United States Court of Appeals
for the Armed Forces
Washington, D.C.

Peter T. Roukis,

Petitioner

v.

United States Army,

Respondent

USCA Dkt. No. 18-0005/AR

ORDER

On consideration of the petition for extraordinary relief, it is, by this Court, this 19th day of October, 2017,

ORDERED:

That the petition for extraordinary relief is hereby dismissed for lack of jurisdiction.

For the Court,

/s/ Joseph R. Perlak
Clerk of the Court

cc: The Judge Advocate General of the Army
Petitioner (Pro Se)
Counsel for Respondent

APPENDIX 1

UNITED STATES, Appellee v. Private E2 PETER T. ROUKIS, JR., United States Army, Appellant
UNITED STATES ARMY COURT OF CRIMINAL APPEALS
60 M.J. 925; 2005 CCA LEXIS 63
ARMY 9800587
March 2, 2005, Decided

Editorial Information: Subsequent History

Review granted by United States v. **Roukis**, 62 M.J. 213, 2005 CAAF LEXIS 1019 (C.A.A.F., 2005)Review granted by, Affirmed by United States v. **Roukis**, 62 M.J. 212, 2005 CAAF LEXIS 1009 (C.A.A.F., 2005)

Editorial Information: Prior History

Joint Readiness Training Center and Fort Polk. Larry S. Merck, Military Judge, Colonel Christopher M. Maher, Staff Judge Advocate.

Disposition:

Affirmed.

Counsel For Appellant: David P. Sheldon, Esquire (argued); Karen L. Hecker, Esquire; Major Sean S. Park, JA (on brief); David P. Sheldon, Esquire; Karen L. Hecker, Esquire; Captain Katy Martin, JA (on reply brief).

For Appellee: Captain Janine P. Felsman, JA (argued); Colonel Lauren B. Leeker, JA; Lieutenant Colonel Margaret B. Baines, JA; Major Jennifer H. McGee, JA (on brief).

Judges: Before HARVEY, BARTO, and SCHENCK, Appellate Military Judges.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant sought review pursuant to Unif. Code Mil. Justice art. 66(c), 10 U.S.C.S. § 866(c), of a conviction, by a general court-martial composed of members authorized to adjudge death, of absence without leave, premeditated murder, and assault. The convening authority approved the adjudged sentence of a dishonorable discharge, confinement for life, forfeiture of all pay and allowances, reduction to Private E1, and a reprimand.There was sufficient evidence for convening authority to find appellant guilty of premeditated murder because appellant considered and reconsidered his actions when after failing to strangle his wife with bootlace and discovering that she still had a pulse, he left the room to get two knives to stab her so he could be sure that she would not talk.

OVERVIEW: Appellant's defense was that he lacked the ability to act with premeditation, as required under Unif. Code Mil. Justice art. 118, 10 U.S.C.S. § 918, because he suffered from mental disorders or was acting out in a "blind rage." The court found that appellant did not have a severe mental disease or defect and that, notwithstanding an apparent personality disorder, there was sufficient evidence to find that appellant consciously conceived the thought of taking his wife's life well before he murdered her.

APPENDIX A

17364045

Appellant had numerous opportunities to consider and reconsider his actions during a series of assaults. When he discovered that his wife still had a pulse after trying to strangle her with a bootlace, he went into the kitchen and returned with two knives to ensure that she would not talk. When the first knife did not work, appellant used the second knife to complete the homicide. The fact that appellant might have been enraged at the time did not necessarily demonstrate that he was deprived of the ability to premeditate. The court also found no reason to depart from the mandatory minimum sentence of life imprisonment because of appellant's actions and the nature of the offense.

OUTCOME: The court affirmed the findings of guilty and the sentence and credited appellant with confinement time.

LexisNexis Headnotes

Military & Veterans Law > Military Offenses > Murder
Military & Veterans Law > Military Justice > General Overview
Criminal Law & Procedure > Criminal Offenses > Homicide > Murder > Capital Murder > Elements
Criminal Law & Procedure > Criminal Offenses > Homicide > Murder > Capital Murder > Penalties
Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview
Military & Veterans Law > Military Justice > Appeals & Reviews > Courts of Criminal Appeals

The court considers an offense a "capital case" where the convening authority refers an offense punishable by death, i.e., premeditated murder, to a general court-martial without an instruction that the case be treated as noncapital. R.C.M. 103(2), Manual Courts-Martial.

Military & Veterans Law > Military Offenses > Murder
Military & Veterans Law > Military Justice > Appeals & Reviews > Courts of Criminal Appeals

See Unif. Code Mil. Justice art. 118, 10 U.S.C.S. § 918.

Military & Veterans Law > Military Offenses > Murder

See Manual Courts-Martial pt. IV, para. 43c(2)(a) (1995).

Military & Veterans Law > Military Offenses > Manslaughter
Military & Veterans Law > Military Offenses > Murder
Criminal Law & Procedure > Criminal Offenses > Homicide > Voluntary Manslaughter > General Overview
Criminal Law & Procedure > Criminal Offenses > Homicide > Voluntary Manslaughter > Elements
Military & Veterans Law > Military Justice > Appeals & Reviews > Courts of Criminal Appeals

An accused cannot be found guilty of premeditated murder if, at the time of the killing, his mind was so confused by rage or fear that he could not or did not premeditate. Such an unlawful killing, although done with an intent to kill or inflict great bodily harm, is not murder but voluntary manslaughter if committed in the heat of sudden passion caused by adequate provocation. Manual Courts-Martial pt. IV, para. 44c(1)(a); Unif. Code Mil. Justice art. 119(a), 10 U.S.C.S. § 919(a). Conversely, the provocation must be adequate to excite uncontrollable passion in a reasonable person, and the act of killing must be committed under and because of the passion. Manual Courts-Martial pt. IV, para. 44c(1)(b).

Military & Veterans Law > Military Offenses > Murder

The fact that an individual may have been enraged at the time of the killing, whether as a result of his particular personality disorder or the circumstances of his marriage, does not necessarily demonstrate that he was deprived of the ability to premeditate or that he did not premeditate.

Military & Veterans Law > Military Justice > Appeals & Reviews > Courts of Criminal Appeals
Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review
Military & Veterans Law > Military Justice > Sentencing > Impeachment & Reconsideration
Criminal Law & Procedure > Appeals > General Overview

The United States Army Court of Criminal Appeals may approve only so much of a sentence as is appropriate. Unif. Code Mil. Justice art. 66(c), 10 U.S.C.S. § 866(c). It must independently determine, in every case within its limited art. 66 jurisdiction, the sentence appropriateness of each case it affirms. Sentence appropriateness shall be evaluated through individualized consideration of the particular accused on the basis of the nature and seriousness of the offense and the character of the offender. "A soldier shall not receive a more severe sentence than otherwise generally warranted by the offense, the circumstances surrounding the offense, his acceptance or lack of acceptance of responsibility for his offense, and his prior record. Accordingly, the punishment shall fit the offender and not merely the crime. The court can conduct such review even in a case where the sentence adjudged was a mandatory minimum of confinement for life in prison.

Military & Veterans Law > Military Justice > Sentencing > Credits
Criminal Law & Procedure > Sentencing > Credits

Sentence credits are required be included in the initial action.

Opinion

{60 M.J. 926} OPINION OF THE COURT

Per Curiam:

A general court-martial composed of officer and enlisted members authorized to adjudge death 1 convicted appellant, contrary to his pleas, of absence without leave, premeditated murder, and assault consummated by a battery, in violation of Articles 86, 118, and 128, Uniform Code of Military Justice, 10 U.S.C. 886, 918, and 928, respectively [hereinafter UCMJ]. The convening authority approved the adjudged sentence consisting of a dishonorable discharge, confinement for life, forfeiture of all pay and allowances, reduction to Private E1, and a reprimand.

This case is before the court for review pursuant to Article 66, UCMJ. Appellant asserts a number of issues on appeal; none have merit, but appellant's two claims that the evidence is insufficient to establish premeditation and that the sentence is inappropriate warrant some discussion.

Background

Appellant and Jennifer Passalacqua met when they were both attending basic training at Fort Jackson, South Carolina. They married on 29 November 1996 as they neared the completion of their training. After graduation, appellant and Jennifer were assigned to separate companies at Fort Polk, Louisiana. Not long after arriving, their marital discord turned violent.

On 9 February 1997, appellant and Jennifer argued while they were at the local Wal-Mart, but

Jennifer walked away from appellant before the conflict became physical. Approximately two hours later, appellant found Jennifer coming out of Wal-Mart, drove up behind her, and told her to get into his car. When Jennifer refused and kept walking, appellant got out of his car, walked up behind her, and choked her with his hands until she almost passed out.

On the next duty day, Jennifer reported the battery to her chain of command. As a result, appellant and Jennifer were referred to the Army's Family Advocacy Program, and began attending individual and group counseling sessions. As the counseling progressed, Jennifer continued to live with appellant in their on-post quarters. Their marital situation, however, did not improve.

In late March, appellant and Jennifer got into another argument because Jennifer had stayed out all night at a party and appellant concluded Jennifer was having an extramarital affair. Jennifer moved into the barracks after appellant threw her clothes out of their on-post quarters. Soon after, she sought counseling from a chaplain and a separation agreement from a military legal assistance attorney. Jennifer told the chaplain that she was afraid of appellant after the Wal-Mart incident and was going to file for divorce. **{60 M.J. 927}** Their relationship became more strained when a friend of appellant's, Private (PVT) Daniel Nichols, told appellant that he had seen Jennifer in her car with another man. Appellant responded that should Jennifer leave him, he "might do something stupid, kill her or something."

In the days leading up to Jennifer's death, appellant unsuccessfully attempted to visit Jennifer at the barracks and tried to contact her by phone to express his despair at the direction their marriage was heading. Jennifer's mother and brother then came to Fort Polk to offer their guidance and support to Jennifer and appellant. They also wanted to say goodbye to appellant, who was scheduled to deploy to Bosnia within a few months. At the end of her family's visit, Jennifer announced that she was going to give her marriage to appellant one more try. Jennifer, however, delayed moving back in with the appellant, although she continued to meet appellant for lunch and had intimate relations with him. Appellant once again became suspicious that Jennifer was having an extramarital affair.

On Saturday, 19 April 1997, Jennifer told appellant that she could not move back in with him due to "a military transport mission." In actuality, Jennifer and Specialist (SPC) Timothy McCarty took a friend to the airport. After drinking a few beers, appellant could not sleep and spent several hours looking for Jennifer between the barracks and the motor pool. Appellant eventually saw Jennifer coming out of the barracks with SPC McCarty, and appellant confronted them in the parking lot.

Jennifer told appellant that SPC McCarty was driving her to the firing range. Suspecting that Jennifer was cheating on him with SPC McCarty, appellant lied and told Jennifer that his father was dying and that he needed her to come home with him. Jennifer agreed to go with appellant and started to walk away with him. Specialist McCarty then saw that appellant was excited, yelling and waving his arms at Jennifer, so SPC McCarty called out to Jennifer to come back to where he was standing. Jennifer returned with appellant, and appellant cursed at SPC McCarty when SPC McCarty asked what was wrong. Specialist McCarty noticed that appellant's lips were quivering and his hands were shaking. Specialist McCarty asked to speak with Jennifer alone and, outside appellant's hearing, warned her not to go with appellant because "he was not acting right." Jennifer told SPC McCarty, "I'll be back in an hour," but SPC McCarty never saw Jennifer again.

Appellant and Jennifer were alone after they arrived at their quarters. 2 Appellant immediately demanded that Jennifer tell him the truth about her relationship with SPC McCarty. Jennifer initially denied that she was having an affair, but later admitted to engaging in sexual intercourse with SPC McCarty. Appellant was angry and began to ask more questions. Jennifer then picked up her car keys and attempted to leave the quarters. Appellant then struck her in the face with his fist and knocked off her glasses. She dropped her keys and began to fall, crying out - "Peter, No!" Appellant

grabbed her around the neck as she fell and began to choke her. Appellant continued to choke her until he could no longer hold her due to fatigue. He then put Jennifer in a headlock until he could regain his strength. As she slid to the ground, he shoved his fist into her neck to further prevent her from breathing. Appellant later recounted that it was during this time that he thought to himself, "Peter, this is all wrong--what are you doing?"

Appellant recognized that Jennifer was apparently losing consciousness, but then he saw her stomach move and realized that she was still alive. Appellant "was overcome with a fear that she would report his behavior to the chain of command . . . [and thought] 'she'll tell someone [he had] done this and things will be even more messed up.'" He saw a bootlace nearby, grabbed it, wrapped it twice around her neck, and **{60 M.J. 928}** pulled. Appellant listened for further breathing from Jennifer as he pulled the bootlace tighter around her neck, and then checked for a pulse. He realized that Jennifer was still alive when he detected her pulse.

Appellant then went to the kitchen and selected two knives from a drawer: a serrated knife and a carving knife. As he took the knives out, he heard what he believed to be Jennifer's breath escape from her lungs. He later described his anxiety about being caught, saying, "If there had been a sword or a gun in the house I would have used it. I wanted her dead, I needed to be sure she wouldn't talk." He proceeded to stab Jennifer with the serrated knife, but it bent as he stabbed through her breast. He next tried to cut her neck using the same knife, but it was equally ineffective. Appellant then took the larger carving knife and "continued to slice" in a sawing motion back and forth across Jennifer's throat. Appellant finished by embedding the carving knife so deeply into Jennifer's neck that approximately four inches of the knife extended out the other side of her neck. He knew that Jennifer was dead because he saw that "her eyes were dull and kind of rolled back in her head." Appellant quickly cleaned himself and left the area in his car.

On Monday morning, 21 April 1997, after appellant and Jennifer both failed to report to their respective morning formations or work call, military authorities discovered Jennifer's lifeless body on the living room floor of appellant's on-post quarters with a bootlace still wrapped around her neck, a stab wound in her chest, and the carving knife still imbedded in her neck. Appellant was eventually apprehended in New York, where he was staying with his parents during his unauthorized absence. While in the custody of the New York City Police Department, appellant spontaneously stated to a nearby detective, "If your wife was fucking everybody on the base, you would have done the same thing that I did? You would have killed her, too, just like I did." Upon return to military custody, appellant also told Special Agent Marker of the U.S. Army Criminal Investigation Command that "he had killed his wife, but it was not premeditated."

Appellant's defense at trial centered on the question of whether he premeditated the death of his wife or lacked the ability to do so because he suffered from various mental disorders, was acting out in a "blind rage," or both. An inquiry into appellant's mental capacity or responsibility was conducted prior to trial, and concluded that appellant did not have a severe mental disease or defect at the time of the killing. The inquiry did conclude, however, that appellant suffered from "Major Depressive Disorder, Recurrent, Moderate" and "Marital Problem" on Axis I, 3 and from "Personality Disorder, not otherwise specified with narcissistic and antisocial features" on Axis II. 4 Three mental health professionals testified on appellant's behalf at trial.

A forensic psychiatrist, Major (Dr.) David Benedek, participated in the pretrial inquiry into appellant's mental responsibility and testified on behalf of appellant at trial. At trial, Dr. Benedek stood by the earlier diagnosis described above, and opined that appellant had not premeditated "at the time [he] embarked on his altercation that resulted in his wife's death." Doctor Benedek further testified that appellant's "mental state, his emotions at that time, were a mixture of ongoing despair, of a sense of

betrayal and tremendous anger." On cross-examination, Dr. Benedek conceded that appellant had intended to kill his wife at some point during the offense, and that appellant had told him, "If there had been a sword or a gun in the house I would have used it. I wanted her dead, I needed to be sure she wouldn't talk."

{60 M.J. 929} Another forensic psychiatrist, Lieutenant Commander (Dr.) Kevin Moore, United States Navy, examined appellant before trial and testified on his behalf. Doctor Moore diagnosed appellant with a variety of mental disorders, including "Major Depressive Episode, Recurrent," "Partner Relational Problem," and "Severe Personality Disorder, Not Otherwise Specified." Doctor Moore testified that appellant was having "a fit of rage" at the time of the offense, and "that, because of [appellant's] vulnerabilities and because of the stress at that time, that it was unlikely that he could have premeditated." Like Dr. Benedek, however, Dr. Moore also acknowledged that appellant had the intent to kill his wife at the time of the offense, and opined that appellant did not suffer from a severe mental disease or defect at that time.

A clinical psychologist, Commander (Dr.) Jerry Brittain, United States Navy, examined appellant and testified on his behalf at trial. Doctor Brittain acknowledged that appellant did not have a severe mental disease or defect, but he did determine appellant had a "Personality Disorder, not otherwise specified with narcissistic and borderline features." Doctor Brittain testified that an individual with a "borderline personality" may, under severe stress, have a "mini-psychotic event" in which the person becomes "acutely psychotic for very short periods of time and then will reconstitute and then will not be psychotic." While Dr. Brittain recognized that appellant did not have a "borderline personality," he nevertheless agreed with the proposition that appellant "might have had a mini-psychotic episode" as a result of "narcissistic rage" on the date of the offense at issue. Doctor Brittain speculated that if appellant had, in fact, experienced a "mini-psychotic episode" while assaulting and killing Jennifer, appellant would not have been able to appreciate the nature and quality or wrongfulness of his conduct. Moreover, Dr. Brittain opined that appellant could not possess a premeditated design to kill.

Notwithstanding this testimony, the panel returned nonunanimous findings of guilty as to all offenses.

Discussion

Appellant asserts that the evidence is legally and factually insufficient to support the guilty findings as to premeditated murder. "Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he . . . has a premeditated design to kill . . . shall suffer death or imprisonment for life as a court-martial may direct." UCMJ art. 118. "Premeditated murder is murder committed after the formation of a specific intent to kill someone and consideration of the act intended. It is not necessary that the intention to kill have been entertained for any particular or considerable length of time." *Manual for Courts-Martial* (1995 ed.), Part IV, para. 43c(2)(a) [hereinafter *MCM*]; *see United States v. Cole*, 54 M.J. 572, 580 (Army Ct. Crim. App. 2000).

However, an accused cannot be found guilty of premeditated murder if, at the time of the killing, his mind was so confused by rage or fear that he could not or did not premeditate. Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 3-43-1, at 401 (30 Jan. 1998) [hereinafter DA Pam 27-9]. Such "an unlawful killing, although done with an intent to kill or inflict great bodily harm, is not murder but voluntary manslaughter if committed in the heat of sudden passion caused by adequate provocation." *MCM*, Part IV, para. 44c(1)(a); *see* UCMJ art. 119(a); *United States v. Schap*, 49 M.J. 317, 321 (C.A.A.F. 1998). Conversely, "the provocation must be adequate to excite uncontrollable passion in a reasonable person, and the act of killing must be committed *under and because of the passion*." *MCM*, Part IV, para. 44c(1)(b) (emphasis added).

We have weighed the evidence and made allowances for not having personally observed the

witnesses. *See* UCMJ art. 66(c). As a threshold matter, we find that appellant did not have a severe mental disease or defect. We also find that, notwithstanding an apparent personality disorder, appellant consciously conceived the thought of taking Jennifer's life well before he murdered her. For example, appellant told PVT **{60 M.J. 930}** Nichols before the murder that he might kill Jennifer if she left him.

Appellant also had numerous opportunities to consider and reconsider his intentions and desist during his escalating series of assaults upon Jennifer. We find appellant considered his actions when he first shoved his fist into Jennifer's neck to prevent her from further breathing and thought to himself, "Peter, this is all wrong--what are you doing?" Appellant also reconsidered his actions and intent to kill Jennifer when he realized that she was still alive after his failed efforts to manually strangle her and he "was overcome with a fear that she would report his behavior to the chain of command . . . [and thought] 'she'll tell someone I've done this and things will be even more messed up.'"

We also find that appellant further considered his actions when, after failing to strangle Jennifer with a bootlace, he checked her body for a pulse, discovered that she was still alive, left the room, entered the kitchen, sifted through a drawer looking for a knife, and returned with two knives to where Jennifer lay so that he could be "sure she wouldn't talk." Appellant then reconsidered his actions a final time after he tried to stab Jennifer with the serrated knife, which bent as he stabbed through her breast. This consideration is evidenced by the fact that appellant shifted his efforts and tried to cut Jennifer's neck using the same knife, but it was equally inadequate to that task. Appellant then took the larger carving knife, "continued to slice" in a sawing motion back and forth across Jennifer's throat, and completed the homicide by embedding it in Jennifer's neck.

Moreover, we need not accept as conclusive the expert opinions that appellant could not premeditate Jennifer's death, and note that Drs. Benedek and Moore both admitted that their diagnoses did not rule out the possibility that appellant had a premeditated design to kill. The fact that appellant may have been enraged at the time of the killing, whether as a result of his particular personality disorder or the circumstances of his marriage, "does not necessarily demonstrate that he was deprived of the ability to premeditate or that he did not premeditate." DA Pam 27-9, para. 3-43-1, at 401-02; *see Schap*, 49 M.J. at 321-324.

As our superior court noted in *United States v. Hoskins*, 36 M.J. 343 (C.M.A. 1993),

> It has been suggested that for premeditation the killer asks himself the question, 'Shall I kill him?' The intent to kill aspect of the crime is found in the answer, 'Yes, I shall.' The deliberation part of the crime requires a thought like, 'Wait, what about the consequences? Well, I'll do it anyway.' *Id.* at 346 (quoting W. LaFave and A. Scott, *Substantive Criminal Law* § 7.7(a) (1986)). This passage closely describes appellant's thought process in this case. Considered in this light, appellant's multiple opportunities for cool reflection upon his intended acts are more than sufficient to persuade us beyond a reasonable doubt that appellant had a premeditated design to kill Jennifer during his assault upon her. 5 *See MCM*, Part IV, para. 43b(1)(d). Based on all the evidence and our findings of fact above, we are satisfied beyond any reasonable doubt of the appellant's guilt of the offenses of which the members found him guilty. *See generally United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987) (setting forth the test for factual sufficiency). Having found the evidence factually sufficient, it is self-evident that we also conclude that it is legally sufficient. *See generally Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979) (setting forth the test for legal sufficiency).

Appellant also contends that life imprisonment is inappropriately severe under the circumstances of his case. This court may approve only so much of the sentence as is appropriate. UCMJ art. 66(c).

We must "independently determine, in every case within our limited Article 66, UCMJ, jurisdiction, the sentence appropriateness of each case we affirm." *United States v. Bauerbach*, 55 M.J. 501, 506 (Army Ct. Crim. App. 2001). Sentence appropriateness should be **{60 M.J. 931}** evaluated through "'individualized consideration' of the particular accused on the basis of the nature and seriousness of the offense and the character of the offender." *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 10 U.S.C.M.A. 102, 106, 27 C.M.R. 176, 180-81 (1959)). A soldier "should not receive a more severe sentence than otherwise generally warranted by the offense, the circumstances surrounding the offense, his acceptance or lack of acceptance of responsibility for his offense, and his prior record." *United States v. Aurich*, 31 M.J. 95, 97 n.* (C.M.A. 1990); *see Bauerbach*, 55 M.J. at 505-06. Accordingly, the punishment should "fit the offender and not merely the crime." *United States v. Wright*, 20 M.J. 518, 519 (A.C.M.R. 1985). This court can conduct such review even in a case where the sentence adjudged was a mandatory minimum of confinement for life in prison. *See United States v. Jefferson*, 7 U.S.C.M.A. 193, 194, 21 C.M.R. 319, 320 (1956) (holding board of review has power to reduce sentence without reducing findings in premeditated murder case); *United States v. Anderson*, 36 M.J. 963, 987 (A.F.C.M.R. 1993) (reviewing sentence appropriateness issue under Article 66(c) in premeditated murder case with mandatory minimum sentence).

Appellant's acts, character, and mental state at the time of the offense place this case squarely within the "heartland" of premeditated-murder offenses. Notwithstanding appellant's mental condition, we find no reason in the record of this case to depart from the mandatory minimum sentence established by Congress for premeditated murder. *See* UCMJ art. 118. A sentence of confinement for life is, under the facts of this case and in our specific determination, fair, just, and appropriate. *See United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005) (citing *Bauerbach*, 55 M.J. at 504).

The remaining issues raised by appellant are without merit. We note, however, that the convening authority's initial action and promulgating order failed to reflect the 365 days of confinement credit that the parties agreed were due to appellant for his time in pretrial confinement. 6 We will correct this administrative error rather than returning appellant's case to the convening authority. The appellant will be credited with 365 days of confinement against the sentence to confinement. *See United States v. Delvalle*, 55 M.J. 648, 649 n.1, 656 (Army Ct. Crim. App. 2001); *United States v. Arab*, 55 M.J. 508, 510 n.2, 520 (Army Ct. Crim. App. 2001).

The findings of guilty and the sentence are affirmed.

Footnotes

1

This was a "capital case" in that the convening authority referred an offense punishable by death, i.e., premeditated murder, to a general court-martial "without an instruction that the case be treated as noncapital." Rule for Courts-Martial [hereinafter R.C.M.] 103(2).

2

Appellant's statements during the inquiry into his mental responsibility provide the only eyewitness account of Jennifer's last few minutes of life. An extract of the report concerning appellant's mental responsibility was prepared under the provisions of R.C.M. 706 and admitted into evidence without objection. The extract summarized and quoted appellant's statements describing his actions.

3

Axis I is where mental health professionals place the major mental disorders, including mood, thought, and anxiety disorders.
4

Axis II is where mental health professionals code personality and developmental disorders that are of a chronic nature. A personality disorder is a lifelong condition that represents a pattern of maladaptive behaviors and other unhealthy ways of dealing with stress. These disorders are subcategorized into several different varieties and an evaluation will determine if the patient meets the criteria for a specified personality disorder. If a person has characteristics from several disorders, but not enough characteristics to be classified under a specific disorder, the diagnosis will be one of "not otherwise specified."
5

We agree with the members' determination that appellant had sufficient mental capacity to have the premeditated design to kill and that he did not act "in the heat of sudden passion" to the degree that it prevented "cool reflection." *See United States v. Eby*, 44 M.J. 425, 428 (C.A.A.F. 1996).
6

See Army Reg. 27-10, Legal Services: Military Justice [hereinafter AR 27-10], para. 5-28a (24 Jun. 1996) (requiring that sentence credits be included in initial action). This requirement remains in effect. *See* AR 27-10, para. 5-31a (6 Sept. 2002).

U.S. v. Peter T. ROUKIS, Jr.
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES
62 M.J. 212; 2005 CAAF LEXIS 1009
No. 05-0455/AR.
September 9, 2005, Decided

Notice:

DECISION WITHOUT PUBLISHED OPINION

Editorial Information: Subsequent History

Habeas corpus proceeding at, Transferred by **Roukis** v. United States Army, 2010 U.S. Dist. LEXIS 23638 (E.D.N.Y., Mar. 11, 2010)Writ of habeas corpus denied, Dismissed by **Roukis** v. Superintendent, 2015 U.S. Dist. LEXIS 107792 (S.D. Ind., Aug. 17, 2015)

Editorial Information: Prior History

CCA 9800587. United States v. **Roukis**, 60 M.J. 925, 2005 CCA LEXIS 63 (A.C.C.A., 2005)

Opinion

On consideration of the petition for grant of review of the decision of the United States Army Court of Criminal Appeals, said petition is hereby granted and the decision of the United States Army Court of Criminal Appeals is affirmed.

U.S. v. Peter T. ROUKIS, Jr.
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES
67 M.J. 414; 2009 CAAF LEXIS 407
Misc. No. 09-8022/AR.
April 28, 2009, Decided

Notice:

DECISION WITHOUT PUBLISHED OPINION

Editorial Information: Prior History

CCA 20081145.

Opinion

Notice is hereby given that a writ-appeal petition under Rule 27(b) for review of the decision of the United States Army Court of Criminal Appeals on application for extraordinary relief was filed by mail on February 25, 2009, and placed on the docket this 28th day of April, 2009. On consideration thereof, said petition is hereby denied.

APPENDIX B

17364045

PETER ROUKIS, Petitioner, -v- UNITED STATES ARMY, Respondent.
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
2014 U.S. Dist. LEXIS 160690
No. 10-cv-2219-RA
November 14, 2014, Decided
November 14, 2014, Filed

Editorial Information: Prior History

Roukis v. United States, 2013 U.S. Dist. LEXIS 189091 (S.D.N.Y., Jan. 23, 2013)

Counsel Peter T. **Roukis**, Military Prisoner, Petitioner, Pro se, Terra Haute, IN. For United States Army, Respondent: Alexis Collins, LEAD ATTORNEY, U.S. Attorney's Office, Brooklyn, NY; Brandon Herbert Cowart, U.S. Attorney's Office, SDNY, New York, NY.

Judges: Ronnie Abrams, United States District Judge.

Opinion

Opinion by: Ronnie Abrams

Opinion

ORDER ADOPTING REPORT AND RECOMMENDATION

RONNIE ABRAMS, United States District Judge:

In this amended petition for a writ of habeas corpus (the "Petition"), filed pursuant to 28 U.S.C. § 2241, Petitioner Peter T. **Roukis** challenges his conviction by general court-martial and subsequent confinement. On January 23, 2013, Magistrate Judge Debra C. Freeman issued a Report and Recommendation (the "Report") recommending the dismissal of the Petition, to which Petitioner has objected. For the following reasons, the Court adopts the Report with the modifications stated herein.

PROCEDURAL HISTORY

In April 1998, Petitioner, who had been a private in the United States Army, was convicted by general court-martial of the pre-meditated murder of his wife, Jennifer **Roukis**. He was sentenced to a dishonorable discharge, forfeiture of all pay and allowances, reduction to Private El, a reprimand, and confinement for life. (United States Army's Response to Petition for Writ of Habeas Corpus ("Resp.") Ex. 11.) Petitioner then appealed his conviction and sentence to the United States Army Court of Criminal Appeals ("ACCA") and the United States Court of Appeals for the Armed Forces ("CAAF"). (Report 10.)

On January 30, 2006, after the completion of the military appellate courts' direct review of his case, Petitioner was discharged from the Army and his sentence became final under Article 76 of the

APPENDIX C

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LEGAL STANDARD

A district court reviewing a magistrate judge's report and recommendation "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). A court may accept portions of a report to which no objections are made as long as those portions are not "clearly erroneous." Greene v. WCI Holdings Corp., 956 F. Supp. 509, 513 (S.D.N.Y. 1997) (citing Fed. R. Civ. P. 72(b)). A court must undertake a *de novo* review of those portions to which specific objections are made. See § 636(b)(1); Greene 956 F. Supp. at 513 (citing United States v. Raddatz, 447 U.S. 667, 676, 100 S. Ct. 2406, 65 L. Ed. 2d 424 (1980)). However, "to the extent that the party makes only conclusory or general objections, or simply reiterates the original arguments, the Court will review the Report strictly for clear error." See, e.g., Alam v. HSBC Bank USA, N.A., No. 07 Civ. 3540 (LTS), 2009 U.S. Dist. LEXIS 89303, 2009 WL 3096293, at *1 (S.D.N.Y. Sept. 28, 2009). "Objections of *pro se* litigants are generally accorded leniency and construed to raise the strongest arguments that they suggest." Quinn v. Stewart, No. 10 Civ. 8692 (PAE) (JCF), 2012 U.S. Dist. LEXIS 46524, 2012 WL 1080145, at *4 (S.D.N.Y. April 2, 2012) (internal quotations omitted). "Nonetheless, even a *pro se* party's objections to a Report and Recommendation must be specific and clearly aimed at particular findings in the magistrate's proposal, such that no party be allowed a 'second bite at the apple' by simply relitigating a prior argument." Id. (quoting Pinkney v. Progressive Home Health Servs., 06 Civ. 5023 (LTS), 2008 U.S. Dist. LEXIS 55034, 2008 WL 2811816, at *1 (S.D.N.Y. July 21, 2008)).

The scope of federal habeas review of the decision of a military court-martial is circumscribed. Initially, the court "must determine whether the military courts gave full and fair consideration to the petitioner's claims." Brown v. Gray, 483 F. App'x 502, 504 (10th Cir. 2012). If the military courts gave full and fair consideration to a petitioner's claims, "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), reh'g denied, 346 U.S. 844, 74 S. Ct. 3, 98 L. Ed. 363 (1953). It is only when the military has not dealt fully and fairly with a claim that "the scope of review by the federal civil court expand[s]" and the federal civil court may reach the merits of the petitioner's claims. Lips v. Commandant, U.S. Disciplinary Barracks, 997 F.2d 808, 811 (10th Cir. 1993).

As a general matter, an issue has been given "full and fair consideration" when it has been "adequately briefed and argued before the military courts . . . even if the military court disposes of the issue summarily." Roberts v. Callahan, 321 F.3d 994, 997 (10th Cir. 2003). Similarly, a court's failure to hear oral argument is not fatal to "full and fair consideration." "[M]ilitary courts, like civilian courts, must diligently review all arguments presented by the parties," and courts "decline to presume a military appellate court has failed to consider all the issues presented to it before making a decision." Thomas v. U.S. Disciplinary Barracks, 625 F.3d 667, 671-72 (10th Cir. 2010).3

"Finally, a petitioner cannot argue that his claims were not given full and fair consideration by the military courts, if he never presents the claims to the military courts." Grafmuller v. Wegner, 13 Civ. 50 (RAJ) (DEM), 2013 U.S. Dist. LEXIS 130236, 2013 WL 4808881, at *8 (E.D. Va. Aug. 9, 2013), report and recommendation adopted, 2013 U.S. Dist. LEXIS 129449, 2013 WL 4804288 (E.D. Va. Sept. 5, 2013), aff'd, 571 F. App'x 184 (4th Cir. 2014); see also Roberts, 321 F.3d at 995; Watson v. McCotter, 782 F.2d 143, 145 (10th Cir. 1986). "If a habeas petitioner neither makes a timely objection to an issue nor raises the issue on appeal, then he has waived that claim." Grafmuller, 2013 U.S. Dist. LEXIS 130236, 2013 WL 4808881 at *8 (citing Lips, 997 F.2d at 812); see also Wolff v. United States, 737 F.2d 877, 880 (10th Cir. 1984). Relatedly, a petitioner seeking relief from an Article III court must first exhaust all remedies in the military courts. Loving v. U.S., 68 M.J. 1, 3 (C.A.A.F. 2009). To overcome procedural default and "obtain federal habeas review of claims based

on trial errors to which no objection was made at trial, or of claims that were not raised on appeal, a state prisoner must show both cause excusing the procedural default and actual prejudice resulting from the error." Lips, 997 F.2d at 812.

DISCUSSION

As noted previously, Petitioner asserts specific objections with respect to Claims One, Two, and Six but otherwise simply "object[s] to the Report and Recommendation in its entirety." (Obj. 3, 7, 10-11.) Where the objections address his six original claims, however, Petitioner merely reiterates the arguments made in the Petition. Petitioner does not mention the Report or its conclusions, nor does he suggest that the military courts failed to give full and fair consideration to his claims; instead he disputes "the merits of the military court decisions." See Christian v. Commandant, U.S. Disciplinary Bd., 436 F. App'x 870, 873 (10th Cir. 2011). As to these arguments, therefore, the Court reviews the Report for clear error. Alam, 2009 U.S. Dist. LEXIS 89303, 2009 WL 3096293, at *1. Petitioner also raises three new arguments in his objections to the Report. Because these arguments were not before Judge Freeman, they are considered separately in Section B, *infra*.

A. Claims Raised in the Petition

The record before Judge Freeman established that all of Petitioner's claims were previously raised in other proceedings before the military courts. In those proceedings, Petitioner briefed each of the claims, attaching numerous relevant documents, including legal briefs submitted by Petitioner's counsel and the Government during the court-martial proceedings and trial transcript excerpts. (See Resp. Exs. 10, 16-18, 21, 24, 27, 29.) In each instance, the ACCA and CAAF issued summary orders indicating that they had considered and denied the petitions. (Id. Exs. 5, 16, 18, 19, 22, 24, 25, 28.)4 On that basis, Judge Freeman reasonably concluded that all of Petitioner's claims were fully and fairly considered by the military courts.5

The summary orders do not, however, articulate the reasons for the denials, including whether the petitions were denied because Petitioner failed to raise his claims on direct review or because the claims failed on the merits. Likewise, the summary orders denying Petitioner's *habeas corpus* petitions do not address whether the military courts had jurisdiction to entertain the petitions, even though, as discussed in more detail below, such jurisdiction has been called into question.6 Nevertheless, to the extent that the military courts had jurisdiction to entertain the *habeas* petitions-a question this Court need not resolve-the Court agrees with Judge Freeman that Petitioner's claims received full and fair consideration by the military courts. See Thomas, 625 F.3d at 672 (declining to "presume a military appellate court has failed to consider all the issues presented to it before making a decision" when reviewing claims asserted in ACCA *habeas* petition); see also Armann v. McKean, 549 F.3d 279, 292-93 (3d Cir. 2008); Grafmuller, 2013 U.S. Dist. LEXIS 130236, 2013 WL 4808881, at *13.

Furthermore, even if the claims in the instant Petition had not been properly considered by the military courts on collateral review, all but one would nevertheless be procedurally barred in this § 2241 action. With the exception of Claim Six, which could not have been raised on direct appeal, Petitioner either failed to exhaust his claims in the military courts or waived them altogether. See Lips, 997 F.2d at 812; see also Lanthron v. Commandant of the United States Marine Corps., 173 F.3d 429, at *1 (6th Cir. 1999) (table opinion). Claims One and Two were not exhausted in the military courts; both claims were preserved at trial but not raised on direct appeal. Claims Four and Five, which assert ineffective assistance of trial counsel claims, were waived when they were not raised on direct appeal, even though Petitioner's appellate counsel raised other arguments regarding ineffective assistance of trial counsel. (Resp. Ex. 10.)7 In fact, despite the voluminous materials Petitioner submitted on appeal to the ACCA, only Claim Three was included in the appeal's nine

claims of error. (Id.) Even that claim, though, was not exhausted because it was not among the claims Petitioner further appealed to the CAAF. (Id. Ex. 4.)

In sum, Petitioner waived or failed to exhaust Claims One through Five in the military courts and he is thus procedurally barred from asserting those claims here. See Schlesinger v. Councilman, 420 U.S. 738, 758, 95 S. Ct. 1300, 43 L. Ed. 2d 591 (1975) ("[F]ederal courts normally will not entertain habeas petitions by military prisoners unless all available military remedies have been exhausted."); Lips, 997 F.2d at 812 (finding waiver where claims were not asserted at trial or on appeal); Hurn v. McGuire, 04 Civ. 3008 (RDR), 2005 U.S. Dist. LEXIS 8440, 2005 WL 1076100, at *2 (D. Kan. May 6, 2005) (declining to find exhaustion where Petitioner had not raised claims at trial or on direct appeal but presented them in *habeas* petition to the military courts).

To overcome procedural default and obtain habeas review, "the petitioner must demonstrate cause excusing the procedural default and prejudice resulting from the error." Grafmuller, 2013 U.S. Dist. LEXIS 130236, 2013 WL 4808881, at *8. Petitioner has demonstrated neither "cause" nor "prejudice." He fails to establish "cause" for his default because he offers no explanation as to why he failed to appeal Claim Three to the CAAF and altogether failed to raise Claims One and Two in his direct appeals. The same is true for Claims Four and Five; Petitioner's appellate counsel made other ineffective assistance arguments on direct appeal but the record contains no evidence justifying the failure to raise the claims asserted here. Indeed, nothing in the record suggests that there was any cause for Petitioner's procedural default as to the five claims. See Lips, 997 F.2d at 812; White v. Lansing, 8 F. App'x 862, 864 (10th Cir. 2001). Similarly, the record is devoid of any evidence of prejudice resulting from Petitioner's error, or any risk of a miscarriage of justice, which generally will apply "only in extraordinary cases, i.e., 'where a constitutional violation has probably resulted in the conviction of one who is actually innocent.'" Hurn, 2005 U.S. Dist. LEXIS 8440, 2005 WL 1076100, at *4 (quoting Murray v. Carrier, 477 U.S. 478, 496, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986)). The Court thus concludes that Petitioner has not overcome his procedural default.

As to Claim Six, the Court agrees with the Report's finding on the merits that Petitioner would not be entitled to relief for his transfer from the United States Military Barracks to the BOP. Judge Freeman correctly relied on 10 U.S.C. § 858(a), which expressly grants the military the authority to transfer prisoners to "any place of confinement under the control of any of the armed forces or in any penal or correctional institution under the control of the United States, or which the United States may be allowed to use." "Courts interpreting § 858(a) have 'consistently held that a military prisoner who is committed to the service of his sentence in a federal penitentiary automatically becomes entitled to any advantages and subject to any disadvantages which accrue to the civilian prisoner.'" Hirsch v. Sec'y of Army, 172 F.3d 878, at *1 (10th Cir. March 1, 1999) (table opinion) (quoting Stewart v. U.S. Bd. of Parole, 285 F.2d 421, 421-22 (10th Cir. 1960) (*per curiam*)). Furthermore, as Judge Freeman rightly observed, "a prisoner generally has no due process right to challenge a transfer from one facility to another." Prins v. Coughlin, 76 F.3d 504, 507 (2d Cir. 1996) (citing Meachum v. Fano, 427 U.S. 215, 225, 96 S. Ct. 2532, 49 L. Ed. 2d 451 (1976)); see also McNally v. Cooksey, 14 F.3d 604, at *8 (7th Cir. 1993) (table opinion) ("[P]laintiff has no constitutional right to choose his location of incarceration nor does he have a constitutional right to be transferred back to military custody."). Accordingly, Petitioner is not entitled to relief on the merits of Claim Six.

B. New Arguments Raised in Petitioner's Objections to the Report

Petitioner asserts three new arguments in his objections to the Report. First, he argues that the ACCA and CAAF lacked jurisdiction to entertain his petitions for collateral relief. (Obj. 5.) Second, Petitioner vaguely references changes in the "scope of inquiry on habeas corpus" petitions. (Id. 12-13.) Lastly, Petitioner attaches two documents, neither of which were submitted with the Petition,

for the Court's consideration: an August 23, 1999 letter from Petitioner's defense counsel to the convening authority advocating for a reduction in Petitioner's sentence, (id. 15-18),8 and a December 15, 1997 pre-trial "Sanity Board Forensic Evaluation," (id. 19-33).

As to these new arguments, Respondent asserts that the Court need not review them because they were improperly raised in objections to Judge Freeman's Report. (Resp. 3.) It is true that "[a]n objecting party may not raise new arguments that were not made before the Magistrate Judge," Robinson v. Keane, 92 Civ. 6090 (CSH), 1999 U.S. Dist. LEXIS 9766, 1999 WL 459811, at *4 (S.D.N.Y. June 29, 1999), and that "[c]ourts generally do not consider new evidence raised in objections to a magistrate judge's report and recommendation," Tavares v. City of New York, et al., 08 Civ. 3782 (PAE), 2011 U.S. Dist. LEXIS 135390, 2011 WL 5877548, at* 2 (S.D.N.Y. Nov. 23, 2011)). Because Petitioner is proceeding *pro se*, however, and in the interest of justice, the Court has considered his new arguments but concludes they are without merit. See Hall v. Herbert, 02 Civ. 2299 (LTS) (FM), 2004 U.S. Dist. LEXIS 1944, 2004 WL 287115, at *1 (S.D.N.Y. Feb. 11, 2004) (examining the merits of Petitioner's timeliness arguments, although asserted for the first time in his objection, "[i]n deference to Petitioner's pro se status and in the interests of the efficient administration of justice").

1. Petitioner's Objection to the Military Courts' Jurisdiction to Entertain Petitions for Writs of Habeas Corpus

Petitioner first argues that the military courts lacked subject-matter jurisdiction to entertain his petitions for collateral relief, which would preclude those courts from giving his claims "full and fair consideration." (Obj. 5-6.) As noted above, Claims One through Five were previously raised in *habeas corpus* petitions filed in the ACCA and CAAF, whose jurisdiction to entertain such petitions has been questioned.9 In United States v. Denedo (Denedo II), the Supreme Court held that "Article I military courts have jurisdiction to entertain *coram nobis* petitions to consider allegations that an earlier judgment of conviction was flawed in a fundamental respect," but simultaneously cast doubt on the jurisdiction of those courts to entertain *habeas corpus* petitions. 556 U.S. 904, 912-13, 917, 129 S. Ct. 2213, 173 L. Ed. 2d 1235 (2009). The Court explained that the military courts' jurisdiction to issue the *coram nobis* writ "derives from the earlier jurisdiction [they] exercise[] to hear and determine the validity of [a] conviction on direct review" and is thus "a belated extension of the original proceeding during which the error allegedly transpired," whereas *habeas corpus* relief, "is sought in a separate case and record" as "a separate civil proceeding." Id. at 913-14.10 Since Denedo II, the Supreme Court has not clarified whether military courts have jurisdiction over *habeas corpus* petitions and the issue remains unsettled. See Loving v. United States, 68 M.J. 1, 5 (C.A.A.F. 2009) (assuming jurisdiction over petitioner's appeal from the United States Navy-Marine Corps Court of Criminal Appeals' (NMCCA) denial of *habeas* petition); but see id. at 20-21 (Ryan, J., dissenting).11

In any event, the Court need not further address the legal uncertainty regarding the military courts' jurisdiction over Petitioner's *habeas corpus* petitions. Irrespective of whether the military courts could have otherwise entertained the petitions, as discussed above, Petitioner procedurally defaulted on Claims One through Five and he is barred from presenting those claims here. Consequently, Petitioner's argument regarding the military courts' jurisdiction is unavailing.

2. Changes in the Scope of Habeas Corpus

Petitioner next references changes in the scope of habeas corpus review in what is in its entirety an excerpt from Justice Frankfurter's opinion denying a petition for rehearing in Burns, 346 U.S. 844, 74 S. Ct. 3, 98 L. Ed. 363 (1953). (Obj. 12-13.) Whether the Court styles Petitioner's argument as a claim about recent changes in the scope of military habeas review or as a general claim about the

consideration afforded to his claims by the military courts, the argument is "not sufficiently specific to warrant review." Amadasu v. Ngati, 05 Civ. 2585 (RRM) (LB), 2012 U.S. Dist. LEXIS 129283, 2012 WL 3930386, at *3 (E.D.N.Y. Sept. 9, 2012).

3. New Evidence

Lastly, Petitioner attaches two documents: a 1999 letter from Petitioner's defense counsel to the convening authority advocating for a reduction in Petitioner's sentence and a copy of his pre-trial Sanity Board Forensic Evaluation. (Obj. 15-33.) Petitioner does not explain the relevance of these documents or why he failed to submit them with his Petition. In any event, the Court's consideration of the documents would not alter its decision to deny the Petition. The 1999 clemency letter is extraneous to the issues presented here. Any attempt to utilize the Sanity Board Forensic Evaluation, which was presented to the trial court along with pre-trial motions, (See Resp. Ex. 15), must fail. Petitioner procedurally defaulted on his claim regarding the introduction at trial of statements from his psychological evaluations (Claim One) as well as his claim regarding his mental competency (Claim Two). Moreover, any independent claim based on the evaluation was waived by Petitioner's failure to assert it in the military courts.

C. Certificate of Appealability

The Report recommends that the Court decline to issue a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(1)(A). (Report 26.) Because no certificate of appealability is necessary for an appeal of a denial of a petition under 28 U.S.C. § 2241, Drax v. Reno, 338 F.3d 98, 106 n.12 (2d Cir. 2003), the Court does not adopt that portion of the Report recommending the denial of a certificate of appealability.

CONCLUSION

The Court has reviewed all remaining matters in the Report for clear error and finds none. The Court adopts the Report and Recommendation of Judge Freeman with the modifications stated herein. Accordingly, the petition for a writ of habeas corpus is denied and the action is dismissed with prejudice. The Clerk of the Court is respectfully directed to close the case.

Dated: November 14, 2014

New York, New York

/s/ Ronnie Abrams

Ronnie Abrams

United States District Judge

Footnotes

1

In the Report, Judge Freeman consolidated Petitioner's second and third claims of trial error and his fourth and fifth claims of ineffective assistance of counsel. Because Petitioner's claims were raised at different levels of review within the military courts, however, the Court refers to each of the six discrete claims as they are alleged in the Petition.

2

Petitioner raised other, distinct issues regarding the performance of his trial counsel on direct appeal,

(Resp. Exs. 4, 10), but those claims were denied and not further pursued in any of the petitions for *habeas* or other extraordinary relief, (Id. Exs. 3, 5).
3

Thomas is instructive on this point. In that case, the ACCA summarily denied a petition for a writ of *habeas corpus* without hearing oral argument. 625 F.3d at 669-70. The Tenth Circuit affirmed the district court's dismissal of the petitioner's § 2241 petition on the ground that the petitioner's claims had been fully and fairly considered by the ACCA, explaining that "the thoroughness and adequacy of the briefing in this case, together with the broad deference [the Court] grant[s] to the military in collateral review of court-martial convictions, supports the district court's determination that Thomas' claims received full and fair consideration by the military court." Id. at 672 (internal citation omitted).
4

The ACCA issued a written opinion denying Petitioner's direct appeal, but summarily denied the only claim asserted here-Claim Three. (Resp. Ex. 5.)
5

With respect to Petitioner's fourth claim that Petitioner's trial counsel failed to advise Petitioner of a plea offer, although the Report states that Miller's Declaration had been "submitted by the Government in opposition to one of Petitioner's later applications for relief," (Report 6), it appears to have been submitted in opposition to Petitioner's habeas petition in this Court. (See Resp. Ex. 31.) Nevertheless, Petitioner briefed this claim before both the ACCA and CAAF in petitions for extraordinary relief, attaching to his petition to the ACCA a post-trial clemency letter in support of his assertion that a plea offer had been made. (Id. Ex. 18, App. D.)
6

The issue of the military courts' jurisdiction over Petitioner's petitions for collateral relief is not discussed in the Report as it was not raised by either Petitioner or Respondent prior to the filing of Petitioner's objections. The issue was, however, raised by the Army in a motion to dismiss Petitioner's 2008 petition for extraordinary relief. (Resp. Ex. 26.) The CAAF denied that motion as moot in its Order denying the petition. (Id., Ex. 25.)
7

These claims were previously asserted only in Petitioner's *habeas* petitions in the military appellate courts. (Resp. Exs. 18, 21.)
8

"A convening authority is a commissioned officer who has the statutory and regulatory authority to convene a court-martial." Victor Hansen, Avoiding the Extremes: A Proposal for Modifying Court Member Selection in the Military, 44 Creighton L. Rev. 911, 912 n.7 (2011). The power to approve a court-martial's sentence rests with the convening authority, who has discretion to grant clemency. See United States v. Sosebee, 35 M.J. 892, 894 (A.C.M.R. 1992).
9

Petitioner raised Claim Six in petitions seeking unspecified collateral relief from the ACCA and CAAF. Construed as *coram nobis* petitions, the petitions were indisputably within the jurisdiction of the military courts. Regardless, as discussed above, the Court agrees with Judge Freeman that Claim Six fails on the merits.
10

Some courts have downplayed the distinction between petitions seeking a writ of *coram nobis* and those seeking a writ of *habeas corpus*. See Nkosi v. Lowe, 38 M.J. 552, 553 (A.F.C.M.R. 1993) ("The label placed on a petition for extraordinary relief is of little significance."); United States v. Calhoun,

No. 12 Misc. 01, 2012 CCA LEXIS 470, 2012 WL 6762022, at *1 n.2 (A.F. Ct. Crim. App. Dec. 3, 2012) ("Although entitled a writ of habeas corpus, we will evaluate the petition as a writ of coram nobis. We note the petition was filed pro se and we do not place a great amount of significance to the label placed on a petition for extraordinary relief."); United States v. Lofton, No. 11 Misc. 10, 2013 CCA LEXIS 653, 2013 WL 3971423, at *1 n.1 (A.F. Ct. Crim. App. July 15, 2013) (treating petition for extraordinary relief in the nature of a writ of habeas corpus as a *coram nobis* petition and concluding that it had jurisdiction to entertain the petition). Moreover, in spite of the general requirement for *coram nobis* relief that "no remedy other than *coram nobis* [be] available to rectify the consequences of the error," Denedo v. United States (Denedo I), 66 M.J. 114, 126 (C.A.A.F. 2008), some military courts have continued to adjudicate petitions of military prisoners in custody who presumably could seek relief under § 2241 in an Article III court. See, e.g., Lofton, 2013 CCA LEXIS 653, 2013 WL 3971423, at *1 n.1.

11

The respective courts of criminal appeals for the armed forces have similarly not reached a consensus on the issue. Compare Gray v. Belcher, 70 M.J. 646, 647 n.2 (A. Ct. Crim. App. 2012) ("Although the reasoning in [Denedo I], and [Denedo II], could be construed to reach all forms of collateral review, their mutual holding is much more limited. Those cases extended collateral review beyond Article 76 only for writs of *coram nobis*."), with United States v. Miller, No. 09 Misc. 02, 2010 CCA LEXIS 293, 2010 WL 2342425, at *1-2 (A.F. Ct. Crim. App. May 27, 2010) (denying relief on the merits of *habeas* petition following completion of direct review and execution of petitioner's sentence).