No. 22-540

In The

Supreme Court of the United States

PAUL ANTHONY RIOJAS

Petitioner

v.

UNITED STATES DEPARTMENT OF THE ARMY

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Paul Anthony Riojas
370 Las Palmas Drive
San Antonio, Texas 78237
(210) 639-8104

Questions Presented for Review

In *Burns v. Wilson*, 346 U.S. 137 (1953), this Court addressed the scope of review the civil courts must apply when considering a service member's habeas corpus petition challenging a military court proceeding. However, the Court did not offer a detailed scope for the lower courts to apply. This has resulted in the Circuit Courts developing drastically different frameworks where a petitioner's success in gaining review is dependent upon which Circuit the petition is filed.

1. Of the varying Circuit Courts' developed standards for determining if review of a military proceeding is appropriate, which scope and standard of review is proper and in accordance with the *Burns'* full and fair consideration standard?

2. Does the holding in *Fletcher v. Outlaw*, 578 F.3d 274 (5th Cir. 2009), as applied in Riojas' case, adequately determine whether a military court fully and fairly considered a claim when it does not account for an abuse of discretion or whether proper legal standards were applied?

Parties to Proceeding

1. Christine E. Wormuth, Secretary of the Army

Related Proceedings

1. Paul Anthony Riojas v. Department of the Army; John E. Whitley, Secretary of the Army, No. 5:20-CV-1054-DAE, U.S. District Court for the Western District of Texas. Judgment entered December 7, 2021.

2. Paul Anthony Riojas v. Department of the Army; John E. Whitley, Secretary of the Army, No. 22-50019, U.S. Court of Appeals for the Fifth Circuit. Judgment entered July 28, 2020.

Table of Contents

Appendix

Table of Authorities

Cases

Statutes

Opinions Below

The citation to the Fifth Circuit Opinion below is *Riojas v. Department of the Army,* No. 22-50019 (5th Cir. Jul. 21, 2022). The citation to the District Court Order is *Riojas v. Department of the Army et al,* 5:20-CV-01054 (W.D. Tex. Dec. 7, 2021), *aff'd,* No. 22-50019 (5th Cir. Jul. 21, 2022).

Jurisdiction

The United States District Court for the Western District of Texas had jurisdiction pursuant to 28 U.S.C. § 1331. The United States Court of Appeals for the Fifth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

The Fifth Circuit's judgment was entered on July 21, 2022. The Fifth Circuit denied the petition for rehearing en banc on September 7, 2022.

Statement of the Case

1. Military Proceedings

This case stems from an arrest on July 5, 2016 by the German Police of Amberg, Bavaria where Riojas was charged under German law with Exhibitionism Activity. On August 22, 2016, following an investigation and review by the Amberg prosecutor the case was dismissed pursuant to German Code § 170 paragraph 2 StPO.

The United States Army subsequently assumed jurisdiction and charged Riojas with sexual abuse of a minor under the Uniform Code of Military Justice (UCMJ) Article 120b.

Interviewed by the Army Criminal Investigation Division, Riojas invoked his Fifth Amendment right and did not answer any of the investigator's questions. All evidence collected and utilized originated from the witness interviews conducted by the Amberg police. These statements were the sole basis for the Article 32 hearing, 10 U.S.C. § 832, similar to a grand jury indictment hearing, concerning the Article 120b charge. Following that hearing, the preliminary hearing officer having reported that there was no evidence to support the sexual intent element of the Article 120b charge recommended that the case be referred to General Court-Martial under the alternate intent to humiliate or degrade element.

At the arraignment, Riojas was charged under the UCMJ Article 120b with the sexual intent element, and Article 92, Disobeying an Order from a Superior Officer.

Despite having raised several matters concerning his defense – an affirmative defense as to a mistake of fact regarding age and the unfounded sexual intent element – to which his counsel provided no assistance, Riojas under the advice of his Army appointed defense counsel Christopher Crall accepted a plea deal to the Article 120b and Article 92 charges. The rationale of the advice given was that the military judge would find Riojas guilty despite any defenses raised and that challenging the

accusations would result in a harsher sentence as well as an unfavorable view of both the accused and their counsel.

At trial the Military Judge while conducting the providence inquiry questioned Riojas about the believed ages of the victims. Riojas responded that he saw women during the incidents in question. This created a discrepancy between the providence inquiry and the stipulation of fact that was not resolved.

On February 22, 2017, Riojas was convicted of Article 120b and Article 90 of the UCMJ, and sentenced to six months confinement, dismissal from service, and forfeiture of all pay and allowances.

On June 23, 2017, Riojas submitted clemency matters to the convening authority, which has the authority to approve or adjust the findings and sentence, challenging the legal sufficiency of the conviction. Within the clemency petition a claim of ineffectiveness assistance of counsel was also presented. On September 29, 2017, an individual not properly possessing convening authority reviewed Riojas' clemency petition, and approved the court-martial's findings and sentence.

On direct appeal, Riojas raised two assignment of error concerning legal sufficiency where the military judge abused their discretion: (1) Whether appellant's guilty plea was improvident because the military judge failed to explore and explain the accident defense; (2) Whether the words "teenage" and "young" sufficiently describe a child under the age of 16 during a providence inquiry. Disregarding both Rule for Court Martial 910(e),

Determining Accuracy of a Plea, and 10 U.S.C. § 845(a), Irregular and Similar Pleas, that state a military judge must resolve or reject an inconsistent plea, the Army Court of Criminal Appeals (ACCA) relied solely on the stipulations of fact during its review. On October 26, 2018, the ACCA delivered its opinion and affirmed the findings and sentence.

Appealing the decision of the ACCA to the Court of Appeals for the Armed Forces (CAAF), Riojas raised the two previous assignments of errors as well as two novel issues as to a question of law: (1) Does the ACCA holding that a stipulation of fact supersedes any defenses raised by appellant during his providence inquiry violate Article 45, UCMJ; (2) Whether the military judge erred in finding that a negligent *mens rea* was sufficient to make otherwise lawful conduct criminal. On February 4, 2019, the CAAF denied review of the petition and summarily affirmed the ACCA decision.

Pursuant to 28 U.S.C. § 1259, Riojas was unable to petition for a writ of certiorari due to the CAAF denial of review.

Riojas filed a petition for a new trial, 10 U.S.C § 873, to the Judge Advocate General (JAG) raising constitutional violation claims. On January 5, 2020, the JAG denied the petition citing lack of authority to review those claims.

Riojas filed a *coram nobis* petition to the ACCA claiming constitutional violations of due process and ineffective assistance of counsel. The ACCA summarily dismissed the petition in a single sentence response absent any grounds on February 24, 2020.

Riojas filed a *coram nobis* petition to the CAAF claiming constitutional violations of due process and ineffective assistance of counsel. The CAAF summarily denied the petition in a single sentence opinion absent any grounds March 31, 2020.

2. Civil Proceedings

On January 15, 2021, Riojas timely filed an Amended Complaint with the Federal District Court in the Western District of Texas collaterally attacking his court-martial conviction on Fifth and Sixth Amendment grounds pursuant to 28 U.S.C. §1331.

On September 9, 2021 and December 7, 2021, the court granted the defendant's motion to dismiss and supplemental motion to dismiss, respectively, citing the *Fletcher v. Outlaw* holding that any claim briefed and argued before the military court was considered to have been fully and fairly reviewed. Although "sympathetic" to Riojas' position, the court adhered to binding precedent noting, however, that the ACCA's decision gave the court "no way to determine on what grounds the [military] court dismissed the Plaintiff's petition." Appendix at 29.

Riojas appealed the decision to the Fifth Circuit Court of Appeals challenging the *Fletcher* application. The basis of the challenge involved the workability of the precedent when applied to a military court's decision that is contended to be inadequate. Riojas also argued that *Fletcher* was insufficient to determine full and fair review as it does not consider whether the military court abused its discretion or failed to apply proper legal

standards. Acknowledging this, the Fifth Circuit noted in its opinion that those two considerations exceeded their limited review. Appendix at 22. The Fifth Circuit Court affirmed the district court's decision on July 21, 2022.

Riojas filed a petition for en banc reconsideration arguing, primarily, that the *Calley v. Callaway*, 519 F.2d 184 (5th Cir. 1975) holding was standing precedent and that *Fletcher* undermined the scope and standard of review accorded there. The en banc reconsideration petition was also treated as a panel rehearing petition and both were denied on September 7, 2022.

Reasons for Granting the Writ

1. Introduction

In *Burns v. Wilson*, this Court held that review of military court proceedings was limited to whether the military court gave full and fair consideration to a petitioner's claims. *Burns*, 346 U.S. at 144. This limited scope of review did not offer specific criteria for the lower courts to follow, and as a result has caused the lower courts to develop varying frameworks to apply the full and fair standard. As noted by several circuit court, this process has been difficult as the language in Burns is not clear.

> "The degree to which a federal habeas court may consider claims of errors committed in a military trial has long been the subject of controversy and remains unclear." *Brosius v. Warden*, 278 F.3d 239, 242 (3rd Cir. 2002);

> "The federal courts' interpretation – particularly this court's interpretation – of the language in Burns has been anything but clear." *Dodson v. Zelez*, 917 F.2d 1250, 1252 (10th Cir. 1990); "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. of the Air Force*, 415 F.2d 991, 997 (D.C. Cir. 1969); "We then reviewed the difficulty that not only this Court has had in applying the Burns test, but the problems other Courts of Appeals have encountered." *Armann v. McKean*, 549 F.3d 279, 290 (3rd Cr. 2008); "Applying Burn several years later, we noted that federal courts have interpreted Burns with considerable disagreement and that confusion existed regarding the proper scope of review" *Fletcher v. T.C. Outlaw*, 578 F.3d 274, 278 (5th Cir. 2009) (citing *Calley v. Callaway*, 519 F.2d 184, 198)

2. Conflict Exists Between the Lower Courts Concerning the Proper Standard to Determine Full and Fair Consideration of Military Proceedings

Of the developed frameworks, the Courts of Appeal for the District of Columbia Circuit and the Federal Circuit provide a broader scope of review and a less-deferential standard of review. Whereas the Courts of Appeal for the Third, Fifth, and Tenth Circuits apply two distinct frameworks that provide, at one end, a broad scope of review and a less-deferential standard of review, and at the other end, a narrow scope with a near-total deference afforded

to the military courts. Of which the framework that the Third, Fifth and Tenth Circuit Courts applies is dependent upon the depth of the opinion delivered by the military court. These drastically different frameworks have created an outcome-determinative issue that is further complicated by the concurrent jurisdiction that the lower courts hold.

A. The Third Circuit Standard

The Third Circuit has utilized drastically different frameworks for analyzing a service member's claim. Each of which has been in accordance with the *Burns'* holding; however, the Third Circuit has been reluctant to alter its scope and standard of review as not to infringe on the authority of the military courts.

In *Brosius v. Warden*, the Third Circuit Court significantly shifted its scope and standard of review in military habeas case. The court found that the inquiry "may not go further than our inquiry in a state habeas case." *Brosius v. Warden*, 278 F.3d 239, 245 (3d Cir. 2002). This allowed the civil court to review the military court's determination utilizing the framework developed under 28 U.S.C. §2254. This standard properly balances the burden of the petitioner against the determinations of the military court.

Subsequently in *Armann v. McKe*an, the Third Circuit Court reverted back to its narrow interpretation of Burns. "A federal court must review what occurred procedurally in the military court to determine if a petitioner was afforded full and fair consideration to each of his or her claims." *Armann v. McKean*, 549 F.3d 279, 292 (3rd Cir. 2008). This

analysis is largely controlled by *United States ex rel. Thompson v. Parker* in which the court found that: (1) full and fair consideration is apparent where the opinion devoted its discussion to those contentions which appear to be colorably credible; (2) full and fair consideration was provided by the military court even where a habeas petitioner's claim has been briefed, argued and summarily dismissed with a mere statement that it was without merit. *United States ex rel. Thompson v. Parker*, 399 F.2d 774, 776 (3rd Cir. 1968). Here it is difficult to identify a situation where a civil court could not apply one of these determinations to dispose of a petitions claim.

Despite its reversal in position, the court in *Armann* did not oppose the *Brosius* opinion. In fact, the court spoke to the merits of *Armann's* argument where the CAAF, citing *Brosius* for its rationale, had applied AEDPA in dealing with habeas petitions as it accords the appropriate balance of individual rights and deference to military court determinations. The shift in position was due to the reasoning that "it is solely the prerogative of the Supreme Court to depart from its precedents." *Id.* at 291.

B. The Fifth and Tenth Circuits Standard

The Fifth and Tenth Circuit both have two framework standards for determining if review of a military proceeding is appropriate. Each framework proposes to offer the same scope of review, and the difference lay in the standard of review applied which is dependent on the depth of the opinion delivered by the military court. In practice, however, the civil court's scope of review is reduced as a result

of more deference being afforded to military determinations.

In *Calley v. Callaway*, the Fifth Circuit addressed the extent to which a civil court may review the validity of contended claims which have been previously considered and rejected by the military courts. The court concluded that the power the civil courts had to review habeas petitions depended on the nature of the issues raised, and developed a four-part test in order to make the appropriate determination. The developed framework inquired whether: (1) the asserted error must be of substantial constitutional dimension, (2) the issue must be on of law rather than of disputed fact already determined by the military tribunal, (3) military considerations may warrant different treatment of constitutional claims, (4) the military courts must give adequate consideration to the issues involved and apply proper legal standards. *Calley v. Callaway*, 519 F.2d 184, 199-203 (5th Cir. 1975).

This framework sufficiently analyzes a majority of military court proceeding. Where a servicemember's habeas petition satisfies the four-factor test then de novo review of the petitioner's claims is authorized per *Burns*. However, this framework is only applicable when the military court discusses in depth the rationale for its decision. Therein lies the challenge in utilizing the *Calley* standard as demonstrated in Riojas' case. The fourth part of the inquiry states that a civil court must consider whether the military courts have adequately considered and applied proper legal standards. This is extremely difficult when the

military court denies a petition in a single sentence without offering any grounds for the decision.

While *Calley* does not specifically addressed the issue of an inadequate record, there is latitude for the lower courts to review the entire record of the proceedings in order to determine full and fair consideration. The Fifth Circuit stated that consideration by the military courts of substantial constitutional rights violations or exceptional circumstance of fundament defects resulting in a miscarriage of justice "will not preclude judicial review for the military must accord to its personnel the protections of basic constitutional rights essential to a fair trial and the guarantee of due process of law." *Id.* at 203. In the instant case, this latitude is necessary and within the limits of Burns to supplement an inadequate record that consist only of the military court's terse decision.

In *Fletcher v. Outlaw*, the Fifth Circuit Court addressed how a civil court determines whether a military court gave full and fair consideration when the military court's opinion summarily disposes of a claim. The court noted that *Calley* did not offer direct guidance to resolve the issue where the depth of the military court opinion made the four-factor framework unworkable. *Fletcher v. Outlaw*, 578 F.3d 274, 278 (5th Cir. 2009).

Instead of relying on the latitude accorded by *Calley*, the court adopted the holding in *Watson v. McCotter*. The borrowed standard reduced the analysis to whether a petitioner's claim had been briefed, argued and summarily disposed of by a military court. *Watson v. McCotter*, 782 F.2d 143, 145

(10th Cir. 1986). If those stated criteria had been met then full and fair consideration was claimed to have been provided, and servicemember's petitions were not open to de novo review of the claims. *Fletcher,* 578 F.3d at 278. While this approach resolved the depth of opinion issue, it also severely reduced the scope of review set out in *Calley*.

The application of the *Fletcher* holding to cases such as Riojas', in effect, precludes review completely. Even where the petitioner produces evidence giving merit to a claim it becomes non-reviewable to the district court simply because a military court summarily dismissed the claim. It would seem that especially where the military decision offers little or no substance for analysis a supplemental review of the military proceeding would better equip the district courts to determine full and fair consideration. This would be in accordance with the exceptional circumstances rule in *Calley*, and allow for the application of the four-factor test. Furthermore, it would not violate the limits of *Burns* as the purpose of the supplemental review would be to analyze the proceedings and not re-weigh the evidence.

The lack of clarity in *Burns* has caused individual circuit courts to implement two distinct frameworks for analyzing the full and fair standard. Consequently, where a petitioner may have success with one application they fail in another simply because of the military court's strategic decision when issuing an opinion. Riojas contends that the military court uses this advantage in order to insulate its judgements from collateral attack when brought before a civil court.

C. The Federal Circuit Standard

In *Matias v. United States*, the Federal Circuit Court addressed the scope of review for analyzing military proceedings and affirmed the lower court's holding that "the narrow window of collateral attack review given to this Court remains open, but only for those issues that address the fundamental fairness in military proceedings and the constitutional guarantees of due process." *Matias v. United States*, 923 F.2d 821, 826 (Fed. Cir. 1990). There the lower court utilized a framework which granted review if it was alleged and proved that (1) significant constitutional defects caused a deprivation of due process; (2) fundamental fairness was lacking in the court-martial proceeding; and (3) the review does not simply amount to a retrying or reweighing of the evidence. *Matias v. United States*, 19 Cl. Ct. 635, 642 (1990). The Federal Circuit court took no issue with this framework standard, and finding no error by the lower court affirmed the decision.

The Claims Court found that Matias was not entitled to review as the record made it plain that the military courts had heard out every significant allegation made by the petitioner, and it was not the duty of the civil court to repeat the process. To aid in its determination the lower court relied on the *Watson* holding to address the three supposed unaddressed claims raised. Although the military court discussed one claim at length, the other two were found to be without merit. *Id.* at 645-46. The Claims Court found that this constituted full and fair consideration. However, in its opinion the lower court did consider the effect that an inadequate record would have on the application of *Watson*.

Where an inadequacy in addressing a significant issue is found it could be cause to support a fundamental unfairness claim presented to the civil court. This deficiency was resolved by enabling de novo review for the "limited purpose of supplementing an inadequate record or reviewing issues of a constitutional dimension." *Id.* at 647.

In Matias' case supplemental review of the unaddressed issues was unnecessary as the issues were not of a constitutional dimension and the record was not inadequate. However, applying this framework and the remedied *Watson* holding to Riojas' case easily justifies de novo review as: (1) the claims raised are of constitutional dimension, (2) the record is inadequate in that even by the minimal requirement the military court did not state the claim lacked merit, and Riojas' contention that the military court failed to apply proper legal standard as set by *Strickland v. Washington*, 466 U.S. 668 (1984) and *Hill v. Lockhart*, 474 U.S. 52 (1985), and (3) the purpose of review by the civil court would be to analyze the military court proceedings. The standard held by the Federal Circuit offers a median scope and standard of review that provides petitioners a fair assessment of the military determinations by minimally reducing the level of deference. Deference that would otherwise halt, as demonstrated above, further analysis of the full and fair consideration.

D. The District of Columbia Standard

The District of Columbia Circuit utilizes two frameworks for analyzing military courts

proceedings. The proper application of which is dependent on the custodial status of the petitioner.

In *Kauffman v. Sect. of the Airforce*, the Circuit Court held that the scope of review when analyzing military proceedings claiming fundamental unfairness of constitutional issues is equal to that of state habeas corpus petitions. *Kauffman v. Sect. of the Airforce*, 415 F.2d 991, 997 (D.C. Cir. 1969). Consequently, the Circuit Court rejected the lower court's holding that consideration by a military court was sufficient to determine full and fair consideration. The Circuit Court held that "the test of fairness requires that military rulings on constitutional issues conform Supreme Court standards." *Id.* at 997.

The level of deference afforded to the military determinations under this standard provides habeas petitioners the greatest opportunity to obtain review. Here, an inadequate record or a single sentence dismissal of a petitioner's claims would clearly fail to satisfy full and fair consideration. The merits of the petitioner's claim are the focus of the court's analysis where a searching review of the proceedings would determine if a fundamental defect is present. While advantageous for the habeas petitioner, this standard also ensures that the constitutional rights of servicemembers are guaranteed.

In *Sanford v. United States*, the Court of Appeals for the District of Columbia reaffirmed its recognition that "the standard of review in non-custodial collateral attacks on court-marital proceedings is tangled." *Sanford v. United States*, 586 F.3d 28, 31 (D.C. Cir. 2009). This entanglement

deals with two relevant precedents: the "full and fair consideration" standard for habeas review which follows the precedent set in *Kauffman* and the "void" standard set in *Schlesinger v. Councilman,* which held that for any relief to be granted the error of the court-martial judgement must be fundamental. *Schlesinger v. Councilman* , 420 U.S. 738, 748 (1975).

Utilizing this tangled standard, the Circuit Court first applies the framework developed through *United States ex rel. New v. Rumsfeld,* 488 F.3d 403 (D.C. Cir. 2006), which considers the petitioner's claims on the merits in order to determine full and fair consideration. The *New II* framework, although not describing the exact degree of deference accorded to the military courts, consists of 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 and certainly more than under *Kauffman*'s *de novo* standard. *Sanford,* 586 F.3d at 32. The next step in the tangle standard is the determination of the fundamental nature of the alleged defect and whether it voids a military's judgement.

The language in *New II* affords the military courts more deference than allowed for by *Kauffman,* and while this inconsistency has yet to be resolved it does not severely affect the scope of review. This standard is still favorable to petitioners as the test of fairness ensures that military determinations conform to prevailing legal standards.

3. The Lower Court's Developed Standard Is Contrary to This Court's Precedent

Fletcher holds that if a petitioner's claim has been briefed and argued before a military court then full and fair consideration has been given even if it was summarily disposed. *Fletcher,* 578 F.3d at 278. In Riojas' case, the claims were briefed, considered and summarily dismissed by the military courts in a single sentence decision. The district court noted that it had "no way to determine on what grounds the [ACCA] dismissed [Riojas'] petition." Appendix at 29. However, the court found that this constituted full and fair consideration, and dismissed Riojas' complaint. As demonstrated by this case, the *Fletcher* standard when applied to a grossly inadequate record creates a scenario which affords the military courts near-total deference and precludes any civil court review.

On appeal, Riojas raised the inadequate record argument claiming that it was extremely difficult, if even possible, to demonstrate that the military court was legally inadequate to resolve the claims. *See Burns*, 346 U.S. at 146. Riojas' only option was to allege and point to evidence in the *coram nobis* brief that the military court failed to apply proper legal standards, i.e. *Strickland* and *Hill*, and that it had abused its discretion when dismissing the claims. The Fifth Circuit Court noted that both of those aspects exceeded its limited review, and affirmed the decision of the lower court. Appendix at 22.

While *Burns* is unclear on the proper scope of review for determining full and fair consideration, it clearly states that "the military courts, like state courts, have the same responsibilities as do the federal courts to protect a person from violation of his constitutional rights." *Burns*, 346 U.S. at 142.

This protection is the primary objective for all cases regardless of origin, and the federal courts should not allow the subjective issue of deference to interfere with this principal function. For this reason and those described above, the *Fletcher* precedent is inadequate in analyzing military determinations.

4. The Issue is Important and Recurring

The questions presented are critically important as they address the protection of servicemember's constitutional rights. As present in Riojas' case, the professional misconduct of military appointed counsel and military courts severely threaten the rights of the accused and require a judicial safeguard. *Burns* was intended to be that defense; however, ambiguity in its language has left it lacking. While the lower courts have attempted to developed standards to this end, it has instead resulted in an outcome-determinative issue.

This is a recurring issue as the military courts continually seek to prevent review of its determinations. While a reasonable course of action, the military courts have done so utilizing questionable methods in its effort. Riojas' case demonstrates two: a misapplied procedural bar where the military court claimed that issues not brought during direct review were barred from collateral attack, and a military decision that lacks all substance in which a collateral attack is virtually impossible dependent on the lower court where it is filed. This practice leaves countless petitioners with claims unexamined by the military courts and the civil courts. It is therefore essential that a uniform

standard be established to ensure proper and fair review.

This case presents an excellent vehicle as all remedies through military channels have been exhausted and all judicial determinations complete. Additionally, the claims of this case are easily resolved by a review of the record and application of the prevailing legal standards. A review of the record demonstrates not only that the military courts did not give full and fair consideration, but an obvious refusal to consider Riojas' claims. A revisiting of Burns is essential to correct this and future miscarriages of justice.

Conclusion

The petition for writ of certiorari should be granted.

Dated this 5th day of December 2022.

Respectfully submitted,

Paul Anthony Riojas
370 Las Palmas Drive
San Antonio, Texas 78237
(210)639-8104

United States Court of Appeals

for the Fifth Circuit

No. 22-50019

Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
July 21, 2022
Lyle W. Cayce
Clerk

Paul Anthony Riojas,

Petitioner–Appellant,

versus

Department of the Army; John E. Whitley, *Secretary of the Army,*

Respondents–Appellees.

Appeal from the United States District Court for the Western District of Texas USDC No. 5:20-CV-1054

Before King, Costa, and Ho, *Circuit Judges.*

Per Curiam:*

Paul Anthony Riojas appeals the judgement of the district court dismissing his collateral attack on his court-martial conviction. We affirm.

*Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4.

Riojas pleaded guilty to and was convicted of one specification of disobeying an order from a superior commissioned officer and one specification of sexual abuse of a child. *United States v. Riojas*, 2018 WL 5619958, at *1 (Army Ct. Crim. App. Oct. 26, 2018). He ultimately appealed the judgement to the Court of Appeals for the Armed Forces ("CAAF"), which denied his petition for review. *United States v. Riojas*, 78 M.J. 346, 346 (C.A.A.F. 2019).

Riojas then filed *coram nobis* petitions with the Army Court of Criminal Appeals ("ACCA") and the CAAF, claiming ineffective assistance of counsel in his initial proceedings. Both summarily denied his petition. The ACCA wrote in full: "On consideration of the Petition for Extraordinary Relief in the Nature of a Writ of Error Coram Nobis, the petition is Dismissed."

Thereafter, Riojas filed this suit in the district court collaterally attacking his court-martial conviction on Fifth and Sixth Amendment grounds. The district court found he failed to state a cliam on both grounds: as to the Fifth Amendment claim, the district court found the military courts "fully and fairly" considered Riojas's due process claims on direct appeal. Then, the district court found the Sixth Amendment claim was fully and fairly considered by the ACCA when it denied his coram nobis petition. Riojas appeals only the Sixth Amendment holding, contending that the ACCA did not fully and fairly consider his ineffective-assistance claim.

We review a district court's dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) de novo. *Wampler v. Sw. Bell Tel. Co.*, 597 F.3d 741, 744 (5th Cir. 2010). When a petition collaterally attacks a decision by the military court, "it is the limited function of the civil courts to determine whether the military has given fair consideration" to the claims raised in that collateral attack. *Burns v. Wilson*, 346 U.S. 137, 144 (1953).[1] In *Fletcher*, we explained that even a summary disposition by a military court constitutes "full and fair consideration" provided that the petitioner "fully briefed and argued the claims before the ACCA." *Fletcher*, 578 F.3d at 278.

Fletcher resolves this appeal. Like the petitioner in *Fletcher*, Riojas fails to identify how his Sixth Amendment claim was not fully briefed or considered by the ACCA. He presented several pages of briefing to the ACCA on his ineffective-assistance claim in his *coram nobis* petition. The ACCA considered the petition, but denied it. Therefore, he was afforded "full and fair review," *id.* at 278-79 ,and the district court did not err when it dismissed his claim.

For the foregoing reasons, the judgement is AFFIRMED.

[1] To the extent Riojas argues that the ACCA abused its discretion when it engaged in a summary disposition "by ignoring relevant facts and law in Riojas's case," we not that exceeds our limited review. *See Fletcher v. Outlaw*, 578 F.3d 274, 278 (5th Cir. 2009) ("[I]t appears that [petitioner] is arguing that he failed to receive full and fair consideration because the military courts were wrong on the merits of his habeas claim. This is not sufficient to show a lack of full and fair review.")

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

PAUL ANTHONY RIOJAS,

Plaintiff,

No. 5:20-CV-1054-DAE

vs.

DEPARTMENT OF THE ARMY and JOHN E. WHITLEY, [1] Secretary of the Army,

Defendants.

ORDER GRANTING DEFENDANTS' SUPPLEMENTAL MOTION TO DISMISS

Before the Court is a Supplemental Motion to Dismiss Plaintiff's Amended Complaint, filed by Defendants John E. Whitley, Secretary of the U.S. Army ("Secretary Whitley") and the United States Department of the Army ("the Army") (collectively "Defendants"). (Dkt. # 30.) The Motion was filed in response to this Court's Order dated September 9, 2021, (Dkt. # 28), which granted in part and denied without prejudice in part Defendants' original motion to Dismiss. (Dkt. # 19.) The Court finds this matter suitable for disposition without a hearing

---

[1] Pursuant to Federal Rule of Civil Procedure 25, John E. Whitley is substituted for Ryan D. McCarthy as a defendant in this case.

and, for the reasons described below, **GRANTS** Defendants' Motion. (Id.)

BACKGROUND

On February 22, 2017, a military judge sitting as a general courtmartial[2] convicted Plaintiff Paul Anthony Riojas ("Plaintiff" or "Riojas") of one specification (count) of Sexual Abuse of a Child, in violation of Article 120b of the Uniform Code of Military Justice ("UCMJ"), and one specification of Disobeying an Order from a Superior Officer, Article 92 of the UCMJ. (Dkt. # 1 ¶ 3); 10 U.S.C. §§ 890, 920b. See generally United States v. Riojas, 2018 WL 5619958, at *1 (Army Ct. Crim. App. Oct. 26, 2018), review denied, 78 M.J. 346 (C.A.A.F. Feb. 4, 2019). Plaintiff appealed to the Army Court of Criminal Appeals ("ACCA"), where his convictions were affirmed on October 26, 2018. Id. at *3. Plaintiff's subsequent petition to the Court of Appeals for the Armed Forces ("CAAF") was denied on February 4, 2019. United States v. Riojas, 78 M.J. 346 (C.A.A.F. Feb. 4, 2019).

Following CAAF's denial of Plaintiff's petition n for review, Plaintiff petitioned the Judge Advocate General of the U.S. Army for a new trial and filed *coram nobis* petitions with both the ACCA and the CAAF. (Dkt. # 1 ¶ 3.) The petition for a new trial was denied on January 5, 2020, and the ACCA and CAAF *coram nobis* petitions were denied on February 24, 2020, and March 31, 2020, respectively. (Id.)

---

[2] Courts-martial differ from courts of standing jurisdiction in that they can be convened by military officers. See 10 U.S.C. § 822.

In his original complaint, Plaintiff sought extraordinary relief in the form of a writ of error *coram nobis*, pursuant to the All Writs Act, 28 U.S.C. § 1651(a). (Dkt. # 1.) On December 8, 2020, the Court ordered Plaintiff to show cause why this case should not be dismissed for lack of jurisdiction because neither Plaintiff nor the Court could identify any case "in which a federal district court has entertained a *coram nobis* petition seeking collateral review of a court-martial conviction." (Dkt. # 5.) On December 18, 2020, Plaintiff responded, still failing to identify such a case but asserting new grounds for jurisdiction. (Dkt. # 7.) On December 30, 2020, in consideration of Plaintiff's *pro se* status, the Court granted Plaintiff leave to amend his Complaint to assert a viable basis for jurisdiction. (Dkt. # 12.)

As a result, Plaintiff timely filed an Amended Complaint on January 15, 2021, in which he sought to collaterally attack his court-martial conviction on Fifth and Sixth Amendment grounds. (Dkt. # 13.) On April 26, 2021, Defendants moved to dismiss Plaintiff's Amended Complaint for lack of subject matter jurisdiction and failure to state a claim ("Original Motion to Dismiss"). (Dkt. # 19.) In ruling on Defendants' Original Motion to Dismiss, the Court (1) found that it had subject matter jurisdiction over Plaintiff's claims, and (2) dismissed Plaintiff's due process claim for failure to state a claim. Because the Court was unable to determine its ability to review Plaintiff's ineffective assistance of counsel claim based on the materials submitted, the Court allowed Plaintiff the opportunity to file the Army Court of Criminal Appeals ("ACCA") decision

on the *coram nobis* petition he submitted to that court.

On September 14, 2021, Plaintiff timely filed a copy of the ACCA decision, and Defendants filed a Supplemental Motion to Dismiss his remaining ineffective assistance of counsel claim on September 16, 2021. (Dkt. ## 29, 30.) Plaintiff responded to the supplemental motion on September 23, 2021, and Defendants replied on September 30, 2021. (Dkt. ## 31, 32.) Because the Court finds the ACCA decision is sufficient to show full and fair review of Plaintiff's ineffective assistance of counsel claim by the military courts, the claim must be dismissed.

LEGAL STANDARD

A. Rule 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted." Review is limited to the contents of the complaint and matters properly subject to judicial notice. See Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007). In analyzing a motion to dismiss for failure to state a claim, "[t]he [C]ourt accepts 'all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'" In re Katrina Canal Breaches Litig., 495 F.3d 191, 205 (5th Cir. 2007) (quoting Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit, 369 F.3d 464, 467 (5th Cir. 2004)). To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual

content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

When a complaint fails to adequately state a claim, such deficiency should be "exposed at the point of minimum expenditure of time and money by the parties and the court." Twombly, 550 U.S. at 558 (citation omitted). However, the plaintiff should generally be given at least one chance to amend the complaint under Rule 15(a) before dismissal with prejudice, "unless it is clear that the defects are incurable[.]" Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co., 313 F.3d 305, 329 (5th Cir. 2002).

B. Non-Habeas Collateral Review of Court-Martial Convictions

Circuits disagree on the level of deference afforded military court decisions after a plaintiff has exhausted all remedies there, with some circuits even applying different standards of review to custodial and non-custodial collateral attacks. See, e.g., Luke, 942 F. Supp. 2d at 162–63 (describing the two "tangled" lines of D.C. Circuit precedent in court-martial collateral attacks). However, the Fifth Circuit has established only one standard, which is the one it applies in court-martial habeas cases.

The Fifth Circuit first enunciated the applicable four-part inquiry for determining whether federal court collateral review of a military conviction is appropriate in Calley v. Callaway, a case in which the plaintiff challenged his military trial on constitutional grounds. Calley v. Callaway,

519 F.2d 184 (5th Cir. 1975). Under Calley, courts must consider whether (1) the claimed error is of "substantial constitutional dimension[;]" (2) the issues raised are questions of law or fact; (3) special military considerations warrant a different constitutional standard; and (4) the military courts have adequately considered and applied the proper legal standard to the issues raised. Id. at 199–203. Federal court review is intended to "determin[e] whether the military has fully and fairly considered contested factual issues"—not to "retry the facts or reevaluate the evidence[.]" Id. at 203.

DISCUSSION

Plaintiff alleges he was denied effective assistance of counsel at his court-martial proceedings in violation of the Sixth Amendment. (Dkt. # 13.) The ACCA considered Plaintiff's ineffective assistance of counsel claim in the form of a *coram nobis* petition, which the ACCA denied. (Dkt. # 29-1.) And the Court of Appeals for the Armed Forces ("CAAF") then denied review of the ACCA's denial of Plaintiff's *coram nobis* petition. (Dkt. # 21 at 62.)

This Court is only able to consider the substance of Plaintiff's claim if he was denied full and fair review in the military courts. See Fletcher v. Outlaw, 578 F.3d 274, 277 (5th Cir. 2009) (agreeing with district court's finding that it could not review claims given full and fair consideration by the ACCA and/or CAAF). Under Fifth Circuit precedent, full and fair review exists even where the military court decision "summarily disposes of the issue" being raised in federal court when the issue was fully presented to the military court and there is no

evidence that the court denied full and fair review. Id. at 278.

The ACCA decision on Plaintiff's ineffective assistance of counsel claim is a single sentence: "On consideration of the Petition for Extraordinary Relief in the Nature of a Writ of Error Coram Nobis, the petition is DISMISSED." (Dkt. # 29-1.) Plaintiff contends this summary disposition demonstrates that the ACCA's review of his ineffective assistance of counsel claim was legally inadequate. (Dkt. # 31 at 2.) It is true that the ACCA's decision gives this Court no way to determine on what grounds the court dismissed Plaintiff's petition. But the record indicates that Plaintiff argued his ineffective assistance of counsel claim before the ACCA, (see Dkt. # 30 at 11–13), and that the ACCA considered his argument. (See Dkt. 29-1.) Thus, however sympathetic it may be to Plaintiff's position, the Court's hands are tied by precedent and the deference afforded military court decisions on collateral review. See Fletcher, 578 F.3d at 278 (finding full and fair review despite summary disposition and plaintiff's argument that military court decisions were wrong on the merits).

Because Plaintiff's ineffective assistance of counsel claim was presented to and considered by the ACCA in the form of a *coram nobis* petition, this Court is unable to further review that claim, and it must be dismissed. See id.

CONCLUSION

For the reasons described above, Defendants' Motion, (Dkt. # 30), is **GRANTED** and Plaintiff's ineffective assistance of counsel claim is **DISMISSED WITH PREJUDICE**. The Clerk is instructed to **CLOSE THE CASE**.

IT IS SO ORDERED.

DATED: San Antonio, Texas, December 7, 2021.

s/ David Alan Ezra

Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

PAUL ANTHONY RIOJAS,

Plaintiff,

No. 5:20-CV-1054-DAE

vs.

DEPARTMENT OF THE ARMY and JOHN E. WHITLEY, [1] Secretary of the Army,

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

Before the Court is a Motion to Dismiss Amended Complaint, filed by Defendants John E. Whitley, Secretary of the U.S. Army ("Secretary Whitley") and the United States Department of the Army ("the Army") (collectively "Defendants"). (Dkt. #19.) The Court finds this matter suitable for disposition without a hearing. For the reasons described below, the Court **GRANTS IN PART AND DENIES IN PART** Defendants' Motion. (Id.)

---

[1] Pursuant to Federal Rule of Civil Procedure 25, John E. Whitley is substituted for Ryan D. McCarthy as a defendant in this case.

BACKGROUND

On February 22, 2017, a military judge sitting as a general courtmartial[2] convicted Plaintiff Paul Anthony Riojas ("Plaintiff" or "Riojas") of one specification (count) of Sexual Abuse of a Child, in violation of Article 120b of the Uniform Code of Military Justice ("UCMJ"), and one specification of Disobeying an Order from a Superior Officer, Article 92 of the UCMJ. (Dkt. # 1 ¶ 3); 10 U.S.C. §§ 890, 920b. See generally United States v. Riojas, 2018 WL 5619958, at *1 (Army Ct. Crim. App. Oct. 26, 2018), review denied, 78 M.J. 346 (C.A.A.F. Feb. 4, 2019). Plaintiff appealed to the Army Court of Criminal Appeals ("ACCA"), where his convictions were affirmed on October 26, 2018. Id. at *3. Plaintiff's subsequent petition to the Court of Appeals for the Armed Forces ("CAAF") was denied on February 4, 2019. United States v. Riojas, 78 M.J. 346 (C.A.A.F. Feb. 4, 2019).

Following CAAF's denial of Plaintiff's petition for review, Plaintiff petitioned the Judge Advocate General of the U.S. Army for a new trial and filed *coram nobis* petitions with both the ACCA and the CAAF. (Dkt. # 1 ¶ 3.) The petition for a new trial was denied on January 5, 2020, and the ACCA and CAAF *coram nobis* petitions were denied on February 24, 2020 and March 31, 2020, respectively. (Id.)

In his original complaint, Plaintiff sought extraordinary relief in the form of a writ of error

---

[2] Courts-martial differ from courts of standing jurisdiction in that they can be convened by military officers. See 10 U.S.C. §822.

coram nobis, pursuant to the All Writs Act, 28 U.S.C. § 1651(a). (Dkt. # 1.) On December 8, 2020, the Court ordered Plaintiff to show cause why this case should not be dismissed for lack of jurisdiction because neither Plaintiff nor the Court could identify any case "in which a federal district court has entertained a *coram nobis* petition seeking collateral review of a court-martial conviction." (Dkt. # 5.) On December 18, 2020, Plaintiff responded, still failing to identify such a case but asserting new grounds for jurisdiction. (Dkt. # 7.) On December 30, 2020, in consideration of Plaintiff's *pro se* status, the Court granted Plaintiff leave to amend his Complaint to assert a viable basis for jurisdiction. (Dkt. # 12.)

As a result, Plaintiff timely filed an Amended Complaint on January 15, 2021, in which he seeks to collaterally attack his court-martial conviction on Fifth and Sixth Amendment grounds. (Dkt. # 13.) On April 26, 2021, Defendants filed the instant Motion to Dismiss the Amended Complaint. (Dkt. # 19.) Plaintiff submitted a Response on May 5, 2021 (Dkt. # 21), and on May 14, 2021, Defendants filed their Reply. (Dkt. # 25.)

LEGAL STANDARD

A. Rule 12(b)(1)

"Federal courts are courts of limited jurisdiction." Gunn v. Minton, 568 U.S. 251, 256 (2013). Therefore, a federal court properly dismisses a case or a cause of action for lack of subject matter jurisdiction when it lacks the statutory or constitutional power to adjudicate the case. Home Builders Ass'n of Miss., Inc. v. City of Madison, 143 F.3d 1006, 1010 (5th Cir. 1998). "[T]he burden of

proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction." Ramming v. United States, 281 F.3d 158, 161 (5th Cir. 2001), cert. denied, 536 U.S. 960 (2002). In resolving disputes regarding its subject matter jurisdiction, the Court may rely on: "(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the [C]ourt's resolution of disputed facts." Id.

B. Rule 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted." Review is limited to the contents of the complaint and matters properly subject to judicial notice. See Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007). In analyzing a motion to dismiss for failure to state a claim, "[t]he [C]ourt accepts 'all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'" In re Katrina Canal Breaches Litig., 495 F.3d 191, 205 (5th Cir. 2007) (quoting Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit, 369 F.3d 464, 467 (5th Cir. 2004)). To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

A complaint need not include detailed facts to survive a Rule 12(b)(6)motion to dismiss. See Twombly, 550 U.S. at 555–56. In providing grounds for relief, however, a plaintiff must do more than recite the formulaic elements of a cause of action. See id. at 556–57. "The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions," and courts "are not bound to accept as true a legal conclusion couched as a factual allegation." Iqbal, 556 U.S. at 678 (internal quotations and citations omitted). Thus, although all reasonable inferences will be resolved in favor of the plaintiff, the plaintiff must plead "specific facts, not mere conclusory allegations." Tuchman v. DSC Commc'ns Corp., 14 F.3d 1061, 1067 (5th Cir. 1994); see also Plotkin v. IP Axess Inc., 407 F.3d 690, 696 (5th Cir. 2005) ("We do not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions.").

When a complaint fails to adequately state a claim, such deficiency should be "exposed at the point of minimum expenditure of time and money by the parties and the court." Twombly, 550 U.S. at 558 (citation omitted). However, the plaintiff should generally be given at least one chance to amend the complaint under Rule 15(a) before dismissal with prejudice, "unless it is clear that the defects are incurable[.]" Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co., 313 F.3d 305, 329 (5th Cir. 2002).

C. Non-Habeas Collateral Review of Court-Martial Convictions

Generally, as a threshold matter, plaintiffs collaterally attacking a court-martial conviction must first exhaust all military remedies available before turning to the civilian court system. Schlesinger v. Councilman, 420 U.S. 738, 758 (1975) (holding exhaustion requirements apply to both habeas and non-custodial collateral attacks on court-martial convictions). Therefore, any issue a plaintiff fails to raise before the military courts will not be considered by an Article III court unless the plaintiff shows (1) cause for failing to raise the issue; *and* (2) that actual prejudice resulted from that failure. Fletcher v. Outlaw, No. 1:06-cv-646, 2008 WL 2625662, at *3 (E.D. Tex. June 30, 2008), aff'd, 578 F.3d 274 (5th Cir. 2009).

Circuits disagree on the level of deference afforded military court decisions after a plaintiff has exhausted all remedies there, with some circuits even applying different standards of review to custodial and non-custodial collateral See, e.g., Luke, 942 F. Supp. 2d at 162–63 (describing the two "tangled" lines of D.C. Circuit precedent in court-martial collateral attacks). However, the Fifth Circuit has established only one standard, which is the one it applies in court-martial habeas cases.

The Fifth Circuit first enunciated the applicable four-part inquiry for determining whether federal court collateral review of a military conviction is appropriate in Calley v. Callaway, a case in which the plaintiff challenged his military trial on constitutional grounds. Calley v. Callaway, 519 F.2d 184 (5th Cir. 1975). Under Calley, courts must consider whether (1) the claimed error is of "substantial constitutional dimension[;]" (2) the

issues raised are questions of law or fact; (3) special military considerations warrant a different constitutional standard; and (4) the military courts have adequately considered and applied the proper legal standard to the issues raised. Id. at 199–203. Federal court review is intended to "determin[e] whether the military has fully and fairly considered contested factual issues"—not to "retry the facts or reevaluate the evidence[.]" Id. at 203.

DISCUSSION

A. Subject Matter Jurisdiction

Plaintiff frames his claim as a non-habeas[3] collateral attack on his military court-martial conviction based on violations of his Fifth and Sixth Amendment rights under the United States Constitution. (Dkt. # 13.) While habeas petitions are not the sole collateral review remedy available to those contesting the validity of a court-martial conviction, a nonhabeas collateral attack must still fall within the court's subject matter jurisdiction to

---

[3] Plaintiff mentions the possibility of pursuing a habeas challenge to his court-martial conviction in his Response to the Court's Order to Show Cause. (Dkt. # 7.) However, Plaintiff is no longer in custody, and he misreads the only authority he cites in support of still being able to pursue a habeas claim in light of that fact. Rather than finding that a habeas petition may be filed by one no longer in custody, Kauffman merely held that a petition for writ of habeas corpus was not the sole collateral remedy available to one wishing to challenge a military court conviction. Kauffman v. Secretary of the Air Force, 415 F.2d 991 (D.C. Cir. 1969). Additionally, Plaintiff abandons his habeas argument in his Amended Complaint. (Dkt. # 13.)

be considered. Schlesinger v. Councilman, 420 U.S. 738, 751–53 (1975). As Plaintiff asserts in his Amended Complaint, Article III courts may have federal question subject matter jurisdiction over such claims under 28 U.S.C. § 1331. See Luke v. United States, 942 F. Supp. 2d 154, 162 (D.D.C. 2013) (citing Sanford v. United States, 586 F.3d 28, 31 (D.C. Cir. 2009)) ("A district court has subject matter jurisdiction to hear a non-custodial Plaintiff's collateral attack based on federal question jurisdiction."); see also Councilman, 420 U.S. at 752–53 (finding federal court jurisdiction to collaterally review court-martial convictions not limited to custodial habeas proceedings).

According to the Fifth Circuit, whether a federal court has federal question jurisdiction to hear a collateral attack on an Article I court decision depends on the basis for the collateral attack. Jacuzzi v. Pimienta, 762 F.3d 419, 421 (5th Cir. 2014) (citing Schlesinger v. Councilman, 420 U.S. 738, 747–48 (1975)). If the collateral attack is grounded in federal law, federal question jurisdiction exists. Id. (finding federal district courts have jurisdiction over jurisdictional challenges to bankruptcy court decisions because such challenges are grounded in federal law). Here, Plaintiff's claims are grounded in his right to due process under the Fifth Amendment and right to counsel under the Sixth. (Dkt. # 13.) Under 28 U.S.C. § 1331, federal district courts have federal question subject matter jurisdiction over "civil actions arising under the Constitution[.]" Because Plaintiff's collateral attack is grounded in federal constitutional law, the Court

finds that it has subject matter jurisdiction to hear his claim under 28 U.S.C. § 1331.

B. Failure to State a Claim

Plaintiff claims he is entitled to relief based on Defendants' violation of his Fifth and Sixth Amendment rights. (Dkt. # 13.) Specifically, Plaintiff alleges he was denied due process and effective assistance of counsel. Id. For the following reasons, the Court finds Plaintiff has failed to state a claim upon which relief can be granted as to his due process claim, but denies Defendants' Motion to Dismiss without prejudice as to Plaintiff's ineffective assistance of counsel claim.

1. Due Process

Plaintiff alleges in his Amended Complaint that the military courts failed to "exercise full and fair consideration," and thus denied him due process under the Fifth Amendment. The Court disagrees. Both the ACCA and the CAAF fully and fairly considered Plaintiff's claims on appeal in those courts, and he is therefore not entitled to additional review of those claims in this Court.

Federal courts reviewing military court decisions are not to "retry the facts or reevaluate the evidence[.]" Calley, 519 F.2d at 203. Rather, Article III court review is merely intended to "determin[e] whether the military has fully and fairly considered contested factual issues." Id. Upon finding the military "gave full and fair consideration to claims asserted" in a collateral review proceeding, federal courts should decline to reevaluate the merits of the allegation. See Fletcher, 578 F.3d at 277.

On appeal in the military courts, the ACCA considered the validity of Plaintiff's plea and affirmed the military judge's finding of guilty. Riojas, 2018 WL 5619958. While Plaintiff claims the "record does not make it plain" that Defendants have "heard him out" on his significant allegations, the ACCA decision is in fact more thorough than necessary for this Court to find Plaintiff was afforded full and fair consideration on his claims. See Fletcher, 578 F.3d at 278–79 (finding full and fair consideration despite ACCA summarily disposing of the petitioner's claims because there was no evidence military courts failed to provide full and fair review). Here, rather than summarily disposing of Plaintiff's claims without justification, the ACCA explained its basis for affirming the military judge. See Riojas, 2018 WL 5619958. Namely, the ACCA found that the judge did not abuse his discretion by accepting Plaintiff's guilty plea because his mistake of fact defense was precluded by Plaintiff's stipulation of fact—which Plaintiff **admitted was true** during his *Care* inquiry. Id.

Because the Court finds that the ACCA fully and fairly reviewed Plaintiff's challenge to his court martial, Plaintiff's due process claims must be dismissed. See Fletcher, 578 F.3d at 279 (denying habeas petition where petitioner failed to show military courts denied full and fair review). Further, in light of ACCA's full and fair review of Plaintiff's claims, the Court finds the defect in his pleadings on that claim is incurable. His due process claim is therefore dismissed with prejudice. See Great Plains Trust Co., 313 F.3d 305 at 329 (noting that allowing

leave to amend complaint is not appropriate where "it is clear that the defects are incurable").

2. Ineffective Assistance of Counsel

Plaintiff alleges he was denied effective assistance of counsel at his court-martial proceedings. (Dkt. # 13.) Defendants, in their Motion to Dismiss, urge the Court to find Plaintiff waived his ineffective assistance of counsel claims by failing to raise them on direct appeal in the military courts. (Dkt. # 19.) Plaintiff contends, however, that he has preserved his ineffective assistance of counsel claims by raising it in his *coram nobis* petitions filed with the ACCA and CAAF. (Id.)

In Massaro v. United States, the Supreme Court held claims of ineffective assistance of counsel are not waived by procedural default merely because they were not raised on direct appeal. 538 U.S. 500 (2003). Instead, ineffective assistance of counsel claims may be brought in a collateral habeas proceeding regardless of whether the claim was raised on direct appeal. Id. at 504. While Plaintiff is not challenging his conviction by habeas petition, this Court is not convinced he has waived a claim of ineffective assistance of counsel by waiting to raise it for the first time in his *coram nobis* petitions filed with the ACCA and CAAF. See id.

However, the Court is also unable to determine, based on the current pleadings, whether the ACCA provided a full and fair review of Plaintiff's ineffective assistance of counsel claim in his *coram nobis* petitions. While Plaintiff cites his

ACCA *coram nobis* petition denial as being attached as "Enclosed Document #7" in his Response to Defendants' Motion to Dismiss (Dkt. # 21), "Enclosed Document # 7" only includes a copy of Plaintiff's CAAF petition denial. As noted above, this Court is only able to consider the substance of Plaintiff's claims if he was denied full and fair review in the military courts. See Fletcher, 578 F.3d at 277 (agreeing with district court's finding that it could not review claims given full and fair consideration by the ACCA and/or CAAF). Because Plaintiff has failed to provide the ACCA decision at issue, merely alleging Defendants have not heard him out on his allegations, the Court is unable to review the substance of Plaintiff's claims in the present case.

Nevertheless, in light of Plaintiff's pro se status, the Court is willing to allow Plaintiff the opportunity to file the ACCA *coram nobis* decision referenced as being attached to his Response to Defendants' Motion to Dismiss (Dkt. # 21) within fourteen (14) days of this order. The Court therefore denies Defendants' Motion as to Plaintiff's ineffective assistance of counsel claim without prejudice. Defendants are free to re-urge that motion if they wish.

CONCLUSION

For the reasons described above, Defendants' Motion is **GRANTED IN PART AND DENIED IN PART**. (Dkt. # 19.) Defendants' Motion is **GRANTED** as to Plaintiff's due process claim, and that claim is **DISMISSED WITH PREJUDICE.** However, Defendants' Motion is **DENIED** without prejudice as to Plaintiff's ineffective assistance of

counsel claim. On the ineffective assistance of counsel claim, Plaintiff may file within **fourteen (14) days from entry of this Order** the referenced attachment to his Response to Defendant's Motion to Dismiss (Dkt. # 21). If Plaintiff chooses not to file the attachment, his ineffective assistance claim will be deemed as **dismissed without prejudice.**

IT IS SO ORDERED.

DATED: San Antonio, Texas, September 9, 2021.

s/ David Alan Ezra

Senior United States District Judge

United States Court of Appeals

for the Fifth Circuit

No. 22-50019

Summary Calendar

Paul Anthony Riojas,

Petitioner–Appellant,

versus

Department of the Army; John E. Whitley, *Secretary of the Army,*

Respondents–Appellees.

Appeal from the United States District Court for the Western District of Texas USDC No. 5:20-CV-1054

ON PETITION FOR REHEARING EN BANC

Before King, Costa, and Ho, *Circuit Judges.*

Per Curiam:

Treating the petition for rehearing en banc as a petition for panel rehearing (5th Cir. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5th Cir. R. 35), the petition for rehearing en banc is DENIED.

United States Court of Appeals
Fifth Circuit
Office of the Clerk

September 7, 2022

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 22-50019 Riojas v. Department of the Army
USDC No. 5:20-CV-1054

Enclosed is an order entered in this case.

See FRAP and Local Rules 41 for stay of the mandate.

Sincerely

Lyle W. Cayce, Clerk
s/ Roeshawn Johnson,
Roeshawn Johnson,
Deputy Clerk
504-310-7998

Mr. Philip Devlin
Mr. Huiju Jeon
Mr. Paul Anthony Riojas
Mr. Kartik Narayan Venguswamy