notice of the military court's records. Initially, the State sought to admit only Mr. Piotrowski's Stipulation of Fact. However, once the defense objection was overruled, Mr. Piotrowski through counsel asked that additional portions of the military record be introduced.

agreement. He also alleges that after his transfer to Florida for trial, CPT Leduc told him the State decided to prosecute when the victim's "family found out" he could be released from his military sentence "as early as seven years" due to good time credit.

The PTA in the record makes no reference to any state prosecution. ROT 558-61. The opinion of the ACCA expressly resolved this claim:

> In a post-trial affidavit, appellant alleges that his [PTA] also included a provision that the state of Florida would not prosecute him if he received a sentence to confinement in excess of ten years. The government has submitted affidavits that contradict this assertion. Our review of the [ROT], including: (1) the terms of appellant's written and signed [PTA], (2) the military judge's inquiry into the terms of this agreement, and (3) appellant's assurances **[*20]** under oath that the written pretrial agreement contained all the understandings and agreement in the case and that no one made any promises not written in his agreement, "compellingly demonstrates" to us the "improbability of [the] facts" alleged by appellant.

United States v. Piotrowski, 2006 CCA LEXIS 487, AR 646, FN 3 (ACCA, Jan. 31, 2006) (citing *United States v. Ginn, 47 M.J. 236, 248 (C.A.A.F. 1997)*. Respondent summarizes this claim as "ineffective assistance of counsel resulted in . . . a sub rosa agreement that (petitioner) would not be prosecuted by the State of Florida", and asserts it should be dismissed because it was briefed and argued before the military courts. [11] The court agrees petitioner's claim that there was either an explicit or sub rosa agreement between state and military authorities providing there would be no Florida prosecution if he received a military sentence in excess of 10 years was "briefed and argued" in the military courts. Mr. Piotrowski may have believed then and perhaps still believes there was a sub rosa agreement. However, the record shows this claim was fully and fairly considered by the military courts, and for that reason it is denied under *Burns*.

The record of the military plea proceedings, further shows the military judge asked Mr. Piotrowski if the PTA "contain(ed) all the understandings or agreements that you have in this case?" Mr. Piotrowski responded: "Yes, your Honor." The military judge asked "Has anyone made any promises to you that are not written into this agreement in an attempt to get you to plead guilty?" Mr. Piotrowski responded, "No, Your Honor." ROT 75. The judge then asked counsel if the exhibits were "the full and complete agreement in this case" and were they "satisfied there are no other agreements", to which they both responded affirmatively. Id. Finally, petitioner stated to the military judge that he had no questions about the PTA **[*22]** and that he fully understood its terms. ROT 84. "This colloquy between a judge and a defendant before accepting a guilty plea is not pro forma and without legal significance . . . . Rather, it is an important safeguard that protects defendants from incompetent counsel or misunderstandings . . . ." See *Fields v. Gibson, 277 F.3d 1203, 1214 (10th Cir.)*, cert. denied, *537 U.S. 1023, 123 S. Ct. 533, 154 L. Ed. 2d 434 (2002)*.

In exchange for petitioner's pleas of guilty and Stipulation of Fact, the Government did not proceed on those specifications to which he pled not guilty, and the convening authority limited his sentence as agreed. In addition, the convening authority did recommend confinement at the Charleston Naval Brig. The record further shows Mr. Piotrowski was informed of the maximum penalties for his offenses before he pled. The purpose of the effective assistance guarantee of the *Sixth Amendment* is to ensure that criminal defendants receive a fair trial so that the outcome of the proceeding can be relied upon as the result of a proper adversarial process." *Strickland v. Washington, 466 U.S. 668, 691-92, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*. Petitioner stated at the plea proceeding that he had consulted with counsel and was satisfied with the **[*23]** assistance he had received. ROT 85.

Before this court, Mr. Piotrowski has shifted emphasis away from alleging that an agreement existed which was breached, to alleging his understanding was based on the advice of his counsel, CPT Leduc [12]. He now

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[11] In a Petition **[*21]** for Clemency filed after petitioner's convictions, his civilian counsel also argued that prosecution by both the military and the State of Florida was contrary to usual policy and amounted to double punishment. Military defense counsel filed a separate Petition for Clemency asserting the impending Florida trial would result in double punishment. The question of whether or not the second prosecution in Florida violated double jeopardy principles is one for courts in Florida.

[12] Mr. Piotrowski has not produced an affidavit from Mr. Leduc. He presents one from his brother containing the brother's and their mother's hearsay statements **[*24]** that "Capt. Leduc told her that if Joe would sign a plea bargain for ten years, the prosecutor for the State of Florida would be satisfied and in

submits his affidavit signed in May 2009, stating: "This statement was made by Cpt. Leduc and was an integral part of why I accepted the military plea agreement." Traverse (Doc. 19) Appendix A at 3. He states his mother and stepfather "were also present in Cpt. Leduc's office when he made this statement." Id. To the extent petitioner has honed his claim to allege that his military defense counsel incorrectly advised him, either negligently or intentionally, the court finds these allegations might support, if anything, his unexhausted claim of ineffective assistance of counsel [13], rather than his exhausted claim that the PTA was breached. His allegations that counsel's performance was deficient were not fully presented to the military courts, and are dismissed for that reason under *Watson*.

In sum, the court denies Ground (1) as fully and fairly considered to the extent it is based upon allegations that the PTA or a sub rosa agreement was breached, and as unexhausted to the extent it is now based upon alleged deficient and **[*28]** prejudicial performance of defense counsel.

GROUND (8) - LACK OF JURISDICTION

Petitioner's ground (8) is that "the record of trial lacks sufficient evidence to demonstrate an appropriate exercise of court-martial convening power by Brigadier

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return would not prosecute Joe." Request for Leave to Amend Petition (Doc. 22) Exhib. B. He also presents one from his mother recalling "Leduc saying to Joe, 'if Joe would sign a plea agreement for ten years, the prosecutor said that the state of Florida would be satisfied and they would not come after Joe." Traverse (Doc. 19) Appendix A. In addition, he presents the affidavit of his first wife stating that after the court-martial she spoke to a lady she believed to be the Assistant DA from Florida who stated "they were real happy with the outcome of the trial and that Florida would not be seeking any additional time to be serve (sic)." Id. Exhib. A. These affidavits were each signed in 2009.

[13] In Strickland, the United States Supreme Court established a two-prong test for evaluating claims of ineffective assistance of counsel. "[T]he (Strickland) test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill v. Lockhart, 474 U.S. 52, 58, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)*. Under Strickland, a habeas petitioner must first demonstrate that **[*25]** his counsel's performance "fell below an objective standard of reasonableness." *Strickland, 466 U.S. at 688*. In evaluating counsel's performance, the court must apply "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." *Id. at 689*. "For counsel's performance to be constitutionally ineffective, it must have been completely unreasonable, not merely wrong." Id. Second, the petitioner "must show that (counsel's) deficient performance prejudiced the defense. . . ." *Id. at 687*. In order to satisfy the prejudice prong, the petitioner must show a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. The Supreme Court has also held that when a criminal defendant waives trial by entering a plea, he assumes "the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts." *McMann v. Richardson, 397 U.S. 759, 770, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970)*. In McMann, the Court found the requirement that a defendant intelligently enter a plea agreement does not require **[*26]** that "all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing." Id.

The Tenth Circuit Court of Appeals has examined under what circumstances an attorney's erroneous advice can invalidate a plea agreement, and has generally held that a plea may be rendered involuntary when an attorney materially misinforms the defendant of the consequences of the plea. *Laycock v. State of N.M., 880 F.2d 1184, 1186 (10th Cir. 1989)*. On the other hand, they have squarely held that a "miscalculation or erroneous sentence estimation by defense counsel is not a constitutionally deficient performance rising to the level of ineffective assistance of counsel." *United States v. Williams, 118 F.3d 717, 718 (10th Cir.)*(quoting *United States v. Gordon, 4 F.3d 1567, 1570 (10th Cir. 1993)*, cert. denied, ***510 U.S. 1184, 114 S. Ct. 1236, 127 L. Ed. 2d 579 (1994)***, cert. denied, ***522 U.S. 1033, 118 S. Ct. 636, 139 L. Ed. 2d 615 (1997)***. In other situations where counsel miscalculated or erroneously estimated the length of a defendant's sentence, the Tenth Circuit has consistently characterized such error as a miscalculation that neither renders a plea involuntary nor counsel's performance deficient. See, e.g., *Wellnitz v. Page, 420 F.2d 935 (10th Cir. 1970)*(finding **[*27]** plea voluntary even though counsel informed defendant he would "get 25 years" and defendant was actually sentenced to 100 years); *Braun v. Ward, 190 F.3d 1181 (10th Cir. 1999)*, cert. denied, ***529 U.S. 1114, 120 S. Ct. 1974, 146 L. Ed. 2d 803 (2000)***; *Fields, 277 F.3d at 1213-14* (trial counsel's projections characterized as erroneous sentence estimate did not invalidate plea where trial counsel never told petitioner they had a promise or guarantee that by pleading guilty he would not receive a death sentence).

Mr. Piotrowski has not described bad faith acts on the part of CPT Leduc, or how he might prove actual prejudice after testifying he had not relied upon any agreement outside the written PTA. His allegations could simply indicate his misunderstanding of his counsel's statements. The court expresses no opinion on the merits of this claim, but notes that the facts alleged in support thus far are insufficient, when viewed apart from petitioner's speculation, innuendoes, and conclusions.

General (BG) Ferrell," and he cites *United States v. Allgood, 41 M.J. 492 (CAAF 1995)*. As supporting facts, he alleges in his federal Petition that sometime before June 26, 2001, BG Ferrell, "BG Peterson's purported successor-in-command", referred his case to trial pursuant to General Court-Martial Convening Order (CMCO) Number 1, as amended by CMCO Numbers 4 and 9; and that on July 22, 2001, referred all general courts-martial convened by CMCO Number 1 to CMCO Number 22. He further alleges "the record of trial is devoid of any evidence that BG Ferrell personally evaluated or selected those members who ultimately sentenced petitioner." He claims the court-martial lacked jurisdiction as a consequence.

The Tenth Circuit recently set forth the standards for civil review of jurisdictional claims by military prisoners, which it emphasized are "independent of the military courts' consideration of such issues":

> "[C]ourts-martial are tribunals of special and **[*29]** limited jurisdiction whose judgments, so far as questions relating to their jurisdiction are concerned, are always open to collateral attack." *Givens v. Zerbst, 255 U.S. 11, 19, 41 S.Ct. 227, 65 L.Ed. 475 (1921)*. . . .
>
> After Burns, we held that the Court had not changed preexisting law on the scope of our review of jurisdictional issues. (Citations omitted). However, subsequent cases in which only constitutional claims were raised have led to broad statements to the effect that any claim that has received full and fair consideration by the military courts is beyond the scope of federal review. See, e.g., [*Lips, 997 F.2d at 811*](stating, in a case challenging evidentiary rulings and prosecutorial statements, that "if the military gave full and fair consideration to claims asserted in a federal habeas corpus petition, the petition should be denied"). By ignoring the separate basis for civil review of jurisdictional issues, these cases have generated confusion regarding whether the Burns standard applies to jurisdictional claims as well. We now reiterate that our review of military convictions is limited "generally to jurisdictional issues and to determination of whether the military gave **[*30]** fair consideration to each of the petitioner's constitutional claims," *Monk, 901 F.2d at 888* (emphasis added), and we clarify that our review of jurisdictional issues is independent of the military courts' consideration of such issues.

Fricke, 509 F.3d at 1289-90; see also *Wright v. Commandant, USDB, 100 Fed.Appx. 709 (10th Cir. 2004)*. A court-martial "is a creature of statute, and, as a body or tribunal, it must be convened and constituted in entire conformity with the provisions of the statute, or else it is without jurisdiction." Id. (citing *McClaughry v. Deming, 186 U.S. 49, 62, 22 S. Ct. 786, 46 L. Ed. 1049 (1902)*). This court has reviewed petitioner's jurisdictional claim under these standards.

In briefs before the military court, counsel for petitioner made the identical claim as raised in this pro se Petition, and alleged the same facts in support. Counsel alleged that in January 2001, BG Peterson convened a general court-martial as memorialized by CMCO Number 1; and that he amended CMCO Number 1 a few days later and in March 2001, citing CMCO Numbers 4 and 9. Then, BG Ferrell referred Piotrowski's case to trial pursuant to CMCO Number 1, as amended by CMCO Numbers 4 and 9; and later referred all general courts-martial **[*31]** convened by CMCO Number 1 to Number 22. The military appellate courts did not separately discuss this claim. Instead, they generally stated:

> We have considered the record of trial, appellant's assignments of error, the matters personally raised by appellant pursuant to (Grostefon), and the government's reply thereto. We heard oral argument. . . ."

ACCA opinion ROT 2. They further stated: "We have considered the remaining assignments of error and the matters personally raised by appellant, and find them to be without merit." Id. at 5.

In *Wright*, the Tenth Circuit held that the claim that the convening authority did not personally appoint one of the court-martial members as required by *10 U.S.C. § 825(d)(2)* [14] "does implicate the court-martial's jurisdiction." Id. (citing *United States v. Ryan, 5 M.J. 97, 101 (C.M.A. 1978)*. A court-martial is created by a convening order of the convening authority. *Allgood, 41 M.J. at 494* (citing RCM 504(d)). A convening order for a general or special court-martial shall designate the type of court-martial and detail the members . . . ." *Id. at 494-*

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[14] *10 U.S.C. § 825(d)(2)* pertinently provides:

> When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.

95 (citing RCM 504 (d)(1)). However, RCM 601(b), Manual for Courts-Martial, United States [hereinafter R.C.M.], **[*32]** sets forth "[w]ho may refer" and specifically provides: "Any convening authority or a predecessor, unless the power to do so has been withheld by superior competent authority." See *Allgood, 41 M.J. at 498*; *U.S. v. Gaspard, 35 M.J. 678 (ACMR 1992)*(Under R.C.M. 601(b) any convening authority may refer charges to a court-martial convened by that convening authority or a predecessor.). In Allgood it was agreed that "a convening authority need not comply with the requirements of RCM 504 . . . when he refers a case to a court-martial already convened by his predecessor." *Allgood, 41 M.J. at 495*.

The charges in this case were referred to a court-martial convened by a predecessor-in-command. Nothing indicates that BG Peterson, who originally convened the court-martial, was other than a predecessor commander for purposes of R.C.M. Rule 601(b). Neither Peterson nor Ferrell is alleged to **[*33]** have lacked authority to issue convening orders detailing members to petitioner's court-martial. [15] Here, as in *Allgood*, the convening authority, BG Ferrell, cited on the record a specific court-martial convening order when he referred the charges for trial. The trial counsel, in reciting the jurisdictional facts at the beginning of petitioner's court-martial, correctly listed the numbers and dates of the convening orders. ROT 2. The court finds that the actions of the convening authority in selecting the panel members in Mr. Piotrowski's case are plainly reflected in the record [16], and that, on its face, the court-martial was properly convened.

Petitioner has argued **[*34]** lack of jurisdiction throughout his military appeals and before this court, but has never provided sufficient factual support for this claim. Here, as in *Allgood*, he did not object "on the basis of *Article 25(d)(2)*". In fact, he raised no objection to the jurisdiction of the court-martial, the manner of convening the court-martial, or the selection of members for the court-martial. He thus did not "develop a record supporting a contrary conclusion or inference." *Allgood, 41 M.J. at 496*. Nor has he alleged facts indicating he was prejudiced in any manner by perceived deficiencies in the convening process [17]. Ultimately, he elected to proceed to trial before a military judge alone and was found guilty of charges and specifications pursuant to his pleas of guilty.

The court concludes there is no support for this claim in either *Allgood* or the military court record. While there **[*36]** is no explicit statement of adoption of the selection of court members by the successor-in-command, this court, like the military court in *Brewick*, is not aware of any authority that so requires. *Brewick, 47 M.J. at 732*. Also as in Allgood, petitioner provides no evidence indicating Ferrell actually failed to properly adopt or select court members. The court concludes the record is sufficient to show that the convening authority appropriately selected the panel members in petitioner's case, and petitioner's allegations to the contrary are without factual or legal merit.

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[15] The Brief of Appellant also mentions COL Austin as "BG Peterson's purported successor in command" and having signed the pretrial agreement. Again, no facts are alleged to indicate COL Austin acted without proper authority.

[16] The record shows the court-martial convening orders cited therein were those used in petitioner's case (ROT 500), that they were properly cited during the court-martial proceeding (ROT 174), and that the judge instructed each member to check the convening order to see that his name was on it. ROT 179.

[17] The Government argued that in Piotrowski's case there was a "straight-forward referral of charges to a court-martial convened by a predecessor for purposes of RCM 601(b)", and there was neither an objection at trial to the referral procedure nor demonstration of prejudice. The Government also cited a 2005 case that decided a claim like petitioner's, *United States v. Starks, ARMY 20020224, 2005 CCA LEXIS 583 (ACCA Mar. 10, 2005)*. In Starks, the **[*35]** Army Court held it "is well-settled that a convening authority may adopt court members selected by his predecessor in command." *2005 CCA LEXIS 583 at *4* (citing *United States v. England, 24 M.J. 816, 817 (ACMR 1987)*; see also *Allgood, 41 M.J. at 496*)). The court in Starks noted that appellate defense counsel in that case "did not provide a scintilla of support for their assertion that MG Blount may not have adopted the court members listed on CMCO # 22", and they "presume(d) regularity in the action of the convening authority (citations omitted)." They cited *United States v. Brewick, 47 M.J. 730 (NMCCA 1997)* and agreed with its rationale:

> [W]hile there is no explicit statement of adoption of the selection of court members by the successor-in-command, we are not aware of any authority that so requires. *Allgood* certainly does not mandate an explicit adoption statement. *Id. at 732*. The Brewick court concluded, "To the extent an 'adoption' is required or helpful, we can presume as much from his action in sending the charge to that court-martial, absent any evidence to the contrary."

Id. at 733.

UNEXHAUSTED CLAIMS

In the Answer and Return, respondent presents that grounds (10) and (11) were not raised during military appellate review. In his Traverse, Mr. Piotrowski "concedes" these issues were not properly raised in the military courts. The record confirms that these claims were not fully presented to the military courts. The court concludes that under *Watson* these claims may not be reviewed by this court and must be dismissed, without prejudice.

As noted, this court previously dismissed petitioner's ground (9) claiming ineffective assistance of counsel, which he admitted in his Petition was not exhausted [18], **[*37]** and that dismissal was prior to issuance of the order to show cause. Consequently, respondent was not required to and did not respond to this claim in its Answer and Return. Although not specified in the order, this dismissal was without prejudice. The order of dismissal has not been vacated.

After respondent filed its Answer and Return, Mr. Piotrowski filed a motion to stay this action (Doc. 15). Therein, he claimed to have "newly discovered evidence" of prosecutorial misconduct [19], and stated he was "in the process **[*38]** of filing a Writ of Error Coram Nobis back in the lower court [20]." He stated his intent to "supplement" his federal Petition with a new claim based upon this evidence, if denied relief in the military courts. This court denied the motion to stay (Doc. 17), and petitioner was again required to choose between proceeding in federal court on exhausted claims only or dismissing this action to exhaust new claims.

Petitioner also filed a Motion to Strike some of respondent's pleadings (Doc. 24). His arguments in this motion are nothing more than counter arguments to those pleadings (Docs. 18, 20, 21). This motion is denied because it is not supported by sufficient authority indicating any of respondent's pleadings must be stricken. To the extent necessary, this court allows these 3 pleadings under *Rule 7* of the Rules Following *28 U.S.C. § 2254*, which authorizes a habeas court to expand the record. The court considered petitioner's counter arguments raised in his motion in making its determinations.

After his motion to stay was denied, petitioner filed his Traverse, in which he responds to the Answer and Return. In addition, despite the court's prior dismissal of claims not presented to the military courts, he again included allegations in support of his unexhausted claim of prosecutorial misconduct. [21] He again stated this is "newly discovered evidence" he "wishes to address in the lower court." The court reiterates that the claim of prosecutorial misconduct was not raised in the Petition, its addition by amendment was denied, and neither **[*40]** it nor petitioner's underlying allegations have been presented to the military courts [22]. If this claim had been included in the Petition, it would be dismissed as unexhausted. The court concludes that the portions of the Traverse regarding the alleged conduct of the prosecutor and conflict of interest of defense counsel are irrelevant to the court's consideration of the habeas claims that are presently properly before it.

Several days after filing his Traverse, and after respondent argued his unexhausted claims may never

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[18] Mr. Piotrowski claimed the PTA was void and his plea improvident because his counsel was ineffective during plea proceedings and sentencing. As factual support for this claim, he alleged defense counsel Leduc "unlawfully advised" he was facing a maximum of 80 years confinement on the initial charges, which he later discovered was only approximately 40 years; advised him and his family that if he received at least ten years of confinement at his court-martial the State of Florida would not prosecute him; failed to object to the prosecutor's inflammatory arguments during sentencing; and advised Mrs. Piotrowski to divorce him without discussing the matter with Mr. Piotrowski.

[19] In support of this motion, Mr. Piotrowski alleged he "recently discovered" that the military prosecutor, CPT Birdsong, "was romantically involved with the petitioner's wife and is at present married to petitioner's ex-wife." He further alleged that defense counsel Leduc was operating under a conflict of interest in that he "appeared to be aware of the affair". He also alleged Leduc spoke with the victim's family not only on a professional level, but also on a personal level and attended a party at their home. The allegations regarding CPT Birdsong are an entirely new claim of prosecutorial misconduct; while the allegations regarding CPT Leduc may be an additional ground for petitioner's unexhausted claim of ineffective assistance of counsel.

[20] No further information regarding any **[*39]** attempt to exhaust this military remedy has been forthcoming.

[21] Respondent filed a response to the Traverse (Doc. 21) arguing that petitioner improperly asserts new arguments in his Traverse to support his grounds (1), (7) and (8). The court considered the Traverse and respondent's arguments in its determinations.

[22] Rather than thoroughly address his failure to present these claims to the military appellate courts, petitioner continues to attempt to argue the merits of his unexhausted claims.

be reviewed in this or the military courts, Mr. Piotrowski filed a Motion for Leave to Amend Petition (Doc. 22). In this motion, he again seeks to "present new claims." In support, he generally alleges that if allowed to amend, he "will present **[*41]** claims of due process (5th Amendment), fair trial (6th Amendment), and ineffective assistance of counsel (6th Amendment) in a form suitable for this court to pass upon merits of the claims." Petitioner's motion for leave to amend his petition (Doc. 22) to add any new claim, including that of prosecutorial misconduct, is denied. Such a claim would simply be dismissed under Watson, because it has not been presented to the military courts.

In his Motion to Amend, petitioner now argues that under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) he must be allowed to raise his new claim in this action, even though it is unexhausted. He cites the holding in Pliler v. Ford, 542 U.S. 225, 239, 124 S. Ct. 2441, 159 L. Ed. 2d 338 (2004) that "staying the petition is the only appropriate course of action where an outright dismissal could jeopardize the timeliness of a collateral attack." He also cites O'Sullivan v. Boerckel, 526 U.S. 838, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999) and argues that when a federal habeas petitioner failed to present his claims in state court and they are no longer available, state remedies are exhausted.

The court previously explained to petitioner that the AEDPA does not apply to a petition filed by a military prisoner **[*42]** [23]. Moreover, petitioner misreads the cited authorities. The cited cases do not hold that a petitioner who failed to exhaust state remedies when they were available is simply disencumbered of the exhaustion prerequisite and entitled to proceed with federal court review. Instead, such a litigant must justify his failure to present his claims when remedies were available by showing both cause and prejudice for his failure. Otherwise, review in federal court is foreclosed.

Petitioner did not provide an Amended Petition with his motion for leave to amend, as required. He did include a "list witnesses and their expected testimony", which he asserts "if true, would be grounds for relief." Most of this "expected testimony" **[*44]** relates to his claim that he pled in exchange for a promise that Florida would not prosecute him if his military sentence exceeded ten years. [24] This "evidence" does not provide any basis for

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[23] To the extent this court suggested it could not consider a "mixed" petition and that a subsequent petition might be dismissed as abusive, it was not relying upon the gatekeeping provisions of the AEDPA. The AEDPA's bar to second and successive applications has been held "not (to) apply when a prisoner is challenging a military court-martial conviction." Ackerman v. Novak, 483 F.3d 647, 650 (10th Cir. 2007). The law applied to petitioner's unexhausted claims is that found in Burns and Watson, rather than the AEDPA or cases applying the AEDPA to § 2254 petitions by state prisoners. See Fletcher v. Outlaw, 578 F.3d 274, 277 FN4 (5th Cir. 2009)(and cases cited therein). Thus, this court does not hold that petitioner may **[*43]** be barred by AEDPA from filing a successive habeas petition in federal civil court raising his unexhausted claims once they are exhausted. Whether or not a subsequent petition is "abusive" is not justiciable until any such second petition is filed. "The doctrine of abuse of the writ defines the circumstances in which federal courts decline to entertain a claim presented for the first time in a second or subsequent petition for a writ of habeas corpus." McCleskey v. Zant, 499 U.S. 467, 470, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991). "The government bears the burden of pleading abuse of the writ", and if it satisfies this burden, the petitioner must show cause and prejudice or probable actual innocence. Id. at 494-95; Murray v. Carrier, 477 U.S. 478, 491, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986); LaRette v. Bowersox, 70 F.3d 986, 987 (8th Cir. 1995). In order to show cause, a petitioner must indicate that some "external impediment" prevented him from presenting his claims in a timely and procedurally proper manner.

[24] The remaining evidence goes to petitioner's new, unexhausted claim of prosecutorial misconduct. He seeks leave to present evidence of the alleged affair between CPT Birdsong and petitioner's second wife, R Piotrowsi now Birdsong (R). Petitioner alleges that Louis Birdsong and R were married on June 25, 2006, even though he initially claimed it was in 2002. He specifies that the "newly discovered evidence (he) could not have known" consists of statements of A. Birdsong, the prosecutor's ex-wife (A), and M. Piotrowski, petitioner's first wife (M). He alleges A is "expected to testify" that R left a message on the Birdsong's home answering machine "within weeks of the court-martial" saying "Hi honey, sorry I missed your call; I was putting the kids to bed (or words to that effect)". Petitioner expects M to testify **[*45]** that during a break at the court-martial R told her about a date she had with Louis Birdsong. However, M's affidavit states only that the two met to discuss the case and played pool. Mr. Piotrowski claims that A's and M's testimony will show Louis Birdsong's "amorous feelings" for R "began during the court-martial". He further claims A's testimony will show Louis Birdsong "had malicious motive in preferring numerous fictitious charges against (him)", went to the victim's family and Florida prosecutor seeking a second prosecution; and his defense attorney's conflict. The court agrees with respondent that petitioner's allegations regarding the alleged affair are conclusory at best. However, no ruling is made on the merits of this unexhausted claim.

petitioner to amend his petition, as this claim is already raised in his original petition. The court considered these attachments as exhibits in connection with petitioner's Ground (1).

RESPONDENT' S ARGUMENT OF NO MILITARY REMEDY

Shortly after the order denying the stay was entered, respondent filed its response (Doc. 18) opposing the motion to stay. Respondent argues therein that petitioner's claims have all either been fully and fairly considered or are unexhausted; that petitioner has not shown cause or prejudice for his failure to present his new claims to the military courts and has thus waived those claims; that, in **[*46]** any event, he alleges insufficient facts and presents no evidence in support; and that his claims are without merit. The court considered these arguments in its deliberations.

Also in opposition to a stay, respondent argues there is no military jurisdiction or remedy available for collateral review of petitioner's new or unexhausted claims. Petitioner does not concede that no military remedy is available. The United States Supreme Court recently decided this issue contrary to respondent's arguments. In *U.S. v. Denedo, U.S. , 129 S.Ct. 2213, 173 L. Ed. 2d 1235 (2009)*, the Court held that an Article I military appellate court has jurisdiction to entertain a petition for writ of error coram nobis challenging its earlier, and final, decision affirming a criminal conviction. [25] *Id. at 2221-22* ([M]ilitary courts, like Article III tribunals, are empowered to issue extraordinary writs under the All Writs Act"; and "quite apart from the All Writs Act, . . . the NMCCA has jurisdiction to entertain (a) request for a writ of coram nobis."). In Denedo, the petitioner claimed, like Mr. Piotrowski, that his guilty plea was improvident due to ineffective assistance of counsel. The Government moved to dismiss **[*47]** for lack of jurisdiction contending the NMCCA had no authority to conduct post-conviction proceedings. The NMCCA and the CAAF on appeal held that standing military courts have jurisdiction to conduct "collateral review under the All Writs Act." The Supreme Court affirmed.

This court is puzzled by respondent's submission of Denedo as support for its position. Denedo clearly rejected the argument that military prisoners have no post-conviction remedy in the military courts. *Denedo, 129 S.Ct. at 2222* (citing Courts of Criminal Appeals Rule of Practice and Procedure 2(b) as "recognizing NMCCA discretionary authority to entertain petitions for extraordinary writs"); see also *Noyd, 395 U.S. at 695 FN 7* (All Writs Act, *28 U.S.C. § 1651*, applies to military courts.); Military Appeals U.S. Ct. of App. Armed Forces, 10 U.S.C. foll. § 867, Rule 4 (The CAAF has jurisdiction to "entertain original petitions for extraordinary relief including, **[*48]** but not limited to, writs of mandamus, writs of prohibition, writs of habeas corpus, and writs of error coram nobis."); Rule 18 (CAAF can entertain original petitions for extraordinary relief, including writs of error coram nobis); Rule 19(d)("a petition for writ of habeas corpus or writ of error coram nobis may be filed at any time"); and Rule 27 (Petition for Extraordinary Relief); *Loving v. U.S., 68 M.J. 1 (2009)*. The Court in Denedo also specifically held that the rule of finality, cited herein by respondent, does not prohibit military appellate courts' collateral review of their earlier judgments. If respondent's argument were correct, that a military prisoner cannot obtain post-appeal review in a military court when civil court review is available under *§ 2241*, Denedo would effectively be nullified, since *§ 2241* is generally available to any military prisoner. The only portions of Denedo and Loving that "support" respondent's arguments are the dissents.

It has long been the established and effective practice of the military appellate courts, like state and federal courts, to exert their authority not only to hear direct appeals but to collaterally review constitutional challenges **[*49]** to their decisions regarding convictions and sentences as well. This court has reviewed numerous *§ 2241* petitions by military prisoners over 3 decades, and many with claims that were exhausted in the military courts in post-appeal proceedings. Under *Burns* all available military remedies must be exhausted prior to, not after, *§ 2241* review. As a matter of comity and judicial efficiency, if nothing else, the military courts should continue to decide collateral challenges in the first instance and have the opportunity to correct their own errors, while applying their expertise in military law.

The more difficult question of whether or not military appellate courts can retain or assert jurisdiction over a collateral action raising Mr. Piotrowski's unexhausted claims once his military discharge has been executed, is one to be answered in the first instance by the military courts. Likewise, whether or not Mr. Piotrowski can

[25] The main basis for this argument, that the military court-martial is disbanded after trial is not persuasive. The same is true of a jury selected from a panel for a civil trial. In any event, the military appellate courts are to hear post-conviction claims.

present sufficient grounds for a writ of error coram nobis is for those courts to decide in the first instance. These are not issues that must or should be decided by this court before Mr. Piotrowski has made any attempt to present his unexhausted claims to the military **[*50]** appellate courts. If military tribunals refuse to hear his unexhausted claims because they have been procedurally defaulted, it is likely his new claims will be considered procedurally defaulted in federal civil court as well. Neither party has presented sufficient procedural or other facts or cited a clear, uniformly-applied military rule or case upon which this court might base a finding that petitioner's unexhausted claims have already been procedurally defaulted in the military courts. This court does not know, and expresses no opinion as to, what specific military remedies may remain available to Mr. Piotrowski under his current circumstances [26]. Nevertheless, the court holds that its dismissal of petitioner's unexhausted claims is without prejudice to his attempting to exhaust any avenues of relief which may remain available to him, and his attempting to return to the district court once he has fully exhausted. See *Laster v. Samuels, 325 Fed.Appx. 127, **2 (3rd Cir. 2009)*.

Briefly summarized, in a prior order the court held that petitioner's claim of ineffective assistance of counsel was not presented to the military courts and must be dismissed, without prejudice. In this Order, the court holds petitioner's claim that the military court-martial lacked jurisdiction is without merit, and his other exhausted claims were fully and fairly considered to the extent they were presented to the military courts. The court dismisses petitioner's unexhausted claims, including all grounds for his claims of ineffective assistance of trial defense counsel and prosecutorial misconduct. For all the foregoing reasons, the court denies Mr. Piotrowski's petition for writ of habeas corpus.

IT IS THEREFORE ORDERED that petitioner's Motion for Leave to Amend (Doc. 22) and petitioner's Motion to Strike and Expunge (Doc. 24) are denied.

IT IS FURTHER ORDERED that petitioner's unexhausted claims, including that of prosecutorial misconduct to the extent **[*52]** it is raised herein, are dismissed without prejudice.

IT IS FURTHER ORDERED that this petition for writ of habeas corpus is denied.

IT IS SO ORDERED.

DATED: This 22nd day of December, 2009, at Topeka, Kansas.

/s/ RICHARD D. ROGERS

United States District Judge

End of Document

[26] If Mr. Piotrowski actually failed to file a petition in the military court to exhaust his unexhausted claims before his military sentence expired, he may be required to overcome several hurdles, including **[*51]** providing proof of sufficient collateral consequences, before any sort of collateral action may be heard. Respondent's conclusory statement that he cannot prove such consequences does not convince this court that none arguably exist.

United States v. Milner

United States Air Force Court of Criminal Appeals

February 7, 2017, Decided

No. ACM S32338

Reporter
2017 CCA LEXIS 84 *

UNITED STATES, Appellee v. Markus A. MILNER, Senior Airman (E-4), U.S. Air Force, Appellant

Notice: THIS IS AN UNPUBLISHED OPINION AND, AS SUCH, DOES NOT SERVE AS PRECEDENT UNDER AFCCA RULE OF PRACTICE AND PROCEDURE 18.4.
NOT FOR PUBLICATION

Subsequent History: Motion granted by *United States v. Milner, 76 M.J. 260, 2017 CAAF LEXIS 238 (C.A.A.F., Apr. 4, 2017)*

Review denied by *United States v. Milner, 2017 CAAF LEXIS 552 (C.A.A.F., May 25, 2017)*

Prior History: [*1] Appeal from the United States Air Force Trial Judiciary. Military Judge: Vance H. Spath (sitting alone). Approved sentence: Bad-conduct discharge, confinement for 75 days, forfeiture of $1,000.00 pay per month for four months, and reduction to E-1. Sentence adjudged 16 July 2015 by SpCM convened at Seymour Johnson Air Force Base, North Carolina.

Core Terms

convening, confinement, sentence, conditions, post-trial, legal error, adjudged, clemency, grant clemency, disapprove, showers, trial defense counsel, of the Eighth Amendment, prejudiced, conditions of confinement, unusual punishment, detention center, recommendation, approve, cruel

Case Summary

Overview

HOLDINGS: [1]-The staff judge advocate (SJA) erred when she advised the convening authority that he was not authorized to reduce the term of confinement. In addition, the SJA presumptively erred when she also advised the convening authority that he was prohibited from setting aside the findings or disapproving the adjudged punitive discharge, but the court concluded that any error did not prejudice appellant; [2]-The SJA, in the Addendum to the Staff Judge Advocate's Recommendation, did not address an alleged legal error. While this omission was error, appellant was not prejudiced; [3]-After reviewing all of the submitted matters, the court was not persuaded that the conditions of appellant's post-trial confinement rose to the level of being so oppressive or disgraceful as to warrant sentence relief under Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)*.

Outcome

The approved findings and sentence were affirmed.

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Courts Martial > Posttrial Procedure

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN1[] **Courts Martial, Posttrial Procedure**

The court of criminal appeals reviews de novo alleged errors in post-trial processing. Although the threshold for establishing prejudice in this context is low, the appellant must nonetheless make at least some colorable showing of possible prejudice.

Evidence > Burdens of Proof > Allocation

Military & Veterans Law > Military Justice > Judicial Review

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Staff Judge Advocate Recommendations

HN2[] Burdens of Proof, Allocation

Failure to timely comment on matters in the staff judge advocate's recommendation (SJAR), to include matters attached to it, forfeits the issue unless there is plain error. R.C.M. 1106(f)(6), Manual Courts-Martial. Under a plain error analysis, the appellant bears the burden of showing: (1) there was an error, (2) it was plain or obvious, and (3) the error materially prejudiced a substantial right of the appellant.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

HN3[] Posttrial Procedure, Actions by Convening Authority

For offenses occurring prior to 24 June 2014, a convening authority has the unfettered discretion to set aside findings or reduce adjudged sentences. Unif. Code Mil. Justice (UCMJ) art. 60(c)(4)(A), *10 U.S.C.S. § 860(c)(4)(A) (2013)*. For offenses occurring on or after that date, a convening authority's power to grant clemency is significantly reduced. Unif. Code Mil. Justice art. 60(c)(4)(A), *10 U.S.C.S. § 860(c)(4)(A) (2014)*. Congress clarified a year later that for courts-martial that include a conviction for an offense committed both before and on/after 24 June 2014, the convening authority has the unfettered discretion to grant clemency as provided in the prior version of art. 60, UCMJ. Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, *Pub. L. No. 113-291, § 531(g)(2)(A), 128 Stat. 3292, 3365-66 (2014)*; also Air Force Instruction (AFI) 51-201, Administration of Military Justice, para. 9.23.4 (6 June 2013) (as modified by Air Force Guidance Memorandum 2015-01 (30 July 2015)).

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Staff Judge Advocate Recommendations

HN4[] Posttrial Procedure, Staff Judge Advocate Recommendations

Whether an appellant was prejudiced by a mistake in the staff judge advocate's recommendation (SJAR) generally requires a court to consider whether the convening authority plausibly may have taken action more favorable to the appellant had he or she been provided accurate or more complete information.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Staff Judge Advocate Recommendations

HN5[] Posttrial Procedure, Staff Judge Advocate Recommendations

R.C.M. 1106(d), Manual Courts-Martial, requires the staff judge advocate's recommendation (SJAR) to comment on any allegation of legal error raised in clemency. When an accused asserts legal error in his post-trial submissions, the SJAR must, at a minimum, include "a statement of agreement or disagreement with the matter raised by the accused." R.C.M. 1106(d)(4), Manual Courts-Martial.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Staff Judge Advocate Recommendations

Military & Veterans Law > Military Justice > Judicial Review

HN6[] Posttrial Procedure, Actions by Convening Authority

Distinguished from their role in clemency, the role of the convening authority with respect to defense claims of legal error is less pivotal to an accused's ultimate interests. The convening authority can, and should in the interest of fairness and efficiency of the system, remedy legal error. The convening authority is not, however, required to do so. The failure to address a defense claim of legal error in an addendum to a staff judge advocate's recommendation can be remedied through appellate litigation of the claimed error.

Consequently, it is appropriate for the court to consider whether any prejudice may have resulted from the failure to address the defense claims of legal error. An appellate finding that those alleged errors have no merit precludes a finding that the SJA's advice prejudiced the appellant.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Criminal Law & Procedure > Postconviction Proceedings > Imprisonment

HN7[] **Fundamental Rights, Cruel & Unusual Punishment**

Both the *Eighth Amendment* and Unif. Code Mil. Justice (UCMJ) art. 55, *10 U.S.C.S. § 855*, prohibit cruel and unusual punishment. In general, the court of criminal appeals applies the U.S. Supreme Court's interpretation of the *Eighth Amendment* to claims raised under art. 55, UCMJ, except in circumstances where legislative intent to provide greater protections under art. 55, UCMJ, is apparent. The *Eighth Amendment* prohibits two types of punishments: (1) those incompatible with the evolving standards of decency that mark the progress of a maturing society or (2) those which involve the unnecessary and wanton infliction of pain. A violation of the *Eighth Amendment* is shown by demonstrating: (1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to the appellant's health and safety; and (3) that the appellant has exhausted the prisoner-grievance system and that he has petitioned for relief under Unif. Code Mil. Justice art. 138, *10 U.S.C.S. § 938*. The court applies these standards de novo.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN8[] **Fundamental Rights, Cruel & Unusual Punishment**

The court of criminal appeals anticipates that only in very rare circumstances will it exercise its Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)*, authority to grant sentence relief based upon conditions of post-trial confinement when the court has found no violation of the *Eighth Amendment* or Unif. Code Mil. Justice art. 55, *10 U.S.C.S. § 855*. Despite the court's significant discretion in reviewing the appropriateness of a sentence, it may not engage in acts of clemency.

Counsel: For Appellant: Major Lauren A. Shure, USAF, and Captain Patricia Encar-nación-Miranda, USAF.

For Appellee: Major Mary Ellen Payne, USAF; Gerald R. Bruce, Esquire; and Ms. Morgan L. Herrell (civilian intern).[1]

Judges: Before DREW, J. BROWN, and MINK, Appellate Military Judges. Senior Judge J. BROWN delivered the opinion of the court, in which Chief Judge DREW and Judge MINK joined.

Opinion by: J. BROWN

Opinion

J. BROWN, Senior Judge:

At a judge alone special court-martial, Appellant was convicted, consistent with his pleas, of divers use of 3,4-methylenedioxymethamphetamine (MDMA), a Schedule I controlled substance, and possession of MDMA, in violation of *Article 112a*, UCMJ, *10 U.S.C. § 912a*.[2] The military judge sentenced Appellant to a bad-conduct discharge, confinement for 75 days, forfeiture of $1,000.00 pay per month for four months, and reduction to E-1. The convening authority approved the **[*2]** sentence as adjudged.

On appeal, Appellant asserts two errors: (1) that the staff judge advocate's recommendation (SJAR) contained erroneous advice regarding the convening authority's ability to grant clemency; and (2) that his post-trial confinement conditions warrant relief under

[1] Ms. Herrell was a law student extern with the Air Force Legal Operations Agency and was at all times supervised by attorneys admitted to practice before this court during her participation.

[2] As a condition of the pretrial agreement, prior to arraignment, the Government dismissed an additional specification of using lysergic acid diethylamide (LSD).

this court's Article 66(c), UCMJ, 10 U.S.C. § 866(c), authority to approve only so much of the sentence that, based on the entire record, "should be approved." Finding no relief is warranted on either issue, we affirm the findings and sentence.

I. Background

Appellant used MDMA on nine occasions from approximately 31 December 2013 to 1 March 2015. During this span, he used MDMA with other military members at many different locations. In addition, on 15 April 2015, law enforcement seized two capsules from Appellant's residence that later tested positive for MDMA. This was the basis for the possession of MDMA offense. Appellant pleaded guilty on 16 July 2015. He immediately began his confinement at the Sampson County Detention Center in Clinton, North Carolina—a civilian confinement facility.

The staff judge advocate (SJA), in the SJAR, initially advised the convening authority that, while he did have the authority to provide clemency **[*3]** as to forfeiture of pay and the reduced rank, he did "not have the authority to disapprove, commute or suspend in whole or in part the confinement or punitive discharge." The SJA then recommended that the convening authority approve the sentence as adjudged.

In a 14 August 2015 clemency submission, Appellant's trial defense counsel asserted that, contrary to the SJAR, the convening authority did have the authority to grant clemency as to the confinement portion of the sentence. Trial defense counsel did not, however, assert that the convening authority had the authority to set aside the conviction or punitive discharge, as some of Appellant's uses of MDMA occurred prior to 24 June 2014. Furthermore, trial defense counsel complained of Appellant's conditions of confinement and asserted that the conditions were both a basis to grant clemency and constituted cruel and unusual punishment that warranted the convening authority taking action to investigate and correct.[3] Appellant requested that the convening authority consider reducing his confinement.

The Addendum to the SJAR did not reference or comment on either of these alleged errors, and the recommendation to approve the sentence as adjudged **[*4]** remained unchanged. The convening authority did not grant relief in clemency and approved the sentence as adjudged.

After the convening authority's action, Appellant submitted a separate complaint about the conditions of his confinement to the convening authority and reviewing authorities. Members from the Seymour Johnson legal office visited the facility and investigated the conditions. The General Court-Martial Convening Authority concluded that the conditions did not violate Air Force regulations and were not otherwise unlawful.

II. Discussion

A. SJAR Errors

Appellant alleges two errors in the SJAR: (1) that the SJA incorrectly stated that the convening authority could not reduce Appellant's confinement and (2) that the SJA did not analyze and offer advice on the conditions of Appellant's confinement in the SJAR Addendum.

HN1[] We review de novo alleged errors in post-trial processing. *See* United States v. Kho, 54 M.J. 63, 65 (C.A.A.F. 2000); United States v. Sheffield, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004). Although the threshold for establishing prejudice in this context is low, the appellant must nonetheless make at least "some colorable showing of possible prejudice." United States v. Scalo, 60 M.J. 435, 436-37 (C.A.A.F. 2005) (quoting Kho, 54 M.J. at 65).

1. Scope of Clemency Authority

The Government concedes, and we agree, that the SJA erred when she advised the convening authority **[*5]** that he was not authorized to reduce the term of confinement. In addition, the SJA presumptively erred when she also advised the convening authority that he was prohibited from setting aside the findings or disapproving the adjudged punitive discharge. Nevertheless, we conclude that any error did not prejudice Appellant.

HN2[] Failure to timely comment on matters in the SJAR, to include matters attached to it, forfeits the issue unless there is plain error. Rule for Courts-Mar-tial

[3] On appeal, Appellant no longer asserts that the conditions constituted cruel and unusual punishment. Instead, he requests relief solely based upon this court's unique authority to approve only that portion of the sentence that "should be approved."

(R.C.M.) 1106(f)(6); Scalo, 60 M.J. at 436. Under a plain error analysis, the appellant bears the burden of showing: (1) there was an error, (2) it was plain or obvious, and (3) the error materially prejudiced a substantial right of the appellant. Kho, 54 M.J. at 65.

HN3[] For offenses occurring prior to 24 June 2014, a convening authority has the unfettered discretion to set aside findings or reduce adjudged sentences. Article 60(c)(4)(A), UCMJ, 10 U.S.C. §860(c)(4)(A) (2013).[4] For offenses occurring on or after that date, a convening authority's power to grant clemency is significantly reduced. Article 60(c)(4)(A), UCMJ, 10 U.S.C. § 860(c)(4)(A) (2014). Congress clarified a year later that for courts-martial that include a conviction for an offense committed both before and on/after 24 June 2014, the convening authority has the unfettered **[*6]** discretion to grant clemency as provided in the prior version of Article 60. Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015, *Pub. L. No. 113-291, § 531(g)(2)(A), 128 Stat. 3292, 3365-66* (2014); *see also* Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, ¶ 9.23.4 (6 June 2013) (as modified by Air Force Guidance Memorandum 2015-01 (30 July 2015)).

Here, Appellant was charged and pleaded guilty to a specification that alleged divers uses of MDMA that occurred both before and after 24 June 2014. The SJA reasoned that, since the specification as alleged covered multiple uses of MDMA through 2015, the misconduct as alleged was not complete until after 24 June 2014. Accordingly, the SJA determined that the prior version of Article 60 did not apply, and she advised the convening authority that he had only limited authority to grant clemency. Appellant's trial defense counsel, while agreeing with the SJA that the new Article 60 applied, disagreed with *how* the new Article 60 applied to the confinement portion of the sentence.

It is not necessary for us to resolve whether the SJA's interpretation was correct, or even if it was not correct, **[*7]** whether it constituted plain error. Appellant must still demonstrate a colorable showing of possible prejudice to prevail on this issue. HN4[] Whether an appellant was prejudiced by a mistake in the SJAR generally requires a court to consider whether the convening authority "plausibly may have taken action more favorable to" the appellant had he or she been provided accurate or more complete information. United States v. Johnson, 26 M.J. 686, 689 (A.C.M.R. 1988).

The Government was able to demonstrate that any error did not prejudice Appellant. The SJA submitted an affidavit conceding that her advice to the convening authority was incorrect when she advised the convening authority that he did not have the authority to dismiss the findings of guilt, or disapprove, commute, or suspend in whole or in part the confinement or punitive discharge.[5] Regardless, the SJA asserted that even if the convening authority had broader discretion, her recommendation would not have changed and she still would have recommended that he approve the sentence as adjudged.

Most importantly, the convening authority submitted an affidavit stating:

> Even with the knowledge that I may have had the authority to disapprove the findings and the authority to disapprove, commute, or **[*8]** suspend the adjudged sentence in whole or in part, my decision would not have changed. I would not have disapproved the findings of guilt, and I would not have disapproved, commuted, or suspended the adjudged sentence.

As Appellant is unable to demonstrate a colorable showing of prejudice, he cannot prevail on this issue. *See* United States v. Smith, ACM 38845, 2016 CCA LEXIS 344 (A.F. Ct. Crim. App. 7 June 2016) (unpub. op.); United States v. Gould, ACM S32275, 2016 CCA LEXIS 99 (A.F. Ct. Crim. App. 24 Feb. 2016) (unpub. op.); United States v. Collins, ACM S32242, 2015 CCA LEXIS 340 (A.F. Ct. Crim. App. 18 Aug. 2015) (unpub. op.).

2. Failure to Comment on Conditions of Confinement Allegation

Appellant's trial defense counsel also raised the condition of Appellant's post-trial confinement in his

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[4] The convening authority's power under Article 60, UCMJ, 10 U.S.C. § 860, was restricted as part of the National Defense Authorization Act for Fiscal Year 2014 (FY 14 NDAA), ***Pub. L. No. 113-66, § 1702(b), 127 Stat. 672, 955-57 (2013)***. Pursuant to section 1702(d)(2), this amendment did not take effect until 24 June 2014, 180 days after the FY 14 NDAA was enacted.

[5] It does not appear, however, that the Government concedes this point in this case, and it is not necessary for us to resolve it in this opinion.

clemency submission. In addition to arguing that Appellant's confinement conditions were a reason for the convening authority to grant clemency, they asserted that the conditions of confinement were also a violation of the *Eighth Amendment*[6] and *Article 55*, UCMJ, *10 U.S.C. § 855*. The SJA, in the Addendum to the SJAR, did not address this alleged legal error. While this omission was error, Appellant was not prejudiced.

HN5[↑] R.C.M. 1106(d) requires the SJAR to comment on any allegation of legal error raised **[*9]** in clemency. When an accused asserts legal error in his post-trial submissions, the SJAR must, at a minimum, include "a statement of agreement or disagreement with the matter raised by the accused." R.C.M. 1106(d)(4).

HN6[↑] Distinguished from their role in clemency, the role of the convening authority with respect to defense claims of legal error "is less pivotal to an accused's ultimate interests." *United States v. Hamilton, 47 M.J. 32, 35 (C.A.A.F. 1997)*. The convening authority can, and should in the interest of fairness and efficiency of the system, remedy legal error. The convening authority is not, however, required to do so. *Id.* The failure to address a defense claim of legal error in an addendum to an SJAR can be remedied through appellate litigation of the claimed error. *Id.* Consequently, it is appropriate for this court to consider whether any prejudice may have resulted from the failure to address the defense claims of legal error. *United States v. Welker, 44 M.J. 85, 89 (C.A.A.F. 1996)*. An appellate finding that those alleged errors have no merit precludes a finding that the SJA's advice prejudiced the appellant. *Hamilton, 47 M.J. at 36*; *Scalo, 60 M.J. at 436*.

Appellant does not argue how he was prejudiced by the omission of this purported legal error, and though Appellant could renew on appeal his assertion that the conditions constituted a violation **[*10]** of the *Eight Amendment* and *Article 55*, he chose not to do so.[7] Furthermore, in addition to the alleged legal error, it was clear from the clemency submission that the convening authority should also consider Appellant's conditions of post-trial confinement generally in determining whether to grant clemency and whether to initiate an investigation into those conditions. Consequently, Appellant is unable to demonstrate that the SJA's error in failing to address this purported error prejudiced Appellant.

B. Post-trial Confinement Conditions

At the close of Appellant's trial, he entered confinement at the Sampson County Detention Center in Clinton, North Carolina. As we previously noted, Appellant does not contend that the conditions of his post-trial confinement amounted to cruel or unusual punishment in violation of the *Eighth Amendment* or *Article 55*. Instead, Appellant alleges that the conditions of his confinement were so egregious as to warrant sentence relief under *Article 66(c)*. *See* *United States v. Gay, 74 M.J. 736 (A.F. Ct. Crim. App. 2015)* (providing sentence relief for post-trial confinement conditions that did not constitute a violation of either the Constitution of the United States or *Article 55*).

In a sworn declaration, Appellant states that he was kept in an area of the detention **[*11]** center that was used exclusively for Air Force prisoners; he was only permitted to leave the cell for recreation time or for showers; he was not given any recreation time for the first 25 days, and thereafter only two hours per week; and he was only allowed to shower twice per week. He also told his trial defense counsel, as reflected in his trial defense counsel's affidavit, that once he figured out how to submit requests for extra showers and phone calls,

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[6] *U.S. CONST. amend. VIII*.

[7] ***HN7***[↑] Both the *Eighth Amendment* and *Article 55*, UCMJ, *10 U.S.C. § 855*, prohibit cruel and unusual punishment. In general, we apply "the Supreme Court's interpretation of the *Eighth Amendment* to claims raised under *Article 55*, except in circumstances where . . . legislative intent to provide greater protections under [*Article 55*, UCMJ,]" is apparent. *United States v. Avila, 53 M.J. 99, 101 (C.A.A.F. 2000)* (citing *United States v. Wappler, 2 C.M.A. 393, 9 C.M.R. 23, 26 (C.M.A. 1953)*). "[T]he *Eighth Amendment* prohibits two types of punishments: (1) those 'incompatible with the evolving standards of decency that mark the progress of a maturing society' or (2) those 'which involve the unnecessary and wanton infliction of pain.'" *United States v. Lovett, 63 M.J. 211, 215 (C.A.A.F. 2006)* (quoting *Estelle v. Gamble, 429 U.S. 97, 102-03, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)*). A violation of the *Eighth Amendment* is shown by demonstrating: "(1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to [the appellant's] health and safety; and (3) 'that [the appellant] has exhausted the prisoner-grievance system . . . and that he has petitioned for relief under *Article 138*, UCMJ, *10 U.S.C. § 938*.'" *Id.* (quotation marks and footnotes omitted). Applying these standards de novo, *United States v. White, 54 M.J. 469, 471 (C.A.A.F. 2001)*, we find no *Eighth Amendment* or *Article 55* violation.

things got progressively better. Appellant also submitted an affidavit reflecting his counsel's telephonic discussion with Sergeant BS from the detention center who clarified that Air Force prisoners are housed in the same unit used for prisoners in protective custody, they receive the same treatment as those in protective custody, Air Force members neither reside nor interact with prisoners in the general population, and the cell size is the same as general population prisoners. Sergeant BS also told Appellant's counsel that while it is hypothetically possible for the detention center to maintain a general population-type pod where there were no foreign nationals, it would take some work.

In response, the Government submitted an **[*12]** affidavit from the representative from the Seymour Johnson legal office who investigated Appellant's complaints about the conditions of confinement. The inmates in that housing area shower twice weekly, though Air Force prisoners are permitted to request showers more frequently. Recreation time is normally done in conjunction with each time they shower. Air Force confinees may also request additional phone calls. The conditions of confinement for Appellant were less restrictive than the conditions for those who are in solitary confinement as those inmates are not granted showers, recreational time, and phone calls at the frequency permitted for Air Force prisoners. The Government also provided this court the inmate handbook, photographs from the detention facility, and the inmate log book.

In *Gay*, the case that Appellant cites to as support for relief, this court employed its *Article 66(c)* authority to grant the appellant sentencing relief even in the absence of cruel or unusual punishment in violation of the *Eighth Amendment* and *Article 55*. *74 M.J. at 742*. In reviewing that decision, our superior court held that, based on the unique facts of that case, this court did not abuse its discretion in doing so. *United States v. Gay, 75 M.J. 264, 269 (C.A.A.F. 2016)*. However, **[*13]** our superior court also noted that *Gay* involved unique facts driven by legal errors in the post-trial process that included both a violation of the appellant's rights under *Article 12*, UCMJ, *10 U.S.C. § 812*, and the ordering of solitary confinement by an Air Force official where an alternative solution was available. *Id.* Significantly, our superior court emphasized, "In reaching this conclusion, we do not recognize unlimited authority of the Courts of Criminal Appeals to grant sentence appropriateness relief for any conditions of post-trial confinement of which they disapprove." *Id.*

HN8[] We anticipate that only in very rare circumstances will this court exercise our *Article 66(c)* authority to grant sentence relief based upon conditions of post-trial confinement when we have found no violation of the *Eighth Amendment* or *Article 55*. *United States v. Garcia, No. ACM 38814, 2016 CCA LEXIS 490 (A.F. Ct. Crim. App. 16 Aug. 2016)* (unpub. op.); *cf. United States v. Nerad, 69 M.J. 138, 145-47 (C.A.A.F. 2010)* (holding that despite our significant discretion in reviewing the appropriateness of a sentence, this court may not engage in acts of clemency.) This case does not present such a rare circumstance. We elect not to grant relief under our *Article 66(c)* authority.

After reviewing all of the submitted matters, **[*14]** we are not persuaded that the conditions of Appellant's post-trial confinement rise to the level of being so oppressive or disgraceful as to warrant sentence relief. There is no evidence he was subjected to physical or mental abuse, singled out for unusual treatment, denied necessary medical attention, or refused any other necessity. Despite Appellant's characterizations, circumstances of his confinement do not appear to involve the extreme segregation often associated with solitary confinement. Nor is there evidence the conditions of his confinement impacted his access to counsel or any other post-trial due process right. Additionally, his allegations were thoroughly investigated by the reviewing authorities and resolved against him. Therefore, we find the extraordinary use of our *Article 66(c)* power to grant sentence relief is not warranted.

III. Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. *Articles 59(a)* and *66(c)*, UCMJ, *10 U.S.C. §§ 859(a)*, *866(c)*.

Accordingly, the approved findings and sentence are **AFFIRMED**.

End of Document

United States v. Trebon

United States Air Force Court of Criminal Appeals

July 14, 2017, Decided

No. ACM 38961

Reporter
2017 CCA LEXIS 473 *

UNITED STATES, Appellee v. Joshua J. TREBON, Major (O-4), U.S. Air Force, Appellant

Notice: THIS IS AN UNPUBLISHED OPINION AND, AS SUCH, DOES NOT SERVE AS PRECEDENT UNDER AFCCA RULE OF PRACTICE AND PROCEDURE 18.4.

Subsequent History: Motion granted by *United States v. Trebon, 2017 CAAF LEXIS 905 (C.A.A.F., Sept. 7, 2017)*

Review denied by *United States v. Trebon, 2017 CAAF LEXIS 1039 (C.A.A.F., Oct. 30, 2017)*

Prior History: [*1] Appeal from the United States Air Force Trial Judiciary. Military Judge: Lyndell M. Powell. Approved sentence: Dismissal and confinement for 7 years. Sentence adjudged 23 September 2015 by GCM convened at Joint Base Elmendorf-Richardson, Alaska.

Core Terms

military, sentence, guilty plea, confinement, convening, sexual, good order, fraternization, discipline, defense counsel, matters, conditions, post-trial, pretrial, segregation, enlisted, circumstances, offenses, declarations, allegations, alcohol, hunting, rights, terms, trial defense counsel, sexual assault, socializing, questions, witnesses, invited

Case Summary

Overview

HOLDINGS: [1]-Evidence that a commissioned officer went on a camping trip alone with an enlisted member of the Air Force, drank alcohol with the enlisted member at off-base bars, and allowed the enlisted member to call him by his first name, was sufficient to affirm the officer's conviction for fraternization, in violation of UCMJ art. 134, *10 U.S.C.S. § 934*; [2]-There was no merit to the officer's claim that he was denied effective assistance of counsel; [3]-Confinement officials did not violate the officer's rights under UCMJ art. 58, *10 U.S.C.S. § 858*, when they placed him into administrative segregation for 203 days while they investigated an allegation that he had sexual contact with another prisoner; [4]-The officer's sentence of a dismissal and confinement for seven years was not inappropriately severe.

Outcome

The court affirmed the findings and sentence but directed promulgation of a corrected court-martial order to address a mistake that appeared in the original order. correct.

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Findings

Military & Veterans Law > Military Justice > Courts Martial > Sentences

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN1[] **Judicial Review, Courts of Criminal Appeals**

The United States Air Force Court of Criminal Appeals ("AFCCA") may affirm only such findings of guilty and a sentence, or such part or amount of a sentence, as it

finds correct in law and fact and determines, on the basis of the entire record, should be approved. Unif. Code Mil. Justice ("UCMJ") art. 66(c), *10 U.S.C.S. § 866(c)*. In United States v. Gay, the AFCCA invoked Article 66(c) to grant the appellant sentencing relief even in the absence of cruel or unusual punishment in violation of the *Eighth Amendment to the U.S. Constitution* and UCMJ art. 55, *10 U.S.C.S. § 855*, and the United States Court of Appeals for the Armed Forces ("CAAF") held that the AFCCA did not abuse its discretion in doing so. However, the CAAF noted that Gay involved unique facts driven by legal errors in the posttrial process that included both a violation of the appellant's rights under UCMJ art. 12, *10 U.S.C.S. § 812*, and the ordering of solitary confinement by an Air Force official where an alternative solution was available. Significantly, the CAAF emphasized that in reaching its conclusion, it was not recognizing unlimited authority of the courts of criminal appeals to grant sentence appropriateness relief for any conditions of posttrial confinement of which they disapproved.

Military & Veterans Law > ... > Courts Martial > Sentences > Confinement

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN2 **Sentences, Confinement**

Only in very rare circumstances does the United States Air Force Court of Criminal Appeals anticipate exercising its authority under Unif. Code Mil. Justice ("UCMJ") art. 66(c), *10 U.S.C.S. § 866(c)*, to grant sentence relief based upon conditions of posttrial confinement when there is no violation of the *Eighth Amendment to the U.S. Constitution* or UCMJ art. 55, *10 U.S.C.S. § 855*.

Military & Veterans Law > ... > Trial Procedures > Pleas > Providence Inquiries

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN3 **Pleas, Providence Inquiries**

The United States Air Force Court of Criminal Appeals reviews a military judge's decision to accept a guilty plea for an abuse of discretion. The test for an abuse of discretion in accepting a guilty plea is whether the record shows a substantial basis in law or fact for questioning the plea. A military judge must question an accused under oath about the offenses to ensure there is an adequate factual basis for a guilty plea. R.C.M. 910(e), Manual Courts-Martial; Unif. Code Mil. Justice art. 45(a), *10 U.S.C.S. § 845(a)*. It is an abuse of discretion for a military judge to accept a guilty plea without an adequate factual basis.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Military & Veterans Law > Military Justice > Counsel

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN4 **Criminal Process, Assistance of Counsel**

The *Sixth Amendment to the U.S. Constitution* guarantees a servicemember the right to effective assistance of counsel. In assessing the effectiveness of counsel, the United States Air Force Court of Criminal Appeals ("AFCCA") applies the standard the United States Supreme Court set forth in Strickland v. Washington, and begins with the presumption of competence the Supreme Court announced in United States v. Cronic. Accordingly, the AFCCA will not second-guess the strategic or tactical decisions made at trial by defense counsel.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Military & Veterans Law > Military Justice > Counsel

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN5[] **Criminal Process, Assistance of Counsel**

When an appellant attacks the trial strategy or tactics of his defense counsel, he must show specific defects in counsel's performance that were unreasonable under prevailing professional norms, and the United States Air Force Court of Criminal Appeals ("AFCCA") reviews allegations of ineffective assistance of counsel de novo. The AFCCA utilizes the following three-part test to determine whether the presumption of competence has been overcome: (1) Are an appellant's allegations true; if so, is there a reasonable explanation for counsel's actions? (2) If the allegations are true, did defense counsel's level of advocacy fall measurably below the performance ordinarily expected of fallible lawyers? And (3) if defense counsel was ineffective, is there a reasonable probability that, absent the errors, there would have been a different result?

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Courts Martial > Sentences

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN6[] **Judicial Review, Courts of Criminal Appeals**

The United States Air Force Court of Criminal Appeals reviews sentence appropriateness de novo. The court assesses sentence appropriateness by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial. Although the AFCCA is accorded great discretion in determining whether a particular sentence is appropriate, it is not authorized to engage in exercises of clemency.

Counsel: For Appellant: Major Annie W. Morgan, USAF.

For Appellee: Major G. Matt Osborn, USAF; Major Mary Ellen Payne, USAF; Gerald R. Bruce, Esquire.

Judges: Before MAYBERRY, JOHNSON, and SPERANZA, Appellate Military Judges. Judge SPERANZA delivered the opinion of the court, in which Senior Judges MAYBERRY and JOHNSON joined.

Opinion by: SPERANZA

Opinion

SPERANZA, Judge:

A military judge sitting as a general court-martial found Appellant guilty, consistent with his pleas pursuant to a pretrial agreement, of willfully disobeying a superior commissioned officer's order to have no contact with Airman First Class (A1C) CV; violating a lawful general regulation by engaging in sexual relations with and dating A1C CV; sexually assaulting Senior Airman (SrA) JC by causing SrA JC's penis to penetrate Appellant's mouth without SrA JC's consent; committing abusive sexual contact by touching SrA JC's neck, chest, and abdomen with Appellant's mouth and hand with an intent to gratify Appellant's **[*2]** sexual desire and without SrA JC's consent; making false official statements to investigators; wrongfully and dishonorably accusing SrA JC of sexual assault, which under the circumstances constituted conduct unbecoming an officer and gentleman; and fraternizing with SrA CS, in violation of *Articles 90*, *92*, *120*, *107*, *133*, and *134*, Uniform Code of Military Justice (UCMJ), *10 U.S.C. §§ 890*, *892*, *920*, *907*, *933*, *934*. The military judge sentenced Appellant to a dismissal and confinement for seven years. Consistent with the terms of the pretrial agreement, the convening authority approved the adjudged sentence.

On appeal, Appellant raises the following errors pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*: (1) the conditions of his post-trial confinement rendered his sentence inappropriately severe, entitling him to sentence relief; (2) his guilty plea to fraternization was improvident; (3) he was selectively prosecuted; (4) he was denied equal access to witnesses and evidence; (5) he was denied effective assistance of counsel; (6) he was subjected to pretrial punishment; (7) he is entitled to a new pretrial hearing; and (8) his sentence is inappropriately severe. We disagree with Appellant's assertions, find no prejudicial error, and affirm. We address **[*3]** Appellant's claims related to his post-trial confinement conditions, his guilty plea to fraternization, the effectiveness of his counsel, and the severity of his sentence. We have considered and reject Appellant's remaining issues, which neither require additional analysis nor warrant relief. *See United States v. Matias, 25 M.J. 356, 363 (C.M.A. 1987)*.

I. BACKGROUND

Appellant, an accomplished officer selected for command, was married with children. Appellant was also involved in a months-long sexual, dating relationship with A1C CV. In addition to dating and engaging in sexual acts with A1C CV, Appellant befriended SrA CS, with whom he socialized, drank alcohol, and went on a three-day camping trip.

SrA CS was also friends with SrA JC. SrA CS invited SrA JC to a gathering hosted by Appellant. SrA JC interacted with Appellant on approximately two or three more occasions after being invited to do so by SrA CS.

Appellant was scheduled to leave Alaska in late November 2014 to take command of a squadron in Texas. Appellant planned his "going away" party accordingly and invited numerous people from the base. The "going away" party consisted of being driven to and drinking alcohol at several bars. Appellant, A1C CV, SrA JC, and SrA CS were among **[*4]** those remaining at the party's last stop. SrA JC was visibly, heavily intoxicated by this point and the group left the bar after being there for just over an hour. SrA JC's and SrA CS's plans to stay the night at a master sergeant's house fell through when the master sergeant left the party early and went to sleep. The group's designated driver refused to drive SrA JC and SrA CS to SrA CS's house due to hazardous weather conditions. Appellant invited SrA JC and SrA CS to stay the night with him and A1C CV at his house.

Appellant's house was essentially empty at this time; his family and furniture had already departed for Texas. So, SrA JC, SrA CS, A1C CV, and Appellant lay on Appellant's living room floor to go to sleep. SrA JC and SrA CS immediately fell asleep. While SrA JC was sleeping, Appellant lifted SrA JC's sweatshirt over SrA JC's face and kissed SrA JC's neck, chest, and abdomen. Appellant then unfastened SrA JC's pants, pulled down SrA JC's pants, placed his mouth on SrA JC's scrotum and penis, and inserted SrA JC's penis into his mouth. SrA JC eventually realized what was happening, pulled his shirt down, and exclaimed, "What the f[**]k." Appellant responded by rolling away **[*5]** from SrA JC. SrA JC rearranged his clothing and fell back asleep.

The next morning, Appellant drove SrA JC and SrA CS to their cars. SrA JC and SrA CS ate breakfast together. During the meal, SrA JC told SrA CS that Appellant had assaulted him the night before. SrA JC later reported the assault to the installation sexual assault response coordinator (SARC). SrA JC also consented to a sexual assault nurse examination (SANE) that revealed injuries on his penis. The examination included the collection of deoxyribonucleic acid (DNA) samples from SrA JC's lower abdomen, chest, neck, penis, and scrotum. Subsequent analysis revealed the presence of Appellant's DNA on SrA JC's abdomen, chest, neck, penis, and scrotum.[1]

SrA JC and SrA CS stopped communicating with Appellant. Worried, Appellant sent SrA CS text messages inquiring as to why they ceased communications with him. Appellant discussed the "going away" party incident with A1C CV. Appellant sent A1C CV a text message stating that he "sexually assaulted a guy" and another text message declaring "Drunk n horny and 3 some with my bf...lay off."

Within days of the sexual assault, Air Force Office of Special Investigations (AFOSI) agents interviewed **[*6]** Appellant. Appellant lied about what occurred at his house the evening of the "going away" party. After the interview, Appellant lodged his own complaint with the SARC, asserting that he was the victim of a sexual assault that evening.

Appellant's wing commander ordered Appellant to have no contact with SrA JC, SrA CS, and A1C CV. However, Appellant willfully disobeyed the order by talking to A1C CV and not reporting this contact to his chain of command.

Less than two weeks after receiving and violating the no-contact order, Appellant completed a written statement in which he falsely accused SrA JC of sexually assaulting him. Appellant caused this false statement and accusation to be provided to AFOSI.

II. DISCUSSION

A. Post-trial Confinement Conditions

After trial, Appellant was confined at the Naval Consolidated Brig—Miramar (Miramar Brig) near San Diego, California. While serving confinement at Miramar Brig, Appellant was segregated with the Male Special Quarters (MSQ) for just over 200 days until he was

[1] A1C CV's DNA was also found on SrA JC's lower abdomen, chest, and scrotum.

transferred to the Midwest Joint Regional Correctional Facility at Fort Leavenworth, Kansas in October 2016. Accordingly, his access to certain privileges and services was limited or **[*7]** denied. Appellant filed timely complaints with proper authorities concerning the restrictions placed upon him.

In general, Appellant complains that his "post-trial confinement conditions were unnecessarily harsh, without necessity or justification, and in violation of *Article 58, UCMJ, 10 U.S.C. § 858*." Specifically, Appellant contends that he "was kept in segregated confinement conditions, without proper justification." He, therefore, reasons:

> Given there was no rational basis or justification for holding Appellant in segregation for 203 days, this Court should provide the Appellant with meaningful relief, not only to rectify the injustice that was done in this case, but also to incentivize the government to ensure that military members are confined in acceptable conditions.

Citing to *Article 66(c), UCMJ, 10 U.S.C. § 866(c)*, and *United States v. Gay, 74 M.J. 736, 740-42 (A.F. Ct. Crim. App. 2015)*, *aff'd*, *75 M.J. 264 (C.A.A.F. 2016)*, Appellant asks us to "approve only so much of [his] sentence as calls for five years confinement and a discharge [sic]."

HN1[↑] This court "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." *Article 66(c), UCMJ, 10 U.S.C. § 866(c)*. In *Gay*, this court invoked **[*8]** *Article 66(c)* to grant the appellant sentencing relief even in the absence of cruel or unusual punishment in violation of the *Eighth Amendment*, *U.S. CONST. amend. VIII*, and *Article 55, UCMJ, 10 U.S.C. § 855*. *Gay, 74 M.J. at 742*. The Court of Appeals for the Armed Forces (CAAF) held that this court did not abuse its discretion in doing so. *Gay, 75 M.J. at 269*. However, the CAAF noted that *Gay* involved unique facts driven by legal errors in the post-trial process that included both a violation of the appellant's rights under *Article 12, UCMJ, 10 U.S.C. § 812*, and the ordering of solitary confinement by an Air Force official where an alternative solution was available. *Id.* Significantly, the CAAF emphasized, "In reaching this conclusion, we do not recognize unlimited authority of the Courts of Criminal Appeals to grant sentence appropriateness relief for any conditions of post-trial confinement of which they disapprove." *Id.*

HN2[↑] Only in very rare circumstances do we anticipate exercising our *Article 66(c)* authority to grant sentence relief based upon conditions of post-trial confinement when there is no violation of the *Eighth Amendment* or *Article 55, UCMJ*. *United States v. Milner, No. ACM S32338, 2017 CCA LEXIS 84, at *13 (A.F. Ct. Crim. App. 7 Feb. 2017)* (unpub. op.); *United States v. Garcia, No. ACM 38814, 2016 CCA LEXIS 490, at *14 (A.F. Ct. Crim. App. 16 Aug. 2016)* (unpub. op.); *cf. United States v. Nerad, 69 M.J. 138, 145-47 (C.A.A.F. 2010)* (holding that **[*9]** despite our significant discretion in reviewing the appropriateness of a sentence, this court may not engage in acts of clemency). This case does not present such circumstances.

Indeed, Appellant was placed in segregation and formally raised concerns about the restrictions he faced while segregated in MSQ. However, as explained by the Commanding Officer of the Miramar Brig, there was both a rational basis and justification for holding Appellant in segregation for 203 days.

In March 2016, another prisoner accused Appellant of abusive sexual contact, requiring an investigation in accordance with the Prison Rape Elimination Action (PREA). PREA standards required Appellant to be separated from the alleged victim during the investigation. Thus, Appellant was segregated and placed on Administrative Segregation Pending Investigation/Disciplinary Action (ASPID) status. ASPID standards restricted or limited Appellant's access to certain privileges and services.

The investigation uncovered three other prisoners who claimed to have witnessed or experienced "sexual harassment" by Appellant. Appellant was ordered to have no contact with these other prisoners. Consequently, movement de-confliction **[*10]** between Appellant and the prisoners involved in the investigation proved difficult; authorities considered these difficulties when evaluating Appellant's segregation. Appellant's status was periodically reviewed in accordance with standard procedure. In conducting such a review, authorities considered "changes in [Appellant's] program plan[,] the safety of his victim and witnesses[,] and maintaining the good order and discipline of the facility."

The commanding officer at the time "founded" the PREA allegation against Appellant and forwarded the case to the applicable Air Force convening authority for potential disposition. The convening authority decided not to pursue court-martial proceedings against Appellant and

returned the case to the Miramar Brig for "final adjudication." Appellant received a Disciplinary Report for the "inappropriate sexual touching charge, for which he was found guilty[.]" Appellant was "awarded 30 days Full Loss of Privileges and 20 days Loss of Good Conduct Time." Moreover, "[t]he significant time [Appellant] had spent in [segregation] was taken into account and he was awarded a lenient punishment for [the] level of offense." The PREA findings resulted in specific **[*11]** treatment requirements for Appellant. However, because the prisoner victim and witnesses were either attending, or scheduled to attend, the same treatment, the facility could not "manage [Appellant] away from his victim and witnesses who [were] part of those treatment groups or [would] be." Accordingly, the decision was made to transfer Appellant to Leavenworth in order to avoid "compromising both [Appellant's] treatment as well as the effectiveness of his victim's treatment."

The conditions Appellant complains of—contrary to his assertions—were rationally and reasonably imposed to serve a legitimate purpose: the investigation and adjudication of additional allegations of sexual misconduct committed against another prisoner. Moreover, these conditions ensured the integrity of the investigation and the safety of a victim and witnesses, as well as preserved good order and discipline within the confinement facility. We decline to exercise our extraordinary *Article 66(c)* power to grant sentence relief under such circumstances.

B. Guilty Plea (Fraternization)

Prior to trial, Appellant stipulated to the following facts:

> [Appellant] met SrA [CS] while both were assigned to [the same squadron]. **[*12]** [Appellant] and SrA [CS] became friends based on common interests such as hunting and fishing. SrA [CS] joined the accused for social events in Eagle River, Alaska, including steak night on Friday nights at the Veterans of Foreign Wars (VFW) bar. Eventually, on Friday nights, SrA [CS] and [Appellant] would drink alcohol at the VFW, drink alcohol at Tips bar, and then drink alcohol at the Homestead Bar. They called this the "Eagle River Circuit." SrA [CS] also had dinner
> at [Appellant's] house on a handful of occasions. On one occasion, [Appellant] and SrA [CS] traveled to Prince William Sound, Alaska, for a bear-hunting trip. Although other individuals were invited, nobody else was able to go. The trip lasted two to three days. [Appellant] and SrA [CS] borrowed a small boat from a friend and anchored in Prince William Sound to hunt. They drank alcohol and slept in the same cabin in separate beds on the boat. No sexual activity took place between [Appellant] and SrA [CS].
>
> [Appellant] was a commissioned officer and knew that SrA [CS] was an enlisted airman. [Appellant] admits that such fraternization violates the custom of the Air Force that officers shall not fraternize with enlisted **[*13]** members on terms of military equality. [Appellant] admits his conduct was to the prejudice of good order and discipline.

Appellant pleaded guilty to the following:

> knowingly fraterniz[ing] with [SrA CS], an enlisted person, on terms of military equality, to wit: consuming alcoholic beverages together while socializing at off-base bars, socializing at each other's homes, and camping alone together for multiple days, in violation of the custom of the United States Air Force that officers shall not fraternize with enlisted persons on terms of military equality, such conduct being to the prejudice of good order and discipline in the armed forces.

In conducting his providence inquiry with Appellant, the military judge advised Appellant that by pleading guilty to this offense Appellant was admitting that the following elements were true and accurately described what Appellant did:

> First element, is that [during the charged timeframe], you were a commissioned officer in the United States Air Force.
>
> Second element, is that within the state of Alaska, on divers occasions, [during the charged timeframe] you fraternized on terms of military equality with [SrA CS], an enlisted person, by consuming alcoholic beverages **[*14]** together while socializing at off-base bars, socializing at each other's homes, and camping alone together for multiple days.
> The third element is that you then knew [SrA CS] to be an enlisted member.
> The fourth element is that such fraternization violated the custom of the Air Force that officers shall not fraternize with enlisted members on terms of military equality.
> And the fifth element is that, under the circumstances, your conduct was to the prejudice of good order and discipline in the armed forces.

The military judge defined "conduct prejudicial to good order and discipline" as "conduct which causes a reasonably direct and obvious injury to good order and discipline." The military judge further explained to Appellant:

> Not all contact or association between officers and enlisted persons is an offense. Whether the contact or association in question is an offense depends on the surrounding circumstances. Factors that should be considered include whether the conduct has compromised the chain of command, resulted in the appearance of partiality, or otherwise undermined good order, discipline, authority, or morale. The facts and circumstances must be such as to lead a reasonable person, **[*15]** experienced in the problems of military leadership, to conclude that good order and discipline in the armed forces have been prejudiced by the tendency of your conduct to compromise the respect of enlisted persons for the professionalism, integrity, and obligations of an officer.

Appellant affirmed that he understood the elements and definitions and confirmed he had no questions about any of them. Appellant admitted that the elements accurately described what he did. Appellant believed and admitted that the elements and definitions taken together correctly described what he did. Nevertheless, Appellant now argues that "[t]here was no evidence admitted that others were aware of the relationship[,]" thus, "[t]he military judge failed to conduct sufficient inquiry into the element of conduct being prejudicial to good order and discipline." Appellant consequently contends that we should set aside this fraternization conviction because "[t]he record is absent of evidence showing Appellant's conduct relating to SrA CS had a direct and palpable injury on good order and discipline in [the] armed forces."

In addition to the stipulation of fact, the military judge relied upon his inquiry with Appellant to determine **[*16]** whether an adequate factual basis for Appellant's plea to this charge existed. During the inquiry, Appellant explained he "had a relationship with [SrA CS] where I allowed that relationship to go down to military equality between the two of us, on a more than familiar basis allowed by the standards of the Air Force."

Appellant first described his relationship with SrA CS as a "mentor relationship" centered on "[c]ommon interests, hunting, fishing, kind of took him under my wing." Accordingly, Appellant "[t]ook [SrA CS] hunting and fishing on quite a few occasions." However, Appellant claimed this relationship "crossed the line [when] we started socializing at bars. More hunting trips, etc., with one individual." Appellant further explained that he invited SrA CS to social events and that his conduct "[e]quated down to equality," and he "started treating [SrA CS] as a peer."

Appellant's explanation led to the following exchanges with the military judge:

> MJ: Okay. Was that because you were, did you consider him a friend, essentially?
> ACC: Our relationship developed into being friends, sir, yes.
>
> MJ: Now when you were socializing, if you and [SrA CS] were alone together, was there still kind of that military relationship **[*17]** between the two of you or did that kind of dissolve a little bit and become more of him calling you Josh or anything like that?
> ACC: There was occasion sir when he did use my first name.
> MJ: And did you correct him or did you allow that to occur?
> ACC: Sometimes but not always.
> . . . .
> MJ: Okay. And, again, when you engaged with him on those occasions was it kind of, was it Major to Airman or was it more Josh to [C]?
> ACC: It was more buddies, sir.
> MJ: Did you guys engage in the same things that normal friends talk about, conversations and just friendly—
> ACC: Yes, sir. We had a lot of common interests.

The military judge and Appellant next discussed the three-day bear hunting trip Appellant took with SrA CS. Appellant maintained that the two enjoyed the trip as "[e]qual hunting buddies, sir. Surviving out in the wild."

Appellant clarified his belief that he fraternized with SrA CS on terms of military equality by stating, "When you start allowing somebody to use your first name, sir, you're giving them an equal position with you. You just threw out a custom and courtesy that keeps a separation between the two of you." Appellant also explained that his conduct was detrimental to good order and discipline **[*18]** because "[i]t could show preferential treatment to the unit. It could be assumed preferential treatment to the unit." Appellant asserted that "at the time [he had] a lot of pull amongst a lot of organizations on this base" and others members of SrA CS's unit "would probably think he was getting a benefit,

the gift of having an officer for a friend."

Appellant later acknowledged that other military members, to include SrA CS's enlisted roommates, knew Appellant, an officer, was friends with SrA CS and such knowledge could have impacted good order and discipline.

At the end of his inquiry with Appellant on this offense, the military judge asked, "Do counsel for either side that any additional inquiry is required?" Trial defense counsel responded, "No, Your Honor."

HN3[] We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Blouin, 74 M.J. 247, 251 (C.A.A.F. 2015)*. "The test for an abuse of discretion in accepting a guilty plea is whether the record shows a substantial basis in law or fact for questioning the plea." *United States v. Moon, 73 M.J. 382, 386 (C.A.A.F. 2014)* (citing *United States v. Passut, 73 M.J. 27, 29 (C.A.A.F. 2014))*. The military judge must question the accused under oath about the offenses to ensure there is an adequate factual basis for a guilty plea. Rule for Courts-Martial 910(e); *see Article 45(a), UCMJ, 10 U.S.C. § 845(a)*. "It is an **[*19]** abuse of discretion for the military judge to accept a guilty plea without an adequate factual basis . . . ." *United States v. Weeks, 71 M.J. 44, 46 (C.A.A.F. 2012)*.

Having examined the entire record, we find no substantial basis to question Appellant's guilty plea. *See United States v. Jordan, 57 M.J. 236, 239 (C.A.A.F. 2002)*. Appellant was convinced of and able to describe the facts necessary to establish his guilt of the offense, as charged. *See United States v. Murphy, 74 M.J. 302, 308 (C.A.A.F. 2015)*. Appellant—an O-4 assigned to the installation's Inspector General's office and formerly assigned to the same unit as SrA CS—held a personal friendship with his "equal," E-4 hunting buddy, SrA CS. The friendship between "Josh" (Appellant) and C (SrA CS) was known to other military members. This relationship, under the facts established within the record, was prejudicial to good order and discipline. Thus, the military judge did not abuse his discretion in accepting Appellant's guilty plea to fraternization.

C. Effectiveness of Counsel

Appellant pleaded guilty pursuant to a pretrial agreement he freely entered into with the convening authority. In exchange for Appellant's guilty plea to certain offenses, *inter alia*, the convening authority agreed to withdraw and dismiss with prejudice the Additional Charge and its four specifications **[*20]** alleging Appellant committed various sexual offenses against A1C CV.

The convening authority also agreed to disapprove any confinement in excess of seven years. Appellant signed the offer for pretrial agreement, affirming that he was "satisfied with [his] defense counsel" and "consider[ed] them competent to represent [him] in this court-martial." Appellant further affirmed that his defense counsel fully advised him of "the nature of the charges against [him], the possibility of . . . defending against them, any defense which might apply, and the effect of the guilty plea." Appellant asserted that he "fully underst[ood]" his trial defense counsel's advice.

In accepting Appellant's pleas, the military judge explained each element of each offense to which Appellant pleaded guilty along with the definitions pertinent to each offense. In each instance, Appellant agreed that he understood the elements of each offense and did not have any questions about any of them. Moreover, Appellant agreed that his plea of guilty admitted that the elements accurately described what he did. Appellant also stated that he believed and admitted that the elements and definitions taken together correctly described what he did. After **[*21]** discussing each offense and the factual bases for his pleas with Appellant, the military judge addressed the terms of the pretrial agreement with Appellant.

The military judge found that Appellant fully understood the pretrial agreement and again received affirmative responses from Appellant that he had enough time to discuss his case with counsel, did in fact consult with counsel and receive the full benefit of their advice, was satisfied that his counsel's advice was in his best interest, and was satisfied with his defense counsel. Furthermore, Appellant stated he was pleading guilty voluntarily and of his own free will, no one had made any threat or tried to force him to plead guilty, he had no questions as to the meaning or effect of his guilty plea, he fully understood the meaning and effect of his guilty plea, that he understood that even if he believed he was guilty he had the legal and moral right to plead not guilty and to place upon the government the burden of proving his guilt beyond a reasonable doubt and still wanted to plead guilty to the charges and specifications. His defense counsel similarly informed the court that he had enough time and opportunity to discuss the **[*22]** case with Appellant.

The military judge found Appellant guilty, consistent with his pleas, and the Additional Charge and its specifications were dismissed with prejudice.

Prior to deliberating on an appropriate sentence, the military judge discussed Appellant's post-trial and appellate rights. Appellant's trial defense counsel affirmed that Appellant was advised orally and in writing of his post-trial and appellate rights.[2] In turn, Appellant confirmed that he was advised of these rights, including his right to submit specific matters for the convening authority's consideration prior to action. Appellant had no questions about his post-trial and appellate rights.

After trial, Appellant was personally provided a memorandum from the base legal office with the subject "Submission of Matters to the Convening Authority—United States v. Maj Joshua J. Trebon." This memorandum advised Appellant of his right to submit matters for the convening authority's consideration prior to initial action[3] and to consult with his defense counsel to determine whether to submit such matters.

Appellant acknowledged the time and date he received this memorandum. In addition, Appellant certified that he "consulted with [his] defense counsel concerning [his] right to submit matters for the convening authority's consideration before the convening authority takes action in [his] case." Appellant indicated that he did not waive this right and intended to submit such matters to the convening authority.

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[2] Appellate Exhibit VII is the written advice provided to Appellant by his defense counsel, which included Appellant's affirmation that his defense counsel "satisfactorily answered any and all questions [Appellant] had about [his] post-trial and appellate rights."

[3] The memorandum specifically advised Appellant that these matters may include:

> a. Allegations of errors affecting the legality of the findings or sentence in your case.
>
> b. Portions or summaries of your **[*23]** [Record of Trial (ROT)], or copies of evidence introduced at trial.
>
> c. Matters in mitigation that were not available for consideration at your trial.
>
> d. Clemency recommendations by any court member, the military judge, or any other person.
>
> e. Any other matter you or your counsel believe the convening authority should be aware of before taking action in your case, whether or not available or introduced into evidence at you trial.

Appellant requested, and the convening authority granted, deferral of automatic forfeitures until action. Later, Appellant acknowledged receipt of the staff judge advocate recommendation (SJAR). Consistent with his indorsement of the memorandum, Appellant submitted matters for the convening authority's consideration. Appellant's submission included his request **[*24]** for "leniency and consideration, and grant [sic] any and all forms of clemency you deem appropriate under the given circumstances in accordance with the UCMJ, impact to the victim [SrA JC], the strains on my family, and the true and dedicated officer I once was and still feel I can be again." Appellant supported his request with various character statements. Appellant asserted no legal errors at the time.

Now, on appeal, Appellant maintains that "[h]ad [his] defense counsel advised him of the matters addressed in [his several declarations], Appellant would not have accepted a pre-trial [sic] agreement and would have litigated the allegations against him." Appellant lodges a variety of complaints through several declarations, including claims that his trial defense counsel did not advise him on the outcome of the second preliminary hearing into A1C CV's allegations; they failed to advise about the defense of mistake of fact; they failed to advise him about the elements of the offenses to which he pleaded guilty; they failed to advise him about his rights under *Article 13, UCMJ, 10 U.S.C. § 813*; they failed to properly advise him of his rights to clemency; and they "coerced [him] into making an uninformed **[*25]** [pretrial agreement] decision."

We ordered and received declarations from Appellant's trial defense counsel in response to his claims. Trial defense counsel's declarations addressed the specific allegations raised by Appellant in his declarations.

HN4[↑] The *Sixth Amendment* guarantees Appellant the right to effective assistance of counsel. *United States v. Gilley, 56 M.J. 113, 124 (C.A.A.F. 2001)*. In assessing the effectiveness of counsel we apply the standard set forth in *Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*, and begin with the presumption of competence announced in *United States v. Cronic, 466 U.S. 648, 658, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)*. *See Gilley, 56 M.J. at 124* (citing *United States v. Grigoruk, 52 M.J. 312, 315 (C.A.A.F. 2000)*).

Accordingly, we "will not second-guess the strategic or tactical decisions made at trial by defense counsel." *United States v. Mazza, 67 M.J. 470, 475 (C.A.A.F.*

2009). HN5[] When Appellant "attacks the trial strategy or tactics of the defense counsel, [he] must show specific defects in counsel's performance that were 'unreasonable under prevailing professional norms.'" Id. (quoting United States v. Perez, 64 M.J. 239, 243 (C.A.A.F. 2006)). We review allegations of ineffective assistance of counsel de novo. United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (citing Mazza, 67 M.J. at 474).

We utilize the following three-part test to determine whether the presumption of competence has been overcome:

> 1. Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions"?
>
> 2. If the allegations are true, did defense counsel's level of advocacy "fall measurably below the performance **[*26]** . . . [ordinarily expected] of fallible lawyers"?
>
> 3. If defense counsel was ineffective, is there "a reasonable probability that, absent the errors," there would have been a different result?

Gooch, 69 M.J. at 362 (quoting United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991)).

The record in Appellant's case and the declarations of trial defense counsel refute Appellant's ineffective assistance of counsel allegations.[4] Trial defense counsel's explanations and actions in this case were reasonable, and their level of advocacy well within the performance ordinarily expected of fallible lawyers. Accordingly, we find trial defense counsel competently represented Appellant. Appellant's counsel were presumed to be competent and Appellant failed to overcome that presumption.[5]

D. Sentence Severity

After being convicted of the offenses to which he pleaded guilty, Appellant faced a maximum sentence of a dismissal, 57 years of confinement, and forfeiture of all pay and allowances. The military judge sentenced Appellant to a dismissal and seven years of confinement. In exchange for Appellant's agreement to plead guilty to certain offenses, *inter alia*, the convening authority agreed to approve no confinement in excess of seven years. Accordingly, the convening authority approved **[*27]** the adjudged sentence.

Now, Appellant seeks sentence relief, positing that "[d]espite the fact that [his] sentence is the result of a pretrial agreement, the confinement that [he] has received as a result of his sentence is disproportionate to the charged offenses." Appellant asks us to "focus on the career accomplishments for which [he] has been recognized." He maintains that his "unjustly severe" sentence "should be reduced to represent the actual crime [sic] committed in relation to the evidence in extenuation and mitigation presented."

HN6[] We review sentence appropriateness de novo. United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006). "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial." United States v. Anderson, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009). Although we are accorded great discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. Nerad, 69 M.J. at 146.

We have given individualized consideration to Appellant, the nature and seriousness of the offenses, Appellant's record of service, and all other matters contained in the record of trial. We disagree with Appellant and find that his sentence of a dismissal **[*28]** and seven years of confinement *does* "represent the actual crime[s] in relation to the evidence in extenuation and mitigation." Appellant admitted to committing the "actual crimes" of sexual assault, abusive sexual contact, making false official statements to investigators, conduct unbecoming an officer for falsely accusing an Airman of sexually assaulting him, disobeying an order, violating a regulation, and fraternization. Appellant's sentence was not inappropriately severe based on the facts and circumstances of his case.

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[4] Having applied the principles announced in United States v. Ginn, 47 M.J. 236, 248 (C.A.A.F. 1997), and considered the entire record of Appellant's trial, a guilty plea during which he expressed his satisfaction with trial defense counsel, we find we can resolve the issues raised by Appellant without additional fact-finding.

[5] In addition to the specific claims identified in this opinion, we considered all other ineffective assistance of counsel claims raised by Appellant in his declarations and briefs pursuant to Grostefon, 12 M.J. 431. We reject those remaining claims as they require no additional analysis nor warrant relief. *See* Matias, 25 M.J. at 363.

III. CONCLUSION

The findings of guilt and the sentence are correct in law and fact and no error materially prejudicial to the substantial rights of Appellant occurred. *Articles 59(a)* and *66(c)*, UCMJ, *10 U.S.C. §§ 859(a)*, *866(c)*. Accordingly, the findings and sentence are **AFFIRMED**.[6]

End of Document

[6] Appellant noted that the Court-Martial Order (CMO) erroneously identifies the Additional Charge as violating "*Article 12*." This appears to be merely a typographical error and Appellant claimed no prejudice as a result of this error; however, we direct promulgation of a corrected CMO to remedy this mistake.