No. 19-_____

IN THE

Supreme Court of the United States

DARYL SCOTT,

Pine Ridge Indian Reservation,

South Dakota,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the widespread fabrication and destruction of false DNA evidence by a government chemist for use at trial against U.S. servicemembers, and the failure of an Article I military court to reopen a conviction following the post-trial discovery of the chemist's misconduct, consistent with this Court's holdings in *Mesarosh v. United States* and *Giglio v. United States*, recognizing the principle that post-trial information can so discredit the credibility of a principal government witness that it undermines the integrity of the judicial process?

RELATED PROCEEDINGS

Petitioner is not aware of any related proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Hospital Corpsman Daryl Scott, United States Navy, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The Navy-Marine Corps Court of Criminal Appeals denied Mr. Scott's petition for a writ of *error coram nobis* on February 9, 2016, attached as Appendix at 1a. The Court of Appeals for the Armed Forces denied Mr. Scott's writ-appeal petition on April 27, 2016, attached as Appendix at 6a. The United States District Court for the District of Columbia issued a Memorandum Opinion and Order dismissing Mr. Scott's complaint on December 18, 2018, attached as Appendix at 7a. The United States Court of Appeals for the District of Columbia denied Mr. Scott's petition on June 25, 2019, and his petition for rehearing *en banc* on August 27, 2019, attached as Appendices at 25a and 26a.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTORY AND REGULATORY PROVISIONS

Articles 73 and 120 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 873 and 920.

STATEMENT OF THE CASE

I. Introduction

Hospital Corpsman Recruit Daryl Scott was convicted by a general court-martial, pursuant to his pleas, of rape in violation of Article 120, UCMJ,[1] in March, 2001. Approximately four years later, beginning in April of 2005, the United States Army Criminal Investigation Laboratory (USACIL) in Forest Park, Georgia discovered that one of its own forensic chemists, Mr. Phillip Mills, was fabricating DNA results in forensic testing.[2] As a result, the USACIL suspended Mr. Mills. He admitted to falsifying results and resigned in May, 2005. Eventually, USACIL conducted a multi-year, $1.55M Remediation Project (the Mills Project) to retest all of his work. The project report, entitled Quality Manager's Final Report – Mr. Phillip Mills, USACIL, DNA Examiner's Misconduct, was completed on September 30, 2008. It was incorporated into a later internal investigation that was not completed until 2012. Among other things, the Mills Project concluded:

> Mills' better than average productivity was due, probably in part, to an innate intellectual dishonesty coupled with his desire to be recognized as the most productive analyst in the lab…. The result…might have led to a miscarriage of justice.

Prior to anyone discovering Mr. Mills' misconduct, Petitioner, Hospitalman Daryl Scott had pled guilty to a rape that neither he nor the victim remembered occurring. He based his plea primarily on Mr. Mills purporting to discover a mixture of Petitioner's semen and the victim's vaginal fluid on a mattress stain. Hospitalman

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[1] 10 U.S.C. § 920 (2000).
[2] Administrative Record (AR) at 0079, 0183.

Scott had no reason to doubt the accuracy of the investigation. According to the Naval Criminal Investigative (NCIS) special agent assigned to the case, the DNA evidence was the only evidence that a rape occurred, "We had nothing else…we had nothing at all." At the time, Hospitalman Scott was a young sailor, less than a few years removed from graduating as high school valedictorian at the Pine Hill Indian Reservation, South Dakota, and enlisting in the U.S. Navy.

Following the revelations of Mr. Mills' misconduct, the military appellate counsel for Hospitalman Scott attempted to re-examine the case through the only means available, by asking the Article I military courts to order a *DuBay* evidentiary hearing,[3] since Mr. Mills' misconduct created doubt about the accuracy of the investigation. However, the military courts repeatedly refused to grant such a hearing.

As a result, Petitioner sought collateral relief in federal district court, seeking merely the ability to re-examine the voluntariness of his guilty plea through the means of a *DuBay* hearing. Petitioner had no other mechanism to investigate whether Mr. Mills falsified the results of the DNA sample in his case, investigate the circumstances of its destruction, and articulate the effect of Mr. Mills' misconduct on his guilty plea to rape. The lower court denied his Complaint, effectively holding that the use of potentially fabricated and fraudulently-destroyed DNA evidence by a government chemist in order to secure a court-martial conviction is consistent with

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

the standards laid out by the Supreme Court and the district court, which defined unconstitutionally unfair trials based on fabricated testimony and newly discovered evidence. The lower court's rationale for holding that Petitioner received a constitutionally fair trial was based, in part, on its determination that there was other evidence that "suggested" Petitioner committed the alleged offense of rape.

Both the Article I and Article III courts failed to apply the principles of this Court's holding in *Mesarosh v. United States*,[4] which pertains to cases when post-trial information related to fraud so discredits the credibility of a principle government witness that it undermines the integrity of criminal trials in federal courts.[5]

II. Legal and Factual Background

When, in April of 2005, the United States Army Criminal Investigation Laboratory (USACIL) discovered Mr. Phillip Mills was fabricating DNA results in forensic testing, the laboratory conducted several investigations. These investigations were not completed until 2012. Ultimately, the various investigations concluded that not only was Mr. Mills dishonest in his testing, but that he was also improperly "consuming" the samples, thereby making re-testing impossible.

Generally, when new physical or testimonial evidence is discovered after conviction of a service member, the Rules for Courts-Martial (R.C.M.) set out a three-prong test to determine whether a new trial shall be granted.[6] The reviewing court

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[4] 352 U.S. 1 (1956).
[5] *Id.* at 3, 9.
[6] RULE FOR COURTS-MARTIAL 1210(f)(2), MANUAL FOR COURTS-MARTIAL [MCM] (2008 ed.); 10 U.S.C. § 873 (2006).

examines: (1) whether the evidence was discovered after the trial; (2) if the evidence would not have been discovered by the petitioner at the time of trail in the exercise of due diligence; and (3) whether the newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.[7]

But in *Mesarosh*, this Court articulated an additional governing principle for the rare case where the government admits that one of its central witnesses has provided unreliable and inaccurate testimony in a number of separate cases. In *Mesarosh*, the government presented information that wholly discredited a government witness's credibility in unrelated proceedings. The credibility of the government witness implicated the "integrity of . . . criminal trial[s] in the federal court," and Mesarosh's conviction was set aside.[8] The integrity of criminal trials in the military is similarly threatened here. Therefore, this additional analysis is necessary—especially since Petitioner's conviction for rape rested almost entirely on the proposed testimony of the discredited expert.

During his guilty plea, Petitioner explained that he did not remember committing the alleged rape but that he must have done so given the government's purported forensic evidence. He stated he had no reason to doubt the investigation. Therefore, when the United States discovered the fraud that had been committed by the government chemist, Petitioner had reason to doubt the investigation. Therefore, the

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[7] *United States v. Brooks*, 49 M.J. at 69; R.C.M. 1210(f)(2); 10 U.S.C. § 873.
[8] *Mesarosh*, 352 U.S. at 3, 9.

voluntariness of the Petitioner's plea became doubtful. The discovery of the fraud should have triggered a *DuBay* hearing to determine the voluntariness of the plea.

Appellate courts have applied the general test for determining whether to grant a new trial based on newly discovered evidence. However, when presented with a wholly discredited government witness, they have had difficulty applying the unique considerations of *Mesarosh*, or neglected to engage in the analysis all together. When exclusively applied in cases where a central government witness's credibility is seriously undermined, the general test conflicts with this Court's precedent for determining whether to grant a new trial. Additionally, this case is of significant public importance as appellate courts require guidance as to how to apply this Court's precedential standard in *Mesarosh*.

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Divided on the Proper Application of this Court's Holding in *Mesarosh v. United States*.

In *Mesarosh*, this Court acknowledged certain unique circumstances in which the credibility of important government witnesses implicates the integrity of the judicial process.[9] Under these circumstances, only a judicial body equivalent to the original finder of fact may determine what it would do on a different body of evidence.[10]

There has been little uniformity in the application of *Mesarosh*. Circuit court judges have applied *Mesarosh* in a number of divergent and conflicting manners. For example, the Ninth Circuit and the Seventh Circuit have reached different

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[9] *Mesarosh*, 352 U.S. at 5–6.
[10] *Id.* at 6.

conclusions as to whether the testimony in question must be wholly discredited in order to invoke *Mesarosh* analysis. In *United States. v. Berry*,[11] the Ninth Circuit concluded that in order to invoke the *Mesarosh* analysis, the testimony in question must have been wholly discredited after trial.[12] But the Seventh Circuit in *United States v. Badger* used a standard requiring that the testimony in question be clearly inconsistent with the evidence discovered after trial.[13] This represents a substantial difference in analysis as one standard is much higher than the other and potentially leads to substantially different analyses and results.

Additionally, appellate courts have considered different factors to be relevant to analysis under *Mesarosh*. In *United States v. Miller*, the Third Circuit considered the government's admission that its witness committed perjury relevant to its *Mesarosh* analysis.[14] It is unclear whether government admission of the unreliability of the essential witness's testimony is a key factor under *Mesarosh*. The Third Circuit has analyzed it as such, yet other circuit courts have not engaged in this same analysis. Furthermore, the Eighth Circuit has held that in order for *Mesarosh* to apply, the testimony must have been brought into question due to accusations of perjury,[15] as opposed to other disqualifying acts, such as mere incompetence. This application has the potential to lead to substantially different results as *Mesarosh* will have a much more limited application if it only applies to cases in which the

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[11] 624 F.3d 1031 (9th Cir. 2010).
[12] *Id.* at 1043.
[13] 983 F.2d 1443, 1457 (7th Cir. 1993).
[14] 59 F.3d 417, 422-23 (3rd Cir. 1995).
[15] *United States v. Burns*, 495 F.3d 813, 874-75 (8th Cir. 2007).

witness committed perjury.

Finally, while the Eleventh Circuit has determined that the application of *Mesarosh* largely turns on whether the issue of falsity and tainted evidence was presented to the jury,[16] other circuit courts have failed to apply any additional analysis under *Mesarosh*.[17] Meanwhile, the Court of the Appeals for the Armed Forces,[18] the Second Circuit[19] and the Seventh Circuit have held that no additional analysis is required under *Mesarosh* at all.[20] This underscores the fundamental difficulty appellate courts have had in applying *Mesarosh*.

The *Mesarosh* analyses of the circuits has been largely divergent and inconsistent, leading to potentially significantly different results. Some circuit courts fail to apply any *Mesarosh* analysis, while others consider various factors giving different weight to different considerations. The lower courts are in great need of guidance as to when and how to apply this Court's ruling in *Mesarosh* especially in circumstances where the perpetrated fraud undermines the voluntariness of a guilty plea.

II. The Lower Courts Violated this Court's Holding in *Mesarosh v. United States*.

The lower courts' decisions defy the constitutional standards relating to an unfair trial in that they condone the use of fabricated DNA evidence by a government

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[16] *United States v. Brunoehler*, 714 F.2d 99, 101 (11th Cir. 1983).
[17] *United States v. Taglia*, 922 F.2d 413, 415 (7th Cir. 1991); *United States v. Stofsky*, 527 F.2d 237, 246 (2d Cir. 1975).
[18] *United States v. Luke*, 69 M.J. 309 (C.A.A.F. 2011).
[19] *Stofsky*, 527 F.2d at 246.
[20] In factually similar cases, the Seventh Circuit has both applied additional *Mesarosh* analysis and found that additional analysis under *Mesarosh* is unnecessary because the traditional examination of newly discovered evidence is sufficient. *Compare Taglia*, 922 F.2d at 415 *with Badger*, 983 F.2d at 1457.

chemist against a servicemember to compel him to plead guilty to rape. In the jurisprudence of American law, when the material evidence upon which a verdict of guilty is grounded is false, the verdict is not only inherently unfair, but it also compromises the judicial integrity of the military justice system, warranting a new trial. This is especially true when, without the false evidence, a guilty verdict would have been highly unlikely. In *Giglio v. United States*, this Court articulated that very standard—a new trial is required if the inaccurate testimony could in *any* reasonable likelihood have affected the judgment of the jury, or in Petitioner's case, the military judge.[21] Similarly in *Mesarosh*, this Court stated that the dignity of the United States Government will not permit the conviction of any person on tainted testimony that is material to the question at issue.[22]

In *Mesarosh*, the government identified information seriously impugning the credibility of a witness in unrelated proceedings. Although the proceedings were unrelated, they cast such significant doubt on the witness's credibility that the Supreme Court set aside the conviction, holding that such cases implicate the "integrity of . . . criminal trial[s] in the federal courts," and further held that the "dignity of the United States Government will not permit the conviction of any person on tainted testimony." *Id.* at 3, 9.

In *Mesarosh,* this Court recognized the integrity of the judicial process could not

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[21] 405 U.S. 150, 154 (1972).
[22] 352 U.S. at 9; *see also United States v. Lisko*, 747 F.2d 1234, 1237 (8th Cir. 1984) (newly discovered evidence relied upon in seeking a new trial must not be merely cumulative or impeaching, but must be material to the issues involved and be of such nature that the evidence would probably produce an acquittal on a new trial).

withstand unresolved allegations of tainted testimony in the circumstances before it:

> This Court should not even hypothetically assume the trustworthiness of the evidence in order to pass on other issues. There is more at stake here even than affording guidance for the District Court in this particular case. This Court should not pass on a record containing unresolved allegations of tainted testimony. The integrity of the judicial process is at stake. The stark issue of rudimentary morality in criminal prosecutions should not be lost in the mélange of more than a dozen other issues presented by petitioners. And the importance of thus vindicating the scrupulous administration of justice as a continuing process far outweighs the disadvantage of possible delay in the ultimate disposition of this case. The case should be remanded now for a hearing before the trial judge.[23]

Similarly, in *Saldana v. United States*,[24] this Court again recognized that certain irregularities were simply "not consistent with that regularity and fairness which should characterize the administration of criminal justice in the federal courts." As a result, the court set aside the Petitioner's conviction.[25] Furthermore, the integrity of the judicial process was the basis for this Court's decision in *Giglio* to set aside a fraud-based conviction:

> As long ago as *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), the court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice." This was reaffirmed in *Pyle v. Kansas*, 317 U.S. 213 (1942). In *Napue v. Illinois*, 360 U.S. 264 (1959), we said, "the same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.* at 269. Thereafter *Brady v. Maryland*, 373 U.S. 83, 87 (1963), held that suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution."[26]

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[23] 352 U.S. at 11.
[24] 365 U.S. 646, 647 (1961).
[25] In doing so, this Court cited 28 U. S. C. § 2106; *Communist Party v. Subversive Activities Control Board*, 351 U.S. 115, 124 (1956); *Mesarosh*, 352 U.S. at 14 and *Marshall v. United States*, 360 U.S. 310 (1959).
[26] *Giglio*, 405 U.S. at 153-54.

The Article I service courts erroneously concluded that Hospitalman Scott's claims were "considered fully and fairly" after the military discovered the misconduct yet failed to order a *DuBay* hearing. In this case, the Department of the Navy and the service courts decided that the use of potentially false DNA evidence to compel a guilty plea did not merit the ordering of a *DuBay* hearing to consider the effect of the potentially false evidence on the conviction. These same courts, though, ordered such a hearing in other similar cases related to the same misconduct, including at least one guilty plea. The evidence of Mr. Mills' misconduct undermined the integrity of the verdict and obligated the service courts to apply the holdings of *Mesarosh* by "fully and fairly" re-evaluating the evidence.

In *Mesarosh*, the government "lost faith in the integrity of its own witness" to such a degree that "the integrity of the judicial process" was effected. In this case, the military courts, and the lower district court have inexplicably stood by a discredited government chemist despite having submitted evidence of his misconduct to the U.S. Attorney's Office for possible criminal action.

By failing to conduct a *DuBay* hearing, the military courts did not provide full and fair consideration in this case. The military courts did conduct *DuBay* hearings in other convictions that were also based on evidence of Mr. Mills' misconduct. In *United States v. Luke*, the military courts conducted no less than two *DuBay* hearings to determine the effect of Mr. Mills' misconduct on that particular conviction. But here, the United States District Court referenced *Luke* and recognized that "the

applicability of Mesarosh to the conduct of Mr. Mills, the DNA analyst at issue, has been considered and rejected…[in Luke].[27]

The district court recognized that the convicted Sailor in *Luke* was afforded the opportunity of a *DuBay* hearing for the exact same allegations of misconduct against Mr. Mills, yet ruled that Hospitalman Scott deserves no such privilege because there is "no case law suggesting that [Mr. Scott] has a right under either constitutional or military law to such a hearing...."[28]

But Petitioner has never asserted that he has a "right" to such a hearing. Rather, he asserts that the probable fabrication and unlawful destruction of the DNA evidence in this case is a fundamental and unconstitutional miscarriage of justice and that the circumstances in this case afforded no other mechanism for him to investigate and challenge the effect of the laboratory misconduct on his conviction.

Accordingly, Hospitalman Scott never received full and fair reevaluation of the evidence in his case. The government, on the contrary, was able to secure evidence related to highly contested facts that it needed to sustain the conviction. However,

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[27] Memorandum Op. at 12.

[28] *Id.* at 13 (citing *Cothran v. Dalton*, 83 F. Supp. 2d 58, 69 (D.D.C. 1999)). But *Cothran* only recognized that a servicemember has no "right" to a *DuBay* hearing in every circumstance. Moreover, *Cothran* is distinguishable from this case. First, *Cothran* involved a summary court-martial where the punishment entailed no more than a fine, a mere reduction of rank by one single grade (E6 to E-5) and restriction for sixty days. Meanwhile, Hospitalman Scott was convicted at a general court-martial for a felony offense of rape, was sentenced to confinement for seven years, and is subject to lifetime sex offender registration in the state of South Dakota. *Id* at 61. Moreover, according to the U.S. District Court, the issue in *Cothran* which did not require an evidentiary hearing, "does not raise a constitutional issue or jurisdictional question, nor does it present any fundamental error." *Id.* at 68. In addition, according to the court, any alleged errors did not survive a "harmless error analysis," and, most importantly, the plaintiff failed to demonstrate how the alleged procedural error caused him prejudice. *Id.* at 69.

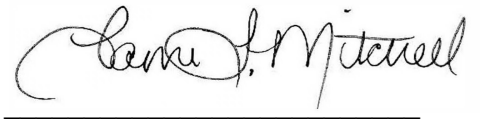
Hospitalman Scott was provided no mechanism at all. For example, during the military appeals, the government was able to secure an affidavit from a government lawyer employed by the USACIL, minimizing the extent of the misconduct, while the appellate defense counsel were forced to investigate the case through means of multiple Freedom of Information Act requests and appeals. *See, e.g.* AR 0253. There was there no independent attempt to fairly and fully gather, investigate and assess all of the evidence in the possession of the agency related to this case. To date, there is no clear answer as to whether the DNA samples were destroyed by Secretary of the Navy, specifically by the Navy Criminal Investigative Services (NCIS), negligently, after learning of the USACIL scandal, or, if they were unlawfully consumed by Mr. Mills as part of his misconduct.

Therefore, in this case, there was no way of fully and fairly considering the questions raised, absent a *DuBay* hearing. The district court's finding that "Mr. Scott has not adduced facts sufficient to support his claim of falsified evidence" ignores not only the content of the Mills Report exposing the extent of the misconduct but the fact that Hospitalman Scott possessed no mechanism to re-examine the facts as they applied to his case, unlike in *Luke.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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Appendix A

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Daryl L. Scott	)	**NMCCA No. 200200891**
Hospitalman Recruit (E-1)	)	
U.S. Navy	)	**PETITION FOR EXTRAORDINARY**
Petitioner	)	**RELIEF IN THE NATURE OF A**
	)	**WRIT OF ERROR CORAM NOBIS**
v.	)	
	)	
UNITED STATES	)	**ORDER**
Respondent	)	

Jurisdiction

The petitioner seeks relief in the nature of a Writ of Error *Coram Nobis*, the consideration of which is properly within our jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a). *See United States v. Denedo*, 556 U.S. 904, 912-13 (2009).

Background

Relying in part upon DNA evidence, the petitioner pleaded guilty to rape on 15 March 2001, a finding upheld by this Court on 10 August 2004. On 2 September 2005, Navy and Marine Corps Judge Advocates were notified that Mr. Mills, the United States Army Criminal Investigation Laboratory (USACIL) DNA analyst who had tested the DNA in the petitioner's case, had admitted to falsifying DNA reports in other cases. Based upon this report, the petitioner filed his first petition seeking a Writ of Error *Coram Nobis* with this Court on 12 July 2007, seeking an order that the DNA evidence in his case be retested. The petitioner argued that "[i]f [his] DNA was not actually on [the victim's] mattress and sheets, then that would raise substantial questions of fact that would warrant setting aside the plea."[1] 2007 Petition for Writ of Error *Coram Nobis* at 4. This Court denied the petition, concluding that (1) the petitioner did not offer evidence the DNA results in his case were tainted or false, (2) he did not seek independent testing of the evidence at the time of his court-martial, and (3) during the providence inquiry he

[1] The petitioner admitted during his guilty plea that he remembered lying beside the unconscious victim on her bed and kissing her. Record at 21; Prosecution Exhibit 1 at 2.

cited a variety of other factors in support of his belief that he was guilty of the offense.

On 30 September 2008, USACIL reported the completion of a remediation project in which they confirmed that Mr. Mills had falsified DNA data and documentation. The petitioner now claims that "[n]ewly [d]iscovered [e]vidence [s]uggests that the [r]esult of [p]etitioner's [t]rial is [u]nreliable due to the [s]ubmission of [f]raudulent DNA [e]vidence by [Mr. Mills] and due to the [f]act that DNA [c]annot be [r]e-[t]ested due to [n]egligence or [f]raud by [Mr. Mills]."[2] Specifically, the petitioner claims that the "newly discovered evidence" in this case is the remediation report. Further, the petitioner claims that Mr. Mills "fraudulently destroyed the incriminating sample that was used to convict the [p]etitioner[.]"[3] As a result, the petitioner asks this Court to set aside his conviction or order a fact-finding hearing to "examine whether to dismiss the findings and sentence."[4] We decline to do either.

Discussion

A Writ of Error *Coram Nobis* is extraordinary relief available only under "exceptional circumstances" based upon facts that were not apparent to the court during the original consideration of the case and that may change the result. *United States v. Frischholz*, 36 C.M.R. 306, 309 (C.M.A. 1966)(citing *United States v. Tavares*, 27 C.M.R. 356, 358 (C.M.A. 1959)). The error the petitioner alleges must be "of the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid." *United States v. Morgan*, 346 U.S. 502, 509 n.15 (1954)(citations and internal quotation marks omitted); *see also Aviz v. Carver*, 36 M.J. 1026, 1028 (N.M.C.M.R. 1993) (the writ is a drastic remedy that should be used only in extraordinary circumstances). The petitioner bears the burden of showing a "clear and indisputable right" to the extraordinary relief requested. *United States v. Denedo*, 66 M.J. 114, 126 (C.A.A.F. 2008) (citing *Cheney v. United States District Court*, 542 U.S. 367, 381 (2004)); *Ponder v. Stone*, 54 M.J. 613, 616 (N.M.Ct.Crim.App. 2000); *Aviz*, 36 M.J. at 1028.

Before we can consider the merits of the claim, a petitioner seeking *coram nobis* relief must meet six stringent

[2] Petition at 9.

[3] *Id.* at 10.

[4] *Id.* at 17.

threshold requirements: (1) the alleged error must be of the most fundamental character; (2) no remedy other than *coram nobis* can be available to rectify the consequences of the error; (3) valid reasons must exist for not seeking relief earlier; (4) the new information could not have been discovered through the exercise of reasonable diligence prior to the original judgment; (5) the petition does not seek to reevaluate previously considered evidence or legal issues; and (6) the sentence has been served, but the consequences of the erroneous conviction persist. *Denedo*, 66 M.J. at 126 (citing *Morgan*, 346 U.S. at 512-13 and *Loving v. United States*, 62 M.J. 235, 252-53 (C.A.A.F. 2005) (additional citation omitted).

Here, the petitioner argues that this Court should set aside his original conviction due to "new evidence" or, in the alternative, order a fact-finding hearing to resolve what the petitioner claims is a disputed factual element. Finding the petition merely an attempt to "reevaluate previously considered evidence or legal issues," we decline to do either.

Regarding whether USACIL's remediation project report constitutes new information, the petitioner has failed to show he warrants relief. While this report may provide evidence that Mr. Mills falsified DNA results and failed to comply with quality control requirements in some of the cases on which he worked, the petitioner offers no evidence the DNA results in his case were tainted or false. The petitioner's argument--that because Mr. Mills falsified test results in other cases means that he did so in his case--was rejected by this court in 2007. The petitioner's attempt to resurrect this argument based upon the remediation report is simply an effort to "reevaluate previously considered evidence or legal issues" and is again rejected.

Next, the petitioner's claim that Mr. Mills "fraudulently destroyed" evidence in his case is based upon a 6 November 2015 telephone conversation his attorney had with a USACIL employee. In his pleading, the petitioner's attorney interprets that conversation to mean that Mr. Mills wrongfully destroyed evidence in the petitioner's case. However, the same USACIL employee provided a declaration made under penalty of perjury regarding the phone call, wherein she categorically refutes that interpretation:

> The USACIL has neither the mission nor the capacity for a long-term evidence storage facility. . . . Mr. Mills was not accused of destroying evidence and there was not an intention to suggest such. The case jacket file

> [in the Scott case] indicates all evidence was returned to the submitter [NCIS] on 18 Jan 2001[.][5]

This declaration is supported by documents submitted by the petitioner which indicate the evidence was destroyed by NCIS, not by Mr. Mills.[6] For these reasons, we decline to find the petitioner's assertion that Mr. Mills destroyed evidence from his case as "new information." Nor do we conclude that a fact-finding hearing is necessary as the record as a whole "compellingly demonstrates" the improbability of the petitioner's assertion. *See United States v. Ginn*, 47 M.J. 236, 243-44 (C.A.A.F. 1997)) (*DuBay* hearing unnecessary when the appellate filings and the record as a whole compellingly demonstrate the improbability of an appellant's assertions.) Accordingly, the petitioner's claim for *coram nobis* relief based upon his since-corrected presumption that Mr. Mills "fraudulently destroyed" the DNA evidence in the petitioner's case is also rejected.

Finally, the petitioner has produced an email to Mr. Mills, ostensibly from a law enforcement agent who investigated the petitioner's case, wherein the law enforcement agent informs Mr. Mills that the petitioner had pleaded guilty, thanks Mr. Mills for his work, and declares that "[w]e had nothing else."[7] The petitioner supports his argument that the "fraudulent" DNA evidence requires extraordinary relief by claiming that this email "demonstrates that this case would have never even been charged absent the fraudulent DNA evidence that Mr. Mills created."[8] Here too we disagree with the petitioner's assertions.

First, and as discussed *supra*, the petitioner's premise that Mr. Mills must have falsified the DNA evidence in his case because he did so in other cases has been rejected. Second, the law enforcement agent's statement that there was no additional evidence belies the record, even were we to ignore the petitioner's admissions: other witnesses put the petitioner in the room alone with the unconscious victim; the victim testified

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[5] Respondent's Motion to Attach of 15 Dec 2015, Declaration of Ms. Baxter-White dated 1 Dec 2015 at ¶¶ 2 and 7.

[6] The petitioner neither offers evidence, nor argues, that NCIS's destruction of the evidence was improper.

[7] Petitioner's Non-Consent Motion to Attach of 16 Oct 2015, Attachment 1. Petitioner's Motion to Attach is hereby granted.

[8] Petitioner's Non-Consent Motion to Attach of 16 Oct 2015 at 3.

that when she awoke she was "covered in blood" and wearing a pair of "white boxers," which she did not own; that the tampon she had been using was on the floor; that her sheets were gone; that the curtains to her first floor room were pulled aside (which she "never did"); her door was chain linked and dead bolted (which she "never did"); and the petitioner was seen outside of the victim's room, using the female head because he "didn't feel like going upstairs" to the male head early the next morning.[9] Therefore, we are simply not persuaded that the email the petitioner has produced supports the drastic remedy he now requests.

"[J]udgment finality is not to be lightly cast aside; and courts must be cautious so that the extraordinary remedy of *coram nobis* issues only in extreme cases." *Denedo*, 556 U.S. at 916. We see nothing in the record and nothing submitted by the petitioner that would justify that action here. The petitioner plead guilty, the record supports that plea, and the petitioner has failed to demonstrate a clear and indisputable right to the extraordinary relief requested.

ORDERED:

1. That the Petition for Extraordinary Relief in the Nature of a Writ of Error *Coram Nobis* is denied.

2. That the Clerk of Court deliver the original of this order and related pleadings to the Navy-Marine Corps Appellate Review Activity for attachment to the record of trial.

For the Court

R.H. TROIDL
Clerk of Court
9 Feb 2016

Copy to:
NMCCA (51.3)
45 (Maj J. Valentine)
46 (Capt Harris)
02

[9] Record at 39, 49-51.

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

Daryl L. Scott,
Appellant

USCA Dkt. No. 16-0431/NA
Crim.App. No. 200200891

v.

O R D E R

United States,
Appellee

On consideration of the writ-appeal petition, it is, by the Court, this 27th day of April, 2016,

ORDERED:

That said writ-appeal petition is hereby denied.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (Valentine)
Appellate Government Counsel (Harris)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DARYL SCOTT, Plaintiff, v. **UNITED STATES**, Defendant.	Case No. 1:17-cv-02301 (TNM)

ORDER

Upon consideration of the Government's Motion to Dismiss or in the Alternative, Motion for Summary Judgment, Daryl Scott's Cross-Motion for Summary Judgment, the pleadings, relevant law, and related legal memoranda in opposition and in support, for the reasons set forth in the accompanying Memorandum Opinion, it is hereby

ORDERED that the Government's Motion is GRANTED, and Mr. Scott's Cross-Motion is DENIED. The Court hereby grants the Government summary judgment on Mr. Scott's first cause of action and dismisses the second cause of action. The Clerk of the Court is directed to close the case.

SO ORDERED.

This is a final, appealable Order.

Dated: December 18, 2018

TREVOR N. McFADDEN, U.S.D.J.

Appendix C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DARYL SCOTT, Plaintiff, v. **UNITED STATES**, Defendant.	Case No. 1:17-cv-02301 (TNM)

MEMORANDUM OPINION

The plaintiff in this case seeks to overturn his court-martial conviction of rape based on misfeasance by the DNA analyst in unrelated cases.

Daryl Scott was a hospital corpsman at the U.S. Naval Hospital in Okinawa, Japan. One night after work in 2001, he met up with a few of his friends to go out drinking. He returned to the naval barracks later that evening with three servicemembers, including a woman who was so intoxicated that she could not walk unassisted. The group helped her to her room before disbanding. Mr. Scott remained behind and saw the woman lay down on her bed. He noticed that she was incoherent and passing in and out of consciousness. So he got in the bed and began kissing her.

Mr. Scott claims that he does not remember what happened next. When the woman woke up in the morning, she was covered in blood. She was wearing a pair of white boxers that were not hers. The tampon she had been using the night before was lying on the floor. The sheets on her bed were missing. Feeling scared and confused, she reported the incident to her chain of command. An investigation by the Naval Criminal Investigative Service ("NCIS") found a stain on the woman's mattress that contained a mixture of her and Mr. Scott's DNA.

Based on these facts, Mr. Scott pled guilty to raping the woman. He told a military judge he had no reason to believe that the victim and witnesses were mistaken about his actions, and that he was convinced of his guilt. After inquiring into its factual basis, the military judge accepted Mr. Scott's plea. He was discharged from the Navy and sentenced to seven years' incarceration. Under a pretrial agreement, the confinement was reduced to four years. He served this sentence and currently lives in Pine Ridge, South Dakota.

Mr. Scott now collaterally attacks his court-martial conviction. He contends that an NCIS analyst fabricated the DNA evidence brought against him. He also believes that the military courts violated the U.S. Constitution and the Administrative Procedure Act ("APA") by refusing to adequately re-consider his case.

The Court disagrees. It finds that Mr. Scott has not adduced facts sufficient to support his claim of falsified evidence. Even if he could present such facts, his guilty plea was based on much more than just the results of DNA testing. His allegations were fully and fairly considered by the military tribunals. And the statutory scheme created by Congress precludes an APA review of Mr. Scott's case. The Court will thus grant the Government summary judgment on Mr. Scott's constitutional claims and will dismiss his APA claims.

I.

Before accepting a guilty plea, "a military judge must conduct a thorough inquiry to insure the accused understands the meaning and effect of the plea, that he enters it voluntarily, and that he in fact is guilty of the offense." *United States v. Roane*, 43 M.J. 93, 98 (C.A.A.F. 1995) (discussing Art. 45(a), Uniform Code of Military Justice). The purpose of this "providence inquiry" is to establish a sufficient basis in law and fact for accepting an accused party's guilt. *See United States v. O'Connor*, 58 M.J. 450, 453 (C.A.A.F. 2003). "In this

respect, military practice differs from that in other federal courts that permit the accused to plead guilty even though the defendant personally professes innocence—a so-called '*Alford* plea.'" *Roane*, 43 M.J. at 98 (citing *North Carolina v. Alford*, 400 U.S. 25 (1970)).

Consistent with this requirement, a military judge conducted an extensive providence inquiry before accepting Mr. Scott's guilty plea. A.R. 9-25. During the inquiry, Mr. Scott conveyed that he had read, understood, and agreed with a stipulation of facts concerning his conduct. A.R. 13. The stipulation stated that:

- "At no time that evening did [the woman] give [Mr. Scott] any indication that she was interested in [him] sexually or romantically;"
- The woman "was highly intoxicated as a result of drinking alcoholic beverages that evening and could not walk by herself to her barracks room;"
- Mr. Scott "knew that [the woman] was intoxicated . . . because [he] had seen her consume many beers throughout the late evening and early morning;"
- Mr. Scott saw that the woman "was not coherent and passed in and out of consciousness;"
- Mr. Scott "remember[s] lying side by side with her and kissing her;" and
- The next morning, Mr. Scott "returned to [the woman's] room and realized that [he] had committed a sexual act with someone who was unable to give her consent because she was too intoxicated. [He] was scared that someone might see [him] leaving the room, so [he] locked [her] door from the inside and left through her window." A.R. 34-35.

The military judge also asked Mr. Scott to describe, in his own words, what happened that night. A.R. 21. He did so. He also confirmed his belief that he "completed this act of sexual intercourse and without the consent of" the woman. A.R. 23.

Though Mr. Scott claimed not to remember the details of the assault, he believed the NCIS investigation was "accurate and reliable." A.R. 20. He said he had no reason to doubt the accounts of the victim and witnesses. A.R. 20-21. And he confirmed that "despite the fact that [he] cannot remember what happened . . . [he is] still guilty of raping" the woman. A.R. 21.

Contrary to the normal procedure in federal court guilty pleas, the judge also heard testimony from the victim. She described waking up covered in blood, wearing boxer shorts that did not belong to her, and seeing her tampon lying on the floor. A.R. 29. Her bed sheets were missing, and her curtain was pulled aside. This was something she never did "because [she] live[d] on the first deck." *Id*. After considering her testimony, the NCIS investigative report, and Mr. Scott's admissions, the military judge found him guilty of rape. A.R. 36.

Roughly two years later, Mr. Scott filed the first of several appeals contesting his conviction. A.R. 38-46. He argued that he had "pled guilty to a rape that was alleged by nobody and that may have never occurred," as neither he nor the woman "remember[ed] whether he had intercourse with her." A.R. 39. He attacked the DNA evidence against him, suggesting that the mixture of his semen and her blood found by NCIS "could have just have [sic] easily occurred outside the vagina." A.R. 42. Thus, he insisted, the military judge's providence inquiry was deficient, as he "failed in his duty to ask the difficult questions, the ones that would have caused him to reject the [guilty] plea." A.R. 44.

The Navy-Marine Corps Court of Criminal Appeals ("Navy Appeals Court") rejected these arguments. It found that he "indicated an understanding of the elements of the offense . . .

and stated that the elements correctly described the offense he committed." A.R. 60. Mr. Scott also "clearly stated, in his own words, the circumstances surrounding the rape." *Id*. The Navy Appeals Court concluded that "[a]lthough the appellant was unable to remember having engaged in intercourse with the victim, his inability to remember does not invalidate the plea where the appellant was convinced of his guilt based on the strength of the evidence against him." *Id*.

Three years after this denial, Mr. Scott tried again. He filed a writ of error *coram nobis* with the Navy Appeals Court. This time, he asked for an evidentiary hearing "in light of newly disclosed evidence of the general mishandling of [DNA] evidence" at an NCIS criminal investigation laboratory. A.R. 62. Mr. Scott argued that the DNA results in his case were "the only reason Appellant believed he had raped" the woman, and that if these "results were in fact fabricated, the 'strength' of the evidence against Appellant would evaporate." A.R. 64.

His challenge arose out of a memorandum issued by the laboratory. It noted that an analyst falsified an entry on one of the DNA tests he had conducted, and that the same analyst had once been suspended after "permitting contamination in his testing processes." A.R. 76. Upon discovering this issue, the laboratory began "reviewing the hundreds of cases worked on by this examiner," and stated that "[a]s of this writing, no false reports are believed to have left the laboratory." *Id*. Mr. Scott characterized this as "newly discovered evidence" that "sheds new light on the reliability of Appellant's conviction." A.R. 65. He urged the court to order more DNA testing through a "*DuBay* hearing." *See United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).[1]

[1] A *DuBay* hearing is "essentially an evidentiary hearing to resolve collateral factual issues, usually ordered by an appellate military court . . . to aid in appellate review." *Cothran v. Dalton*, 83 F. Supp. 2d 58, 69 (D.D.C. 1999).

The court declined to do so. The basis for Mr. Scott's request, it noted, "is the misconduct in other cases of the laboratory technician who conducted the DNA test in the appellant's case." A.R. 102. It found that Mr. Scott "offers no evidence that the DNA results in his case were tainted or false" and that he "did not seek independent testing of the evidence at the time of his court-martial." *Id*. The court also found that "during the providence inquiry, [he] cited a variety of factors in support of his believe that he was guilty of the offense and not just the results of a DNA test." *Id*.

Undeterred, Mr. Scott filed a third challenge eight years later. He again asserted that his conviction "was based solely on DNA evidence" tested by Phillip Mills, the examiner whose misconduct was the subject of the laboratory's memorandum. A.R. 104. He claimed to have "recently discovered that Dr. Mills destroyed the DNA samples in this case in violation of standard operating procedures, preventing them from being re-tested." *Id*. Based on this purported discovery, he again sought a *DuBay* hearing. He also pointed to an email that a special agent investigating his case once sent to someone in the NCIS laboratory. This email suggested that Mr. Scott "would never have been charged had it not been for the work you all put into it at the lab. We had nothing else." A.R. 106.

The Navy Appeals Court denied this petition too. It began by reiterating that Mr. Scott pled guilty to rape "[r]elying *in part* upon DNA evidence." A.R. 199 (emphasis added). The court found that the petition was "merely an attempt to reevaluate previously considered evidence or legal issues," and that it "decline[d] to do either." A.R. 201. Mr. Scott's argument "that because Mills falsified test results in other cases means that he did so in [this] case," it explained, "was rejected by this court in 2007." *Id*.

The court then assessed a declaration from a laboratory employee, made under the penalty of perjury, which refuted the contention that Mr. Mills destroyed Mr. Scott's DNA samples. *Id*. The employee explained that the laboratory "has neither the mission nor the capacity for a long-term evidence storage facility . . . Mr. Mills was not accused of destroying evidence and there was not an intention to suggest such." *Id*. The court found that this declaration was "supported by documents submitted by [Mr. Scott] which indicate the evidence was destroyed by NCIS, not by Mr. Mills." A.R. 202. It thus concluded that a *DuBay* hearing was unnecessary "as the record as a whole 'compellingly demonstrates' the improbability of the petitioner's assertion." *Id*. (quoting *United States v. Ginn*, 47 M.J. 236, 243-44 (C.A.A.F. 1997)).

Finally, the court considered the special agent's email. It rejected the notion that the DNA test results were the only evidence available to the prosecutors. A.R. 202. It noted, for instance, that "other witnesses put [Mr. Scott] in the room alone with the unconscious victim," that the victim testified in detail about what she observed when she woke up, and that Mr. Scott "was seen outside of the victim's room, using the female [bathroom] because he 'didn't feel like going upstairs' to the male [bathroom] early the next morning." A.R. 202-203. The court was "simply not persuaded that the email the petitioner has produced supports the drastic remedy he now requests." A.R. 203. It therefore denied his petition. Mr. Scott then filed a motion for reconsideration with the Navy Appeals Court and a request for review to the Court of Appeals for the Armed Forces. Both were denied. *See* A.R. 202-206; A.R. 207-312.

Mr. Scott now challenges what he calls the Navy's "continued failure to re-examine the case." Compl. 11. The decisions not to order a *DuBay* hearing or a new trial, he argues, were "a far cry from the standards laid out by the Supreme Court and this Court for rectifying unfair

trials based on fabricated testimony and newly discovered evidence." *Id*. at 13. He also contends that the "decision of the Judge Advocate General of Navy not to set aside or re-examine the case . . . was grossly irresponsible, arbitrary[,] and capricious" in violation of § 706(2) of the APA. *Id*. at 17.

The Government moved to dismiss Mr. Scott's complaint or, in the alternative, sought summary judgment based on the administrative record. *See* Def.'s Mot. to Dismiss, ECF No. 9 ("Def.'s Mot."). It urges the Court to find that the military tribunals followed all applicable legal standards, and that they gave Mr. Scott's many arguments adequate consideration. *See id*. It also argues that the APA specifically provides for the non-reviewability of courts martial and military commissions. *Id*. at 1. Mr. Scott has filed a cross-motion for summary judgment. *See* Pl.'s Cross-Mot. for Summ. J., ECF No. 10 ("Pl.'s Cross-Mot.").

II.

To prevail on a motion for summary judgment, a movant must show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). A factual dispute is material if it could alter the outcome of the suit under the substantive governing law. *Anderson*, 477 U.S. at 248. A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* "[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant makes this showing, the non-moving party bears the

burden of setting forth "specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 250.

Under Federal Rule of Civil Procedure 12(b)(1), a court must dismiss a claim if it lacks subject matter jurisdiction. The plaintiff bears the burden of proving that the court may hear the claim. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The reviewing court "may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction." *Jerome Stevens Pharms. v. FDA,* 402 F.3d 1249, 1253 (D.C. Cir. 2005). But it must still "accept all of the factual allegations in the complaint as true." *Id*. (cleaned up).

III.

Federal district courts have limited and deferential jurisdiction over decisions of military tribunals. Convicted servicemembers who are still in custody may seek *habeas* review of their court-martial proceedings. *Sanford v. United States*, 586 F.3d 28, 31 (D.C. Cir. 2009). Mr. Scott, of course, is now free. A district court has federal question jurisdiction "to review the validity of court-martial proceedings brought by non-custodial plaintiffs who cannot bring habeas suits." *Id. at* 32 (cleaned up). Thus, the Court can review the constitutionality of the decisions in Mr. Scott's case.

The standard of review to apply is, as the D.C. Circuit has recognized, "tangled." *United States ex rel. New v. Rumsfeld,* 448 F.3d 403, 406 (D.C. Cir. 2006) ("*New II*"). The Supreme Court has held that "when a military decision has dealt fully and fairly with an allegation raised in [a *habeas* petition], 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 (1953). Rather, the court is limited to determining whether "the military have given fair consideration to each of [the plaintiff's] claims." *Id*. at 144.

For non-custodial plaintiffs like Mr. Scott, collateral relief is "barred" unless the district court finds that the military tribunals' "judgments were void." *Schlesinger v. Councilman*, 420 U.S. 738, 748 (1975). This means that any error in their decision-making "must be fundamental." *Sanford*, 586 F.3d at 32. Whether a decision is "void" turns on "the nature of the alleged defect and the gravity of the harm from which relief is sought." *Schlesinger*, 420 U.S. at 753.

The Supreme Court "has never clarified the standard of full and fair consideration, and it has meant many things to many courts." *Kauffman v. Sec'y of the Air Force*, 415 F.2d 991, 997 (D.C. Cir. 1969). Nor is the precise level of deference due during a "void" review clear. *See New II*, 448 F.3d at 407. In any event, the D.C. Circuit has expressed "serious doubt [that] the judicial mind is really capable of applying the sort of fine gradations in deference" that the two standards may indicate. *Id*. at 408. Indeed, while the Circuit has sometimes engaged in a *Burns*-style fairness inquiry in the context of non-custodial plaintiffs, other times it has not. *Compare Kauffman*, 415 F.2d at 996-1000, *with Priest v. Sec'y of the Navy*, 570 F.2d 1013, 1015 (D.C. Cir. 1977).

That said, "non-habeas review is if anything more deferential than habeas review of military judgments." *New II*, 448 F.3d at 408. Thus, a military court's judgment cannot be considered void "if it satisfies *Burns's* 'fair consideration' test." *Id*. Recent cases suggest that the latter inquiry has two steps: "(1) a review of the military court's thoroughness in examining the relevant claims, at least where thoroughness is contested; and (2) a close look at the merits of the claim, albeit with some degree of deference . . . ." *Sanford*, 586 F.3d at 32. Here, the Navy Appeals Court thoroughly evaluated Mr. Scott's claims. And the Court finds no reason to disturb its decisions on the merits of these claims.

IV.

Mr. Scott's Complaint features two causes of action. First, he alleges that the actions of the military tribunals were "unconstitutional because they do not conform to Supreme Court standards as articulated in federal cases such as *Mesarosh v. United States* and *United States v. Giglio*." Compl. 12. Second, he contends that the "administrative decisions of the Department of the Navy and the service courts to uphold" Mr. Scott's conviction were "arbitrary and capricious" in violation of the APA. The Government is entitled to judgment as a matter of law for the first cause of action and dismissal for the second.

A.

Mr. Scott's constitutional claims rest on a series of conclusory statements. He suggests that he was "unjustly convicted" based on "false incriminating evidence." Compl. 12-13. He believes the military courts "decided to ignore and suppress the evidence" of the DNA analyst's misconduct. Compl. 17. And he sees himself as a victim of "a highly charged atmosphere of hostility towards clemency and exoneration in military sexual assault cases." Compl. 13.

Nothing in the record supports these statements. As a result, Mr. Scott's case is readily distinguishable from cases like *Mesarosh* and the principles they stand for. In *Mesarosh v. United States*, the Government told the Supreme Court it had "serious reason to doubt the truthfulness" of its own witness. 352 U.S. 1, 4 (1956). In a separate proceeding, this witness had provided "bizarre testimony . . . concerning sabotage, espionage, handling of arms and ammunition, and plots to assassinate Senators, Congressmen, and a state judge . . . ." *Id*. at 8. The Government suggested that "none of [this testimony] is worthy of belief." *Id*. In fact, the

Solicitor General suggested that the untrue statements "might have been caused by a psychiatric condition" that "may have arisen subsequent to the time of this trial." *Id*.

The *Mesarosh* Court granted the petitioner a new trial because of the unreliability of the witness's testimony. But it explicitly cabined its holding, noting that

> "[i]t must be remembered that we are not dealing here with a motion for a new trial initiated by the defense . . . presenting untruthful statements by a Government witness subsequent to the trial as newly discovered evidence affecting his credibility at the trial. Such an allegation by the defense ordinarily will not support a motion for a new trial, because new evidence which is 'merely cumulative or impeaching' is not, according to the often-repeated statement of the courts, an adequate basis for the grant of a new trial."

Id. at 9 (citation omitted).

Indeed, several courts have recognized the narrow scope of *Mesarosh*. *See, e.g.*, *United States v. Burns*, 495 F.3d 873, 875 (8th Cir. 2007) (noting that the holding "has no application to the present case because there is no evidence whatever that [the witness] was a practiced perjurer or suffered from some disqualifying mental condition. There was, moreover, no evidence that he perjured himself in [this] trial."); *United States v. Vogel*, 251 Fed. Appx. 399, 401 (9th Cir. 2007) (describing "*Mesarosh* and its progeny" as being limited to the rare case in which a "critical witness committed perjury or otherwise demonstrated a complete lack of reliability."); *United States v. Anderson*, 933 F.2d 1261, 1275 (5th Cir. 1991) ("No one has presented any proof that [the witness] gave false testimony about material facts, and there has been no recantation of testimony as to material facts.").

In fact, the applicability of *Mesarosh* to the conduct of Mr. Mills, the DNA analyst at issue, has been considered and rejected by a court in this district in a strikingly similar case brought by another hospital corpsman contesting his court-martial for sexual assault. In *Luke v. United States*, Judge Contreras held that the military tribunals "did not act unreasonably in

determining that the plaintiff was not entitled to a new trial because Mill's misconduct did not undermine the integrity of the conviction." 942 F. Supp. 2d 154, 168 (D.D.C. 2013). He added that the analyst was "not entirely discredited in the same way the witness in *Mesarosh* was." *Id*. And, as in this case, the court found "no evidence in the plaintiff's specific conviction that Mills utilized improper procedures, cross-contaminated samples, or perjured himself in any way." *Id*.

Mr. Scott suggests his case is distinguishable from *Luke*. Pl.'s Mot. at 13. It is not. True, the plaintiff in that case was provided a *DuBay* hearing by a military court. *See Luke*, 942 F. Supp. 2d at 165-166. But there is "no case law suggesting that [Mr. Scott] has a right under either constitutional or military law to such a hearing or that the convening officer may not conduct a more limited form of investigation." *Cothran v. Dalton*, 83 F. Supp. 2d 58, 69 (D.D.C. 1999). Rather, the question is whether the officers that heard his claims evaluated them thoroughly and fairly. They did.

The Navy Appeals Court carefully considered each of Mr. Scott's arguments. It rejected as unsubstantiated speculation the contention that the testing in his case was tainted or false. A.R. 102. It reviewed, for example, the laboratory's "remediation project report." A.R. 201. The report noted that the laboratory re-tested 68 of the 435 cases that Mr. Mills worked on from 1995 – 2005. USACIL Quality Manager's Final Report at 68, ECF No. 14-1. In 65 out of the 68 re-tested cases, or roughly 96%, Mr. Mills' DNA conclusions were confirmed. *Id*. The court noted that "[w]hile this report may provide evidence that Mr. Mills falsified DNA results . . . in some of the cases on which he worked, the petitioner offers no evidence the DNA results in his case were tainted or false." A.R. 201.

The tribunal also highlighted several documents "compellingly" demonstrating the improbability of the notion that Mr. Mills destroyed Mr. Scott's DNA samples. A.R. 202. It

evaluated the declaration of Anece Baxter-White, the laboratory's attorney-advisor. A.R. 165-66. This declaration made clear that "[n]o evidence is maintained or retained at the laboratory." A.R. 165. It also confirmed that "Mr. Mills was not accused of destroying evidence and there was not an intention to suggest such." A.R. 166. The court found that documents submitted by Mr. Scott corroborated this declaration, as they showed that "the evidence was destroyed by NCIS, not by Mr. Mills." A.R. 202. Mr. Scott, the court added, "neither offers evidence, nor argues, that NCIS's destruction of the evidence was improper." *Id*. n.6.

Most importantly, the Navy Appeals Court found that Mr. Scott's conviction was not, contrary to his contention, based solely on DNA evidence. *See, e.g.*, A.R. 199; A.R. 203. Mr. Scott maintains that "the only evidence that a victim was 'raped' . . . was the fake DNA lab testing . . ." Compl. 3. Not so. The circumstantial evidence of a rape occurring and him being the perpetrator is considerable:

- Mr. Scott was the last person seen with the victim that night. A.R. 35;
- He admitted to initiating physical contact with the victim after she was no longer conscious. *Id.*;
- Her used tampon was removed and found on the floor of her barracks room, which is certainly suggestive of sexual intercourse. *Id*.;
- Mr. Scott admitted that he was "scared that someone might see [him] leaving the room, so [he] locked [the victim's] door from the inside and left through her window." *Id*.;
- He was spotted in a nearby women's bathroom in the morning. *Id*.;
- She awoke in someone else's boxer shorts. A.R. 29; and

- The bedsheets were missing in the morning and there was blood and what appeared to be semen on her mattress. A.R. 35.

In short, it was reasonable to decide that the weight of the non-DNA evidence and Mr. Scott's admissions of guilt during the providence inquiry were sufficient to sustain his conviction. And it was reasonable to arrive at this decision without conducting a *DuBay* hearing. The record reveals no genuine issues of material fact that permit the Court to conclude otherwise. The actions of the military tribunals that evaluated Mr. Scott's claims were not unconstitutional.

B.

The Court lacks subject matter jurisdiction to consider Mr. Scott's two APA arguments. First, he contends that the "decision of the Judge Advocate General of Navy not to set aside or re-examine the case pursuant to Article 69 [of the Uniform Code of Military Justice] was grossly irresponsible, arbitrary and capricious." Compl. 17. Second, he suggests that the decisions of "the Article I administrative appellate courts" were "fundamentally defective." Compl. 18.

To begin with, the APA provides for the non-reviewability of "courts martial and military commissions." 5 U.S.C. § 701(b)(1)(F). *See also McKinney v. White*, 291 F.3d 851, 853 (D.C. Cir. 2002). Thus, to the extent that Mr. Scott seeks APA review of the decisions made by the military tribunals, the Court lacks jurisdiction to engage in this review, and dismissal is warranted under Federal Rule of Civil Procedure 12(b)(1). Indeed, he appears to concede this in his briefing. *See* Pl.'s Mot. at 13 (noting that the APA "specifically excludes courts-martial from it [sic] purview).

But he argues that the APA does not "exclude all administrative actions taken by NCIS agents and military justice officials before and after a court-martial. Pl.'s Mot. at 13. True, it "does not expressly preclude review of Judge Advocate General decisions reviewing courts

martial pursuant to [Article 69]." *McKinney*, 291 F.3d at 853. But the D.C. Circuit has found that "Congress' establishment . . . of a separate judicial system for courts martial review is . . . convincing evidence that Congress could not have intended Judge Advocate General review of courts martial to fall within APA review of agency decisions." *Id*. In other words, "Congress' preclusion of APA review of courts martial reaches the Judge Advocate's decision" where it directly concerns a court martial. *Id*. at 855.

The decisions in question here do so. Article 69 of the Uniform Court of Military Justice permits the Judge Advocate General to set aside the findings or sentence in a court-martial case. *See* 10 U.S.C. § 869. If he does, he may also order a rehearing. *Id*. Mr. Scott asks the Court to review decisions not to set aside his conviction and/or order a *DuBay* hearing. Compl. 18. This is precisely the type of review barred by the APA.

Lastly, Mr. Scott attacks what he calls the "failure of the [Judge Advocate General] to . . . provide information and discovery to the detailed appellate defense counsel." Pl.'s Mot. at 13. In his Complaint, Mr. Scott details several requests he made to the Office of the Judge Advocate General for information about his case and appeals. *See* Compl. 9-10. But the Complaint itself demonstrates that the Office responded to each of these requests or identified for Mr. Scott the appropriate procedural mechanisms to obtain the information he sought. *Id*. Thus, Mr. Scott has not sufficiently alleged any decision by the Judge Advocate General that this Court may review under the APA, and his claims will be dismissed. *See Schmidt v. U.S. Capitol Police Bd.*, 826 F. Supp. 2d 59, 65 (D.D.C. 2011) ("In deciding a motion to dismiss challenging the Court's subject-matter jurisdiction under Rule 12(b)(1) courts are not required to accept inferences unsupported by the facts or legal conclusions that are cast as factual allegations.") (cleaned up).

V.

For these reasons, the Government's Motion to Dismiss or in the Alternative, Motion for Summary Judgment will be granted. Mr. Scott's Cross-Motion for Summary Judgment will be denied. A separate order will issue.

Dated: December 18, 2018

TREVOR N. McFADDEN
United States District Judge

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5033 **September Term, 2018**

1:17-cv-02301-TNM

Filed On: June 25, 2019

Daryl Scott,

Appellant

v.

United States of America,

Appellee

BEFORE: Pillard, Katsas, and Rao, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance, the opposition thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Because appellant failed to respond to appellee's arguments regarding his claim under the Administrative Procedure Act, he has forfeited any argument that the district court erred in dismissing that claim. See U.S. ex rel. Totten v. Bombardier Corp., 380 F.3d 488, 497 (D.C. Cir. 2004). As for appellant's constitutional claim, appellant has not demonstrated that his claims were not given full and fair consideration by the military courts, or that the military judgment did not conform to Supreme Court standards. See Sanford v. United States, 586 F.3d 28, 33 (D.C. Cir. 2009).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5033 **September Term, 2018**

1:17-cv-02301-TNM

Filed On: August 27, 2019

Daryl Scott,

Appellant

v.

United States of America,

Appellee

BEFORE: Garland, Chief Judge, and Henderson, Rogers, Tatel, Griffith, Srinivasan, Millett, Pillard, Wilkins, Katsas, and Rao, Circuit Judges

O R D E R

Upon consideration of the petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk