APPENDIX A

UNITED STATES OF AMERICA v. JOSHUA G. ANDERSON HOSPITALMAN APPRENTICE (E-2), U.S. NAVY
UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
2013 CCA LEXIS 517
NMCCA 201200499
June 27, 2013, Decided

Notice:

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.ÿ

Editorial Information: Subsequent History

Appeal dismissed by Anderson v. United States, 78 M.J. 12, 2018 CAAF LEXIS 372 (C.A.A.F., June 6, 2018)Motion denied by, As moot Anderson v. United States, 78 M.J. 48, 2018 CAAF LEXIS 388 (C.A.A.F., July 5, 2018)Appeal dismissed by Anderson v. United States, 78 M.J. 189, 2018 CAAF LEXIS 696 (C.A.A.F., Nov. 2, 2018)Writ of habeas corpus dismissed, Motion denied by, in part Anderson v. Bolster, 2020 U.S. Dist. LEXIS 38322, 2020 WL 1056504 (E.D. Va., Mar. 4, 2020)Petition denied by, Writ of habeas corpus denied In re Anderson, 2020 CCA LEXIS 72 (N-M.C.C.A., Mar. 11, 2020)Petition denied by, Writ of habeas corpus denied, Writ denied by In re Anderson, 2021 CCA LEXIS 225, 2021 WL 1884633 (N-M.C.C.A., May 11, 2021)Petition denied by, Writ of habeas corpus denied, Writ denied by In re Anderson, 2022 CCA LEXIS 3 (N-M.C.C.A., Jan. 5, 2022)Writ dismissed by Anderson v. United States, 82 M.J. 276, 2022 CAAF LEXIS 228, 2022 WL 1197388 (C.A.A.F., Mar. 22, 2022)Motion denied by, As moot Anderson v. United States, 2022 CAAF LEXIS 282, 2022 WL 1525455 (C.A.A.F., Apr. 13, 2022)

Editorial Information: Prior History

Sentence Adjudged: 27 July 2012. Military Judge: Col G.W. Riggs, USMC. Convening Authority: Commanding General, Marine Corps Installations East, Marine Corps Base, Camp Lejeune, NC. Staff Judge Advocate's Recommendation: LtCol D.M. McConnell, USMC.
GENERAL COURT-MARTIAL.

Counsel For Appellant: CDR Edward Hartman, JAGC, USN.
For Appellee: Maj David Roberts, USMC; LT Lindsay Geiselman, JAGC, USN.

Judges: Before R.Q. WARD, B.L. PAYTON-O'BRIEN, J.R. MCFARLANE, Appellate Military Judges. Senior Judge WARD and Senior Judge PAYTON-O'BRIEN concur.

CASE SUMMARY Servicemember's conviction for taking indecent liberty with a child, in violation of former UCMJ art. 120(j), was set aside because the child was unconscious at time servicemember and his wife had sexual intercourse near child's bed; however, servicemember's plea established all elements of "indecent act," in violation of former UCMJ art. 120(k).

OVERVIEW: HOLDINGS: [1]-Evidence that a servicemember drugged his five-year-old niece and penetrated her genital opening with his tongue while she was unconscious was sufficient to sustain his conviction for rape of a child; [2]-The servicemember's conviction for taking indecent liberty with a child, in violation of former UCMJ art. 120(j), 10 U.S.C.S. § 920(j), had to be set aside because the child was

unconscious at the time the servicemember and his wife engaged in sexual intercourse in a bed next to the child's bed; however, the servicemember's plea established all elements of the lesser offense of "indecent act," in violation of former UCMJ art. 120(k); [3]-The Government did not misrepresent or exaggerate the servicemember's criminality when it charged him with two specifications of possessing child pornography because he had identical images stored in separate electronic files.

OUTCOME: The court of criminal appeals set aside the guilty finding to taking indecent liberty with a child, affirmed a guilty finding to the lesser included offense of committing an indecent act in violation of former UCMJ art. 120(k), 10 U.S.C.S. § 920(k), affirmed the remaining finding of guilty, reassessed the servicemember's sentence, and affirmed the sentence that was approved by the convening authority.

LexisNexis Headnotes

Military & Veterans Law > Military Justice > Pleas > Providence Inquiries
Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review

The United States Navy-Marine Corps Court of Criminal Appeals reviews a military judge's decision to accept a guilty plea for abuse of discretion. Once a military judge accepts an accused's plea as provident and enters findings based on the plea, the court of criminal appeals will not reject the plea unless there is a substantial basis in law or fact for questioning the plea. When making that determination, the court is permitted to look to the record as a whole in evaluating the factual basis for the plea and is not limited to considering only the appellant's statements.

Military & Veterans Law > Military Offenses > Carnal Knowledge & Rape

The statutory definition of "sexual act" requires that the penetration of the genital opening be made with an intent to abuse, humiliate, harass, or degrade any person, or to arouse or gratify the sexual desire of any person. Former Unif. Code Mil. Justice art. 120(t)(1), 10 U.S.C.S. § 920(t)(1) (now codified as Unif. Code Mil. Justice art. 120(g)(1), 10 U.S.C.S. § 920(g)(1)).

Military & Veterans Law > Military Offenses > Conspiracy

A conspiracy exists when two or more persons enter into an agreement to commit an offense under the Uniform Code of Military Justice and, while the agreement continues to exist, either conspirator performs an overt act for the purpose of bringing about the object of the conspiracy. Manual Courts-Martial pt. IV, para. 5(b) (2008). The agreement need not be in any particular form or manifested in any formal words. Manual Courts-Martial pt. IV, para. 5(c)(2). A conspiracy is generally established by circumstantial evidence and is usually manifested by the conduct of the parties themselves. The evidence must show that the accused possessed deliberate, knowing, and specific intent to join the conspiracy, not merely that he was associated with persons who were part of the conspiracy or that he was merely present when the crime was committed.

Criminal Law & Procedure > Accusatory Instruments > Multiplicity
Military & Veterans Law > Military Justice > Pretrial Proceedings > Charges

What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges. R.C.M. 307(c)(4), Discussion, Manual Courts-Martial (2008). In determining whether there is an unreasonable multiplication of charges, the United States Navy-Marine Corps Court of Criminal Appeals considers five factors: (1) Did the accused object at trial? (2) Are the charges aimed at distinctly separate criminal acts? (3) Do the charges misrepresent or exaggerate the appellant's criminality? (4) Do the

charges unreasonably increase the appellant's punitive exposure? (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges and specifications?

Military & Veterans Law > Military Offenses > Carnal Knowledge & Rape
Military & Veterans Law > Military Offenses > General Article > Indecent Acts With a Child

Prior to October 1, 2007, "Indecent acts or liberties with a child" was an enumerated offense under Unif. Code Mil. Justice art. 134, 10 U.S.C.S. § 934. From October 1, 2007, to June 27, 2012, "Indecent liberty with a child" was made punishable under former Unif. Code Mil. Justice art. 120(j), 10 U.S.C.S. § 920(j). Acts that would have been prosecuted under those provisions committed on or after June 28, 2012, are now punishable under Unif. Code Mil. Justice art. 120b(c), 10 U.S.C.S. § 920b(c), "Sexual Abuse of a Child."

Military & Veterans Law > Military Offenses > Carnal Knowledge & Rape

Under former Unif. Code Mil. Justice art. 120, 10 U.S.C.S. § 920, the crime of "Indecent liberty with a child" was defined by statute as engaging in indecent liberty in the physical presence of a child with the intent to arouse, appeal to, or gratify the sexual desire of any person. Former Unif. Code Mil. Justice art. 120(j), 10 U.S.C.S. § 920(j) (now punishable under Unif. Code Mil. Justice art. 120b(c), 10 U.S.C.S. § 920b(c), as "Sexual Abuse of a Child."). The phrase "indecent liberty" was defined as "indecent conduct, but physical contact is not required," and could consist of communication of indecent language as long as the communication was made in the physical presence of the child. Former Unif. Code Mil. Justice art. 120(t)(11), 10 U.S.C.S. § 920(t)(11). In addition, "indecent conduct" was defined as that form of immorality relating to sexual impurity that was grossly vulgar, obscene, and repugnant to common propriety, and tended to excite sexual desire or deprave morals with respect to sexual relations. Former Unif. Code Mil. Justice art. 120(t)(12), 10 U.S.C.S. § 920(t)(12).

Military & Veterans Law > Military Offenses > Carnal Knowledge & Rape
Military & Veterans Law > Military Offenses > General Article > Indecent Acts With a Child

No statutory definition was provided for the term "physical presence" set forth in former Unif. Code Mil. Justice art. 120(j), 10 U.S.C.S. § 920(j). However, the word "presence" was the subject of judicial interpretation when indecent liberty with a child was an offenses under Unif. Code Mil. Justice art. 134, 10 U.S.C.S. § 934. In United States v. Miller, the United States Court of Appeals for the Armed Forces noted that the definition and common understanding of "presence" is the state or fact of being in a particular place and time and close physical proximity coupled with awareness.

Military & Veterans Law > Military Offenses > Carnal Knowledge & Rape

In United States v. Burkhart, the United States Air Force Court of Criminal Appeals ("AFCCA") held that in order to sustain a charge of "Indecent liberty" under former Unif. Code Mil. Justice ("UCMJ") art. 120(j), 10 U.S.C.S. § 920(j) (now punishable under Unif. Code Mil. Justice art. 120b(c), 10 U.S.C.S. § 920b(c), as "Sexual Abuse of a Child."), the child victim had to have at least some awareness that the accused was in her physical presence. The court based its decision on the intent behind the criminalization of the conduct, the statutory definition of the offense, and the case law interpreting the requirement of "presence" for the offense of indecent liberty. Specifically, the court noted the fact that the statute focused on protection of a child's morals, prevention of premature exposure to sexual matters, and prevention of injury to the child. The United States Navy-Marine Corps Court of Criminal Appeals agrees with the AFCCA's reasoning, and for the reasons set forth in United States v. Burkhart, comes to the same conclusion: that in order to sustain a charge of "Indecent liberty" under former UCMJ

art. 120(j), a child must have had at least some awareness the accused was in her physical presence.

Military & Veterans Law > Military Offenses > Lesser Included Offenses
Military & Veterans Law > Military Justice > Pleas > Providence Inquiries

The United States Court of Appeals for the Armed Forces has recognized that an improvident plea may be upheld as a provident plea to a lesser included offense.

Military & Veterans Law > Military Offenses > Carnal Knowledge & Rape
Military & Veterans Law > Military Offenses > General Article > Indecent Acts With a Child

An "Indecent act," in violation of former Unif. Code Mil. Justice ("UCMJ") art. 120(k), 10 U.S.C.S. § 920(k), was a lesser included offense of "Indecent liberty with a child," in violation of former UCMJ art. 120(j), 10 U.S.C.S. § 920(j) (now punishable under UCMJ art. 120b(c), 10 U.S.C.S. § 920b(c), as "Sexual Abuse of a Child."). The five elements of "Indecent liberty with a child" were: (a) that an accused committed a certain act or communication; (b) that the act or communication was indecent; (c) that the accused committed the act or communication in the physical presence of a certain child; (d) that the child was under 16 years of age; and (e) that the accused committed the act or communication with the intent to arouse, appeal to, or gratify the sexual desires of any person. Manual Courts-Martial pt. IV, para. 45b(10). The elements of an "Indecent act" were: (a) that an accused engaged in certain conduct; and (b) that the conduct was indecent conduct. Manual Courts-Martial pt. IV, para. 45b(11).

Military & Veterans Law > Military Offenses > Carnal Knowledge & Rape
Military & Veterans Law > Military Offenses > General Article > Indecent Acts With a Child

Application of the statutory elements test the United States Court of Appeals for the Armed Forces discussed in United States v. Jones reveals that the elements of "Indecent act" under former Unif. Code Mil. Justice art. 120(k), 10 U.S.C.S. § 920(k), were also elements of "Indecent liberty with a child" under former Unif. Code Mil. Justice art. 120(j), 10 U.S.C.S. § 920(j), and "Indecent liberty with a child" was the greater offense because it contained all of the elements of "Indecent act" along with one or more additional elements. It was impossible to prove "Indecent liberty with a child" without also proving "Indecent act." Moreover, while not dispositive, the Manual for Courts-Martial also listed "Indecent act" in violation of former Unif. Code Mil. Justice art. 120, 10 U.S.C.S. § 920, as a lesser included offense of "Indecent liberty with a child." Manual Courts-Martial pt. IV, para. 45d(10)(a).

Military & Veterans Law > Military Offenses > Carnal Knowledge & Rape

All that is required for a conviction under former Unif. Code Mil. Justice art. 120(k), 10 U.S.C.S. § 920(k), is conduct signifying that form of immorality relating to sexual impurity that is not only grossly vulgar, obscene, and repugnant to common propriety, but also tends to excite lust and depraved the morals with respect to sexual relations. Former Unif. Code Mil. Justice art. 120(t)(12), 10 U.S.C.S. § 920(t)(12).

Opinion

Opinion by: J.R. MCFARLANE

Opinion

OPINION OF THE COURT

MCFARLANE, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of one specification of conspiracy to rape a child, one specification of fraudulent enlistment, one specification of rape of a child, one specification of taking indecent liberties with a child, two specifications of possession of child pornography, one specification of distribution of child pornography, two specifications of using indecent language, one specification of communicating a threat, and one specification of wearing unauthorized medals or badges, in violation of Articles 81, 83, 120, and 134, Uniform Code of Military Justice, 10 U.S.C. 881, 883, 920 and 934. The appellant was sentenced to confinement for 30 years, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged.1

The appellant submits the following assignments of error:

1. The appellant's plea to conspiracy to rape a child was improvident because the military judge failed to elicit facts sufficient to prove each element of the offense;

2. The appellant's plea to rape of a child was improvident because the military judge failed to elicit facts sufficient to prove each element of the offense;

3. The military judge erred when he did not *sua sponte* find that separate specifications for the possession of the same child pornography on different media represented an unreasonable multiplication of charges;2 and

4. The appellant's plea to taking indecent liberty with a child was improvident because the military judge failed to elicit facts sufficient to support a finding that the appellant's conduct was committed in the presence of an "aware" child.

After carefully considering the record of trial and the submissions of the parties, we find merit in the fourth assigned error listed above. After taking corrective action in our decretal paragraph and reassessing the sentence, we conclude that the remaining findings and the reassessed sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Background

The charges relevant to the first, second, and fourth allegations of error in this case arose out of an incident wherein the appellant and his wife sexually assaulted the wife's niece. The charges relevant to the third assignment of error arose out of the appellant's possession of child pornography.

In January of 2011, the appellant was planning on leaving his wife. Wanting to save their marriage and aware of the appellant's sexual interest in minors, the appellant's wife came to him and proposed a plan to sexually assault AU, her five-year -old niece. Pursuant to that plan, they arranged to babysit AU overnight at their home. At bedtime, they fed AU hot chocolate laced with sleeping medication. Once AU was unconscious, both the appellant and his wife raped the child by penetrating her genital opening with their tongues. After the assault, the couple engaged in sexual intercourse in the bed right next to AU. AU remained unconscious throughout the sexual assault and sexual intercourse between the appellant and his wife.

Between December of 2009 and April of 2011, the appellant downloaded 580 distinct and different digital images of child pornography to his personal computer. Between May of 2010 and April of 2011, the appellant copied a number of those images from his personal computer to the flash drive

on his Blackberry cellular phone.

Additional relevant facts are further developed below.

Factual Basis to Support the Guilty Pleas

The appellant asserts that the military judge failed to obtain an adequate factual basis for the appellant's pleas regarding rape of a child, and conspiracy to rape a child. Specifically, the appellant avers that, for both offenses, the facts fail to show an "intent to abuse, humiliate, harass or degrade, or arouse or gratify the sexual desire of any person . . . ." Appellant's Brief of 13 Feb 2013 at 7-8 (citing to Article 120(t)(1), UCMJ). Additionally, with respect to the conspiracy charge, the appellant argues that the providence inquiry failed to show that he was more than a mere bystander, and that the military judge's failure to reconcile his answers during the inquiry with the more incriminating statements in the stipulation of fact create a substantial basis to question the plea. We disagree.

We review a military judge's decision to accept a guilty plea for abuse of discretion. *United States v. Inabinette,* 66 M.J. 320, 322 (C.A.A.F. 2008) (quoting *United States v. Eberle,* 44 M.J. 374, 375 (C.A.A.F. 1996)). Once a military judge accepts an accused's plea as provident and enters findings based on the plea, we will not reject the plea unless there is a substantial basis in law or fact for questioning the plea. *Id.* (citing *United States v. Prater,* 32 M.J. 433, 436 (C.M.A. 1991)). When making this determination, we are permitted to look to the record as a whole in evaluating the factual basis for the plea and are not limited to considering only the appellant's statements. *See United States v. Jordan,* 57 M.J. 236, 239 (C.A.A.F. 2002).

A. Rape of a Child

As applied to the facts of this case, the statutory definition of sexual act requires that the penetration of the genital opening be made "with an intent to abuse, humiliate, harass, or degrade, any person or to arouse or gratify the sexual desire of any person." Art. 120(t)(1), UCMJ. In this case, the military judge read the applicable definition of sexual act to the appellant, and the appellant agreed that his acts comported with that definition. However, the military judge did not ask any specific questions regarding intent during the portions of the providence inquiry regarding the charges of rape of a child, and conspiracy to commit rape of a child. Nonetheless, when reviewing the record as a whole, we find ample evidence to show that the acts were committed to gratify the appellant's sexual desires.

First, after having been read the aforementioned definition, the appellant specifically referred to what happened to the victim as a "sexual act." Record at 41. The appellant also agreed with the military judge's suggestion that his wife came up with the idea of assaulting AU because of the appellant's "proclivity to be interested sexually in minors." *Id.* Later during the proceeding, evidence was introduced that the appellant had referred to the five-year-old victim as a "hottie," that he had sexual fantasies about her, and that he masturbated to a photograph of AU in her Christmas dress. *Id.* at 107-09. Given these facts, we do not find a substantial basis in law or fact for questioning the appellant's guilty plea to rape of a child. *See Inabinette,* 66 M.J. at 322.

B. Conspiracy to Commit Rape of a Child

A conspiracy exists when two or more persons enter into an agreement to commit an offense under the Code and, while the agreement continues to exist, either conspirator performs an overt act for the purpose of bringing about the object of the conspiracy. Manual For Courts-Martial, United States (2008 ed.), Part IV, ¶ 5(b). The agreement "need not be in any particular form or manifested in any formal words." *Id.* at ¶ 5(c)(2). A conspiracy is "generally established by circumstantial evidence and is usually manifested by the conduct of the parties themselves." *United States v. Barnes,* 38 M.J. 72, 75 (C.M.A. 1993) (citations omitted). The evidence must show that the accused possessed

"deliberate, knowing, and specific intent to join the conspiracy, not merely that he was associated with persons who were part of the conspiracy or that he was merely present when the crime was committed." *United States v. Mukes,* 18 M.J. 358, 359 (C.M.A. 1984) (citing *United States v. Glen-Archila,* 677 F.2d 809 (11th Cir. 1982)). *See also United States v. Knowles,* 66 F.3d 1146, 1157 (11th Cir. 1995) (mere presence and association with conspirators insufficient to support conspiracy conviction).

The appellant's argument with respect to this charge is two-fold. First, the appellant argues that the record fails to show that the agreement between he and his wife encompassed the requisite intent, by either party, to assault AU in order to abuse, humiliate, harass or degrade, or arouse or gratify the sexual desire of any person. Rather, he argues, the record shows that his wife's intent was to "salvage her marriage." Appellant's Brief at 13. This argument confuses intent with motive. The appellant's wife may have been motivated by a desire to save her marriage, but the record shows that her intent was to satisfy the appellant's sexual desires. Second, for the reasons detailed above, it is clear that the appellant's intent was to gratify his sexual desires, thus providing the required *mens rea.*

Second, the appellant argues that the providence inquiry "makes clear that the plan, furtherance, and execution were committed solely by Appellant's wife" and that, to the extent that the inquiry conflicts with the stipulation of fact, this court should find that inconsistency a basis for questioning the plea. *Id.* at 12. This argument mischaracterizes the record. Although the appellant's answers to the military judge's questions during the providence inquiry do suggest that the plan was conceived by the appellant's wife, and that she was the one who largely carried it out, the appellant ignores the fact that he said "my wife came to me - and she knew that I was attracted to her niece - and she came to me and *asked* if I wanted to do sexual acts with her and her niece and I told her I did." Record at 33 (emphasis added). This statement, along with the portion of the stipulation of fact wherein the appellant states "*we* discussed and agreed to drug AU while she was in our bed, remove her underwear, and commit rape of a child on her while she was unconscious," shows that he was not some mere bystander at this crime. Prosecution Exhibit 1 at 2 (emphasis added). Rather, this shows that he helped plan the crime, and that it was executed both on his behalf and with his active participation. Given these facts, we do not find a substantial basis in law or fact for questioning the appellant's guilty plea to conspiracy to rape a child. *See Inabinette,* 66 M.J. at 322.

Unreasonable Multiplication of Charges

In the third assignment of error, the appellant asserts that the military judge committed plain error by not finding that the two specifications of possession of child pornography constituted an unreasonable multiplication of charges. The appellant argues that the military judge should have found that Specification 1 of Charge IV and the sole specification under Additional Charge IV were an unreasonable multiplication of charges because the images contained on the flash memory card referenced in Additional Charge IV were copied from, and therefore a subset of, the images referenced in Specification 1 of Charge IV. We disagree.

What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges (UMC). Rule for Courts-Martial 307(c)(4), Manual for Courts-Martial, United States (2008 ed.), Discussion. In determining whether there is UMC, this court considers five factors: (1) Did the accused object at trial; (2) Are the charges aimed at distinctly separate criminal acts; (3) Do the charges misrepresent or exaggerate the appellant's criminality; (4) Do the charges unreasonably increase the appellant's punitive exposure; and, (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges and specifications? *United States v. Quiroz,* 57 M.J. 583, 585-86 (N.M.Ct.Crim.App. 2002) (en banc), *aff'd,* 58 M.J. 183 (C.A.A.F. 2003)

(summary disposition).

In this case, the first *Quiroz* factor weighs against the appellant, since no motion was made at trial to treat the two specifications as an unreasonable multiplication of charges. The second and third factors also weigh against the appellant. He used a separate and distinct form of media when he transferred the images and videos from his laptop computer to the flash drive on his Blackberry, which made each possession a separate and distinct criminal action. *See United States v. Campbell,* 66 M.J. 578, 583 (N.M.Ct.Crim.App. 2008) ("[E]ach possession on different media was a separate crime, and, therefore, a proper basis for a separate specification alleging possession, regardless of the similarity of the images and videos in each instance"), *aff'd in part and rev'd in part on other grounds,* 68 M.J. 217 (C.A.A.F. 2009); *see also United States v. Planck,* 493 F.3d 501, 504-05 (5th Cir. 2007) ("[T]he *actus reus* is the possession of child pornography; the Government need only prove the defendant possessed the contraband at a single place and time to establish a single act of possession . . . . [Here, the appellant] possessed child pornography in three separate places - a laptop and desktop computer and diskettes - and, therefore, committed three separate crimes."). Though the images were identical to the originals when viewed, the duplicates on the flash drive are separate electronic files, created by the appellant, and embedded in different media. Therefore, we conclude that the number of specifications under the charge did not misrepresent or exaggerate the appellant's criminality.

As to the fourth factor, the appellant faced life without the possibility of parole as a result of the rape charge, therefore the separate possession offenses did not increase the appellant's punitive exposure. Finally, we find that the Government's charging strategy in this case reflected a reasoned approach and was not overreaching. In sum, all of the *Quiroz* factors weigh against the appellant. Accordingly, we hold that it was not an abuse of discretion for the military judge to accept the appellant's guilty pleas to two different specifications of possession of child pornography.

Indecent Liberty with a Child

The appellant asserts that his plea to taking indecent liberty with a child was improvident because the military judge failed to elicit facts sufficient to support a finding that the appellant's conduct was committed in the physical presence of a child, in that the term "presence" requires a level of awareness by the child that did not exist in this case. Appellant's Brief at 19-20. We agree.

This area of the law has been evolving in recent years, and has been the subject of two recent changes to the UCMJ. Prior to 1 October 2007, "Indecent acts or liberties with a child" was an enumerated offense under Article 134, UCMJ. From 1 October 2007 to 27 June 2012, "Indecent liberty with a child" was made punishable under Article 120(j), UCMJ. Acts that would have been prosecuted under those provisions committed on or after 28 June 2012, are now punishable under Article 120b(c), UCMJ, "Sexual Abuse of a Child."

At the time of the appellant's offense, the crime of indecent liberty with a child was defined by statute as: "engag[ing] in indecent liberty in the physical presence of a child . . . with the intent to arouse, appeal to, or gratify the sexual desire of any person . . . ." Art. 120(j), UCMJ. The phrase "indecent liberty" was further defined as "indecent conduct, but physical contact is not required. . . . An indecent liberty may consist of communication of indecent language as long as the communication is made in the physical presence of the child. . . ." Art. 120(t)(11), UCMJ. In addition, "indecent conduct" was defined as: "that form of immorality relating to sexual impurity that is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations. . . ." Art. 120(t)(12), UCMJ.

No statutory definition was provided for the term "physical presence" set forth in Article 120(j),

UCMJ. However, the word "presence" had been the subject of judicial interpretation when indecent liberty with a child was an Article 134 offense. In *United States v. Miller,* the Court of Appeals for the Armed Forces (CAAF) noted that "[t]he definition and common understanding of 'presence' is: '[t]he state or fact of being in a particular place and time' and '[c]lose physical proximity *coupled with awareness.*'" 67 M.J. 87, 90 (C.A.A.F. 2008) (quoting *Black's Law Dictionary* 1221 (8th ed. 2004)) (emphasis added).

Although the CAAF has not yet applied that definition as the word is used in Article 120(j), UCMJ, the Air Force Court of Criminal Appeals (AFCCA) has. In a recent published opinion, the AFCCA held that "in order to sustain a charge of indecent liberty under Article 120(j), UCMJ, the child must have at least some awareness the accused is in her physical presence." *United States v. Burkhart,* 72 M.J. 590, (A.F.Ct.Crim.App. 2013). The AFCCA based this decision on the "intent behind the criminalization of the conduct, the statutory definition of the offense, and the case law interpreting the requirement of 'presence' for the offense of indecent liberty." *Id.* Specifically, the court noted the fact that the statute focused on "protection of the child's morals, prevention of premature exposure to sexual matters, prevention of injury to the child." *Id.*

We agree with the AFCCA's reasoning, and for the reasons set forth in their opinion, come to the same conclusion: that in order to sustain a charge of indecent liberty under Article 120(j), UCMJ, the child must have at least some awareness the accused is in her physical presence. Because the providence inquiry in this case indicated that AU was unconscious, and therefore not aware that the appellant and his wife engaged in sexual intercourse in the bed next to her, we find a substantial basis to question the appellant's plea to indecent liberty with a child. *See Inabinette,* 66 M.J. at 322.

Indecent Act as a Lesser Included Offense

Our determination that the appellant's plea is improvident as to a violation of Article 120(j), UCMJ, does not end our inquiry. The CAAF has recognized that an improvident plea may be upheld as a provident plea to a lesser included offense. *See, e.g., United States v. Pillow,* 28 M.J. 1008, 1011 (C.G.C.M.R. 1989); *United States v. Anderson,* 27 M.J. 653, 655 (A.C.M.R. 1988). We must determine whether the record supports our affirming a lesser included offense.

As this court recently noted in *United States v. Morris,* an indecent act in violation of Article 120(k), UCMJ, is a lesser included offense of indecent liberty with a child in violation of Article 120(j). *United States v. Morris,* No. 201100569, 2012 CCA LEXIS 455, unpublished op. (N.M.Ct.Crim.App. 30 Nov 2012) (citing *United States v. Jones,* 68 M.J. 465, 472 (C.A.A.F. 2010)).

The five elements of "Indecent liberty with a child" are:

(a) That the accused committed a certain act or communication;

(b) That the act or communication was indecent;

(c) That the accused committed the act or communication in the physical presence of a certain child;

(d) That the child was under 16 years of age; and

(e) That the accused committed the act or communication with the intent to: arouse, appeal to, or gratify the sexual desires of any person.MCM, Part IV, ¶ 45b(10).

The elements of "indecent act" are:

(a) That the accused engaged in certain conduct; and

(b) That the conduct was indecent conduct.MCM, Part IV, ¶ 45b(11).

Application of the statutory elements test discussed in *Jones* reveals that the "elements of [indecent act] are also elements of [indecent liberty with a child] and [indecent liberty with a child is] the greater offense because it contains all of the elements of [indecent act] along with one or more additional elements." *Jones,* 68 M.J. at 470. It is impossible to prove indecent liberty with a child without also proving an indecent act. Moreover, while not dispositive, the Manual for Courts-Martial also listed "Article 120 - Indecent act" as a lesser included offense of indecent liberty with a child. MCM, Part IV, ¶ 45d(10)(a). Accordingly, we find that the appellant received the constitutionally-required notice that he had to defend against both the greater and lesser offense, and that we can decide whether the appellant's plea was provident to the lesser offense of indecent act in violation of Article 120(k), UCMJ.

The problematic part of the appellant's plea to indecent liberty with a child - awareness by the child - is not an issue under the LIO of indecent act. All that is required for a conviction under Article 120(k) is conduct signifying "that form of immorality relating to sexual impurity that is not only grossly vulgar, obscene, and repugnant to common propriety, but also tends to excite lust and depraved the morals with respect to sexual relations." Art. 120(t)(12), UCMJ. Here, the appellant had sexual intercourse with his wife right next to a sleeping five-year-old to whom he was sexually attracted, and who they had just raped. Moreover, the appellant's wife told the Naval Criminal Investigative Service that the appellant was "rubbing [AU's] vagina" during the intercourse. Record at 109. Under these circumstances the appellant's sexual acts were "grossly vulgar, obscene, and repugnant to common propriety." Art. 120(t)(12), UCMJ. Consequently, we set aside the guilty finding to Specification 6 of Charge II and affirm a guilty finding to the lesser included offense of indecent act, in violation of Article 120(k), UCMJ.

Sentence Reassessment

Because of our above action on findings, we must determine whether we are able to reassess the sentence. Applying the analysis set forth in *United States v. Sales,* 22 M.J. 305 (C.M.A. 1986), *United States v. Moffeit,* 63 M.J. 40 (C.A.A.F. 2006), and *United States v. Buber,* 62 M.J. 476, 479 (C.A.A.F. 2006), and carefully considering the entire record, we conclude that there has not been a "dramatic change in the 'penalty landscape.'" *United States v. Riley,* 58 M.J. 305, 312 (C.A.A.F. 2003). Moreover, we are satisfied beyond a reasonable doubt that the military judge would have adjudged a sentence no less than that approved by the convening authority in this case. Accordingly, no further action is deemed necessary.

Conclusion

We affirm the findings, as modified, and the sentence approved by the convening authority and reassessed by this court.

Senior Judge WARD and Senior Judge PAYTON-O'BRIEN concur.

Footnotes

1

To the extent that the convening authority's action purported to execute the punitive discharge, it was a nullity. *United States v. Bailey,* 68 M.J. 409 (C.A.A.F. 2009).

2

The appellant's brief initially framed this assignment of error as a failure of the military judge to find

the two specifications "facially identical," and therefore multiplicious. Appellant's Brief of 13 Feb 2013 at 2, 9. However, in the argument portion of his brief the appellant focuses entirely on whether the two specifications represent an unreasonable multiplication of charges. *Id.* at 20-24. Given the focus of the appellant's argument, and the fact that the specifications are not facially duplicative, we address the assignment of error as one of unreasonable multiplication of charges.

APPENDIX B

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Joshua G. Anderson Petitioner v. UNITED STATES Respondent	NMCCA NO. 201200499 PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF HABEAS CORPUS ORDER

On 9 July 2018, this court received a Petition for Extraordinary Relief in the Nature of a Writ of Habeas Corpus. On consideration of the writ petition, it is, by the Court, this 24th day of July, 2018,

ORDERED:

That the writ petition is dismissed for lack of jurisdiction.

For the Court

R.H. TROIDL
Clerk of Court

Copy to:
NMCCA (51.2)
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02

APPENDIX C

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

Joshua G. Anderson,

Appellant

v.

United States,

Appellee

USCA Dkt. No. 19-0021/NA
Crim.App. No. 201200499

ORDER

On consideration of the writ-appeal petition, it is, by the Court, this 2nd day of November, 2018,

ORDERED:

That the writ-appeal petition is hereby dismissed for lack of jurisdiction.

For the Court,

/s/ Joseph R. Perlak
Clerk of the Court

cc: The Judge Advocate General of the Navy
Appellant (Pro Se)
Appellate Defense Counsel
Appellate Government Counsel (Huisenga)

APPENDIX D

Joshua Gary Anderson, Petitioner, v. Mark J. Bolster, Respondent.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION
2020 U.S. Dist. LEXIS 38322
1:19cv75 (LO/TCB)
March 4, 2020, Decided
March 4, 2020, Filed

Editorial Information: Subsequent History

Petition denied by In re Anderson, 801 Fed. Appx. 184, 2020 U.S. App. LEXIS 12387, 2020 WL 1900034 (4th Cir., Apr. 17, 2020)Writ of habeas corpus dismissed Anderson v. Bolster, 2020 U.S. Dist. LEXIS 156859, 2020 WL 5097516 (E.D. Va., Aug. 27, 2020)

Editorial Information: Prior History

United States v. Anderson, 2013 CCA LEXIS 517 (N-M.C.C.A., June 27, 2013)

Counsel **{2020 U.S. Dist. LEXIS 1}**Joshua Gary Anderson, Petitioner, Pro se, Petersburg, VA.

For Mark J. Bolster, Respondent: John E. Swords, LEAD ATTORNEY, US Attorney's Office (Alexandria-NA), Alexandria, VA; Yolanda Dee McCray Jones, LEAD ATTORNEY, US Attorney's Office (Alexandria-NA), Alexandria, VA.

Judges: Liam O'Grady, United States District Judge.

Opinion

Opinion by: Liam O'Grady

Opinion

MEMORANDUM OPINION

Federal inmate Joshua Anderson seeks a writ of habeas corpus to correct perceived errors plaguing his military court-martial convictions and his subsequent appeals in the military court system. See 28 U.S.C. § 2241. Respondent filed a motion to dismiss the petition [Dkt. No. 6] which petitioner has opposed, first through a memorandum that exceeds the page limit set by this Court's Local Rules [Dkt. No. 11], and second through an unauthorized surreply [Dkt. No. 13].1 This matter has therefore been fully briefed and is ripe for disposition. The Court finds that petitioner is not entitled to relief as to four of the five grounds he raises but cannot conclusively determine whether or to what extent petitioner is entitled to relief as to the fifth. Accordingly, respondent's motion will be granted in part and denied in part, and the parties will be directed to file additional**{2020 U.S. Dist. LEXIS 2}** briefing as to two discrete issues.

I. Background

Petitioner, a prisoner at the Federal Correctional Institution Petersburg, is serving a thirty-year sentence having pleaded guilty before a military trial judge to multiple specifications of violating Articles 81, 83, 120, 134, and 135 of the United States Code of Military Justice ("UCMJ").2 Dkt. No.

1; United States v. Anderson, NMCCA201200499, 2013 CCA LEXIS 517, 2013 WL 3242397. at *1 (N-M. Ct. Crim. App. June 27, 2013). As part of a pretrial plea agreement, petitioner agreed to waive his right to move for "Article 13, UCMJ" credit, which is credit issued by a military judge when an accused has been subjected to pretrial confinement that constituted punishment or that involved unusually harsh circumstances. See Dkt. Nos. 4, 7-7. The court-martial convening authority approved petitioner's sentence as adjudged on November 20, 2012. Id.

Next, pursuant to Article 66, UCMJ, the Navy and Marine Corps Court of Criminal Appeals ("NMCCA") conducted a mandatory review of petitioner's case.3 Anderson, 2013 CCA LEXIS 517, 2013 WL 3242397. Through appellate counsel, petitioner raised four specific assignments of error:

> (1) The appellant's plea to conspiracy to rape a child was improvident because the military judge failed to elicit facts sufficient to prove**{2020 U.S. Dist. LEXIS 3}** each element of the offense;
>
> (2) The appellant's plea to rape of a child was improvident because the military judge failed to elicit facts sufficient to prove each element of the offense;
>
> (3) The military judge erred when he did not *sua sponte* find that separate specifications for the possession of the same child pornography on different media represented an unreasonable multiplication of charges; and
>
> (4) The appellant's plea to taking indecent liberty with a child was improvident because the military judge failed to elicit facts sufficient to support a finding that the appellant's conduct was committed in the presence of an "aware" child.2013 CCA LEXIS 517, [WL] at *1.

The NMCCA found no error with respect to the first three grounds but did find merit with respect to petitioner's fourth claim. 2013 CCA LEXIS 517, [WL] at *1-6. Accordingly, on June 27, 2013, the NMCCA set aside petitioner's conviction for indecent liberties with a child and affirmed a guilty finding for the lesser included offense of commission of an indecent act. Id. The NMCCA reassessed petitioner's sentence in this light and affirmed it without modification. 2013 CCA LEXIS 517, [WL] at *7. Petitioner did not file an appeal with the Court of Appeals for the Armed Forces ("CAAF"), and his court-martial case**{2020 U.S. Dist. LEXIS 4}** therefore became final on December 16, 2013. Dkt. No. 7-5 (Respondent's Exhibit ("REX") 5).

Five years later, on July 9, 2018, petitioner filed a petition for writ of habeas corpus in the NMCCA requesting that the court (1) set aside the sentence and findings of guilt and (2) grant petitioner a new trial. Dkt. Nos. 1, 4; REX 6. Petitioner included the following five grounds for relief in his petition:

> (1) The Convening Authority, pursuant to R.C.M. 705(d)(1), unlawfully sponsored a provision in Petitioner's pretrial agreement requiring him to waive the Article 13, UCMJ, 10 U.S.C.S. § 813 (2000), motion which he intended to raise at trial in violation of public policy and appellate case law, rendering the agreement void, and invalidating his pleas of guilty.
>
> (2) Petitioner's trial defense counsel was ineffective by incorrectly advising him, either negligently or intentionally to accept the Convening Authority's provision and to sign the pretrial agreement.
>
> (3) The Military Judge's inquiry into Petitioner's waiver of motion for relief under Article 13, UCMJ. 10 U.S.C.S. § 813 (2000) fell short of what is required by R.C.M. 910(f). The error substantially prejudiced the rights of the Petitioner by depriving him of a**{2020 U.S. Dist. LEXIS 5}** complete sentencing hearing. The Military Judge also erred when he accepted the pretrial agreement because the Government sponsored provision violated public policy.
>
> (4) Appellate defense counsel was ineffective pursuant to § 15-2(c)(3) of the Military' Criminal

Justice Practice and Procedure, by refusing to raise the argument that Petitioner's Article 13 waiver was against public policy and Petitioner's allegation of the conditions of his post-trial confinement, as well as failing to discover violations of R.C.M. 705(c)(1)(B). 705(d)(1), and 910(1).

(5) This Court [the NMCCA] failed to consider the Petitioner's entire record when it affirmed the findings and sentence. The government overreach in Petitioner's case is plain error that any legally trained professional should have discovered upon reviewing the entire record. A complete Article 66 review is a "substantial right" of an accused and a CCA may not rely on only selected portions of a record or allegations alone.Id. On July 24, 2018, the NMCCA dismissed petitioner's habeas petition for lack of jurisdiction. Id. Petitioner then appealed the NMCCA's dismissal to the CAAF, which, on November 2, 2018, dismissed petitioner's habeas petition, also for lack of jurisdiction.**{2020 U.S. Dist. LEXIS 6}** Dkt. Nos. 1, 4.

Finally, on January 17, 2019, petitioner filed the instant petition for writ of habeas corpus, invoking the same five grounds he raised in his petition for writ before the military courts. See id.

II. Standard of Review

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) should be granted when it is determined that a court lacks subject matter jurisdiction over the proceeding at hand. The burden of proving subject matter jurisdiction lies with the party asserting it, Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982), and, to determine if it exists, the court may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." Richmond, Fredericksburg & Potomac R.R. Co. v. United States, 945 F.2d 765. 768 (4th Cir.1991).

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the sufficiency of a complaint; it does not resolve contests surrounding facts, the merits of a claim, or the applicability of defenses. Republican Party of N.C. v. Martin, 980 F.2d 943, 952 (4th Cir. 1992). To survive a 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). A claim is facially plausible if "the factual content of a complaint allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 256 (4th Cir. 2009) (quoting Iqbal, 556 U.S. at 678). A plaintiff must therefore allege facts in support**{2020 U.S. Dist. LEXIS 7}** of each element of each claim he or she raises; "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are insufficient. Iqbal at 678.

When addressing a 12(b)(6) motion, a reviewing court generally may not look outside the facts contained within the complaint without converting the motion into one for summary judgment. Anand v. Ocwen Loan Servicing, LLC, 754 F.3d 195, 198 (4th Cir 2014). With that said, a court may nevertheless take judicial notice of matters of public record such as court filings, see Witthohn v. Fed. Ins. Co., 164 F. App'x 395 (4th Cir. 2006), without converting a 12(b)(6) motion into a motion for summary judgment. See Philips v. Pitt Cty. Mem. Hosp., 572 F.3d 176, 180 (4th Cir. 2009). The Court may also consider documents attached to the complaint as well as those attached to the motion to dismiss, so long as they are integral to the complaint and authentic. See Blankenship v. Manchin, 471 F.3d 523, 526 n.1 (4th Cir. 2006).

III. Analysis

To obtain habeas relief under § 2241, a petitioner must demonstrate that he is detained in federal custody "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §

2241(c)(3). Relief under this statute is available to military prisoners convicted by a court-martial, but a federal district court's authority to review military court proceedings is limited. See Burns v. Wilson, 346 U.S. 137, 73 S. Ct. 1045, 97 L. Ed. 1508 (1953). Indeed, pursuant to Burns, if a district court determines that the military court system**{2020 U.S. Dist. LEXIS 8}** gave "full and fair consideration" to the claims it is presented, the district court should deny the petition. See id. at 142. "Only when the military has not given a petitioner's claims full and fair consideration does the scope of review by the federal civil court expand." Lips v. Commandant, United States Disciplinary Barracks, 997 F.2d 808, 810 (10th Cir. 1993); see also Burns, 346 U.S. at 142 (finding district courts are empowered to conduct *de novo* review only if military courts "manifestly refused" to consider the petitioner's claims).

Federal Circuit Courts of Appeal agree that whether a petitioner's claims received "full and fair consideration" in the military tribunals is the correct threshold question in a § 2241 action but do not agree as to what constitutes "full and fair consideration." The Fourth Circuit has not implemented a definitive framework, but district courts within the circuit have near universally adopted the Tenth Circuit's approach.4 This approach states that review by a federal district court of a military conviction is appropriate when the four following conditions are met:

> (1) the asserted error is of substantial constitutional dimension; (2) the issue is one of law rather than of disputed fact already determined by the military tribunal; (3) there are no military considerations that**{2020 U.S. Dist. LEXIS 9}** warrant different treatment of constitutional claims; and (4) the military courts failed to give adequate consideration to the issues involved or failed to apply proper legal standards.Lips, 997 F.2d at 811.5

A military court is, of course, unable to provide "full and fair consideration" to a claim never properly presented to it. But that court's failure to review a claim under those circumstances does not entitle a petitioner to *de novo* review of that claim in a federal district court. Instead, "if a ground for relief was not raised in the military courts, then the [reviewing federal district] court must deem that ground waived." Roberts v. Callahan, 321 F.3d 994, 995 (10th Cir. 2003). To overcome such a waiver, a petitioner must demonstrate cause excusing his procedural default and prejudice resulting from the error. Lips at 812 (citing Wolff v. United States, 737 F.2d 877 (10th Cir. 1984)).

A. Waiver and Full and Fair Consideration

With this framework laid out, the Court must first make a determination as to the threshold question: whether petitioner's claims were afforded full and fair consideration in the military court system. The parties, unsurprisingly, have different views on the issue. Respondent does not contend that petitioner's claims**{2020 U.S. Dist. LEXIS 10}** were fully reviewed but does assert that petitioner has waived them and that they are therefore barred from review in this forum. Petitioner asserts that because he presented the claims in the instant petition to the military courts through a writ of habeas corpus, he did not waive them. He further asserts that the military courts' refusal to review those claims means they were not afforded "full and fair consideration," entitling him to *de novo* review before this Court. In this light, it is also necessary to determine whether a petitioner like Anderson, who did not raise claims at trial or on direct appeal but several years later raises those claims in the context of a military habeas corpus petition, has waived those claims and thereby divested the federal court of jurisdiction to review them.

This second question, while not novel, is not a fixture in § 2241 case law. Several of the courts to directly address the issue have found that a petitioner acting in this manner has waived his claims, rendering them unreviewable in federal court. See, e.g., Narula v. Yakubisin, 650 F. App'x 337, 338 (9th Cir. 2016) ("Absent a showing of cause and prejudice, constitutional challenges to court-martial convictions are waived when not raised *on direct appeal**{2020 U.S. Dist. LEXIS 11}** in the military*

courts.") (emphasis supplied); Hurn v. McGuire, No. 04-3008, 2005 U.S. Dist. LEXIS 8440, 2005 WL 1076100, at *2 (D. Kan. May 6, 2005) (finding that, despite raising claims through habeas petition to military courts, petitioner had waived claims due to failure to raise them at trial or on direct appeal), aff'd No. 05-3206 (10th Cir. Feb. 17, 2006).

But, in what is perhaps the Tenth Circuit's closest analog to the instant case, the result was different. In Brimeyer v. Nelson, 712 F. App'x 732 (10th Cir. 2017), the district court found one of petitioner's claims waived and procedurally defaulted where petitioner failed to raise that claim on direct appeal but later raised it in a military habeas filing. The Tenth Circuit affirmed the district court's denial of relief, but on different grounds: the federal appellate court found that, because the military habeas court had not denied petitioner's claim on procedural grounds (here, waiver grounds), it had not erected an enforceable procedural bar on which the district court could rely.6 The Circuit Court nevertheless found that, because the military court "considered the Petition" and then denied it, plaintiff's claim had received full and fair consideration, divesting the district court of the power to consider it.

The similarity of the procedural history in this action is apparent.**{2020 U.S. Dist. LEXIS 12}** Here, as in Brimeyer, petitioner did not raise his federal habeas claims at trial or on direct appeal but did later raise them through a military habeas petition. Here, as in Brimeyer, the military habeas court denied petitioner's claims on grounds other than procedural (i.e. waiver) grounds. But, here, *unlike* in Brimeyer, the military habeas courts dismissed petitioner's petition for want of jurisdiction.

As a result, the Court hesitates to discard this petition on either waiver and default *or* on full and fair consideration grounds. Indeed, in light of Brimeyer, which relied on Harris v. Reed, dismissal of this petition on the back of a procedural default is inappropriate; the military courts did not hold that petitioner had waived his claims, and this Court therefore cannot dismiss this case on procedural bar grounds. But the Court also cannot conclude that petitioner's claims received full and fair consideration by the military courts. The bar for finding that a military court fully and fairly considered a petitioner's claims is not high. "[F]ull and fair consideration occurs when the parties brief and argue the issue, even if the military court summarily resolves the claim." Roberts v. Callahan, 321 F.3d 994, 997 (10th Cir. 2003). Where**{2020 U.S. Dist. LEXIS 13}** the issue has been presented, "the military tribunal has given the claim fair consideration, even though its opinion summarily disposed of the issue with the mere statement that it did not find the issue meritorious or requiring discussion." Watson v. McCotter, 782 F.2d 143, 145 (10th Cir. 1986). Here, the military courts did not give petitioner's claims even this bare a level of treatment. Instead, the NMCCA stated, "On consideration of the writ petition, it is, by the Court ... ORDERED: That the writ petition is dismissed for lack of jurisdiction." See Dkt. No. 7-6. The CAAF stated, "On consideration of the writ-appeal petition, it is ordered that the writ-appeal petition is dismissed for lack of jurisdiction." See 78 M.J. 189.

In light of the foregoing, the Court concludes that there is no procedural bar blocking petitioner's claims and that those claims did not receive full and fair consideration in the military courts. Consequently, the Court will proceed to assess the merits of petitioner's claims *de novo*.

B. Merits Analysis

Each of petitioner's grounds for relief revolve around Article 13, U.C.M.J., which states that "[n]o person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the**{2020 U.S. Dist. LEXIS 14}** charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline." 10 U.S.C. § 813. Upon a motion, a military judge may provide credit to an accused for pretrial confinement that constituted punishment or involved unusually harsh circumstances. See

R.C.M. 305(k).

Although petitioner outlines five independent grounds for relief, based on his post-petition filings, which conflate and expand legal arguments and issues, all five claims appear to reduce to one central claim: that the inquiry the military judge conducted regarding the propriety of the Article 13 waiver provision was insufficient in light of United States v. McFadyen, 51 M.J. 289 (C.A.A.F. 1999). Ground Three of the instant petition raises this issue in earnest. Petitioner's remaining four claim at points seem to rely on this central argument but are shoehorned into tangential claims related to ineffective assistance of counsel and legal error allegedly committed by the military appellate court system. Nevertheless, to the extent the Court can discern appreciable differences between petitioner's claims, those**{2020 U.S. Dist. LEXIS 15}** claims shall be addressed in turn.

1. Ground One

Petitioner asserts that "[t]he Convening Authority ... unlawfully sponsored the provision to Petitioner's pretrial agreement requiring him to waive his right to submit a motion for relief under Article 13, U.C.M.J. ... as he intended to do at trial." Dkt. No. 4.

This claim is easily disposed of. "Pretrial agreement negotiations may be initiated by the accused, defense counsel, trial counsel, the staff judge advocate, convening authority, or their duly authorized representatives. Either the defense or the government may propose any term or condition not prohibited by law or public policy." R.C.M. 706(d)(1). Petitioner appears to suggest that, under the logic of United States v. Benitez, 49 M.J. 539 (N-M. Ct. Crim. App. Dec. 31, 1998), the waiver provision in this case was invalid and contrary to public policy because it required him to "waive fundamental statutory rights protected by procedural rules." Benitez, 49 M.J. at 541; Dkt. No. 23. But, as respondent notes, Benitez dealt not with an Article 13 waiver provision but a speedy trial waiver provision-a constitutional issue.

What's more, in cases that post-date Benitez, the CAAF, a higher court than the one that decided Benitez, has repeatedly reiterated**{2020 U.S. Dist. LEXIS 16}** that Article 13 waivers are not, in the abstract, contrary to public policy. See McFadyen, 51 M.J. 289; United States v. Felder, 59 M.J. 444 (C.A.A.F. 2004). Indeed, the CAAF has held that Article 13 waivers are legitimate provided the military judge takes certain steps to ensure that such a waiver is executed with full knowledge of its implications.7 See id. The Convening Authority's sponsoring of the Article 13 waiver in this case was therefore not impermissible in the abstract. Consequently, Ground One is denied.

2. Grounds Two and Four

Grounds Two and Four of the petition relate to alleged ineffective assistance of counsel. Ground Two deals with the acts or omissions of petitioner's trial counsel while Ground Four relates to the acts or omissions of his appellate counsel. As explained below, neither claim is meritorious.

To prevail on an ineffective assistance of counsel claim, a habeas petitioner must show (1) that counsel's performance was deficient and (2) that there is a reasonable probability that the deficiency prejudiced his or her defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). This test applies to both trial and appellate counsel. See United States v. Hullum, 15 M.J. 261, 267 (C.M.A. 1983). To establish deficient performance, a petitioner must overcome the "strong presumption that counsel's strategy and tactics fall within the wide range**{2020 U.S. Dist. LEXIS 17}** of reasonable professional assistance." Burch v. Corcoran, 273 F.3d 577, 588 (4th Cir. 2001) (quoting Strickland, 466 U.S. at 689) (internal quotations omitted). To establish prejudice, a petitioner must show that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland 466 U.S. at 694. In analyzing an ineffective assistance claim, a reviewing court "need not determine whether counsel's performance was deficient before examining

the prejudice suffered by the defendant as a result of the alleged deficiencies .... If it is easier to dispose of an ineffective claim on the ground of lack of sufficient prejudice ... that course should be followed." Id. at 697.

a. Trial Counsel was not Ineffective

Petitioner argues that his trial counsel was ineffective in advising him to accept the Convening Authority's terms for a pretrial agreement and for his failure to raise to the sentencing judge the issue of petitioner's conditions of pretrial confinement. See Dkt. No. 4. Petitioner specifically argues that his

> counsel failed to properly research the Government sponsored provision and discover that the [waiver] was a violation of public policy. Counsel then ... advised Petitioner that the pretrial agreement with the prohibited provision was in his best interest**{2020 U.S. Dist. LEXIS 18}** and that he should accept the pretrial agreement. Then, at trial, Petitioner's counsel did not ensure the Military Judge conducted a proper inquiry regarding the provision.Id. Petitioner's arguments fall flat. First, petitioner's trial counsel's performance was not deficient based on his failure "to properly research the Government sponsored provision and discover that the [waiver] was a violation of public policy" because, for the reasons discussed in the Ground One subsection, the government sponsored provision was, in and of itself, *not* contrary to public policy. For that very reason, petitioner's gripe that his counsel advised him to accept such a waiver provision is equally baseless.8

Nor can the Court conclude that petitioner's attorney's failure to raise the pretrial confinement issue to the military judge was erroneous. Petitioner cites to several cases in which trial counsel *did* raise the issue of pretrial confinement with the military judge. See id. But petitioner's attorney's failure to do so in this case does not mean his performance was deficient. Instead, petitioner's counsel could have strategically decided not to raise that issue because it could have highlighted**{2020 U.S. Dist. LEXIS 19}** the fact that petitioner was routinely penalized for poor behavior-including for possession of contraband, disorderly conduct, staff harassment, property damage, false statements, and for being an escape risk, see Dkt. No. 7-8-while being held in pretrial confinement. Although petitioner is correct that information regarding the conditions of petitioner's confinement could have been relevant to the question of mitigation at the sentencing phase, such information also could have reflected poorly on petitioner, negatively influencing the judge who would ultimately decide the length of petitioner's sentence. And, absent evidence to the contrary, the Court cannot credit petitioner's argument that trial counsel omitted this information by mistake or neglect. Instead, "we presume that challenged acts are likely the result of a sound trial strategy." Spencer v. Murray, 18 F.3d 229, 233 (4th Cir. 1994) (citing Strickland, 466 U.S. at 689). For these reasons, petitioner's trial counsel's performance was not constitutionally deficient. Ground Two is denied.

b. Appellate Counsel was not Ineffective

Petitioner's Ground Four is difficult to parse because, as this case has proceeded, petitioner's arguments in support of the ground have evolved and expanded.9 The precise language**{2020 U.S. Dist. LEXIS 20}** petitioner used in his petition reflects the argument in its simplest form: "Appellate defense counsel was ineffective ... by refusing to raise Petitioner's argument that his Article 13 waiver was against public policy and his allegation of his post-trial confinement conditions." See Dkt. No. 4. In his "Supporting Facts" section, petitioner grieves that, "[i]f Petitioner's counsel would have brought the [Article 13] provision issue up on appeal, or at the very least, listed it without briefing it ... the burden would have fallen on the Court of Criminal Appeals to determine the provision's validity." Id. He continues, arguing that "[i]f an appellant's counsel refuses to present their client's post-trial confinement conditions to the court, then they cannot consider those conditions as part of their

overall sentence appropriateness determination." Id.

It thus appears that the basis of petitioner's argument is solely that his appellate counsel was ineffective for his failure to raise issues that petitioner saw as valid. Accordingly, appellate counsel's failure to raise certain issues represents the foundation on which this claim shall be analyzed, and petitioner's**{2020 U.S. Dist. LEXIS 21}** attempts to supplement or amend this argument through briefs shall not be sanctioned.10 To the extent petitioner's post-petition arguments are consistent with the ground for relief as originally stated, those arguments are considered.

The military court system has a procedure through which appellants may raise legal issues even if their counsel does not think those issues are meritorious. See United States v. Grostefon, 12 M.J. 431, 435 (C.M.A. 1982). It could be, then, that petitioner argues that his appellate counsel failed to abide by the requirements of Grostefon, causing petitioner prejudice in the form of an adverse appellate decision. But petitioner does not argue-and the Court cannot find precedent which holds-that military appellate counsel's failure to raise on appeal issues flagged by the servicemember constitutes a *per se* violation of law that would automatically lead to a different result on appeal.

And, in any event, no Grostefon violation appears to have occurred in this case. Petitioner states that he "believed that his counsel had his best interests at heart and knew what was fair for Petitioner." See Dkt. No. 11, p. 34. He further states that he was not aware of any perceived deficiencies in the NMCCA's reasoning**{2020 U.S. Dist. LEXIS 22}** ... [and] only discovered the Benitez case and Article 66's power *last year [in 2018] shortly before filing his habeas corpus petition with the NMCCA*." Id. (emphasis supplied). At the time of the appeal, petitioner thus could not have pushed to raise issues with which he was unfamiliar, meaning that petitioner's appellate counsel could not have denied petitioner's request to raise those issues. Consequently, to the extent petitioner seeks to argue that his appellate counsel was ineffective for his failure to abide by Grostefon, petitioner's claim must be denied.

But, even assuming petitioner's claim did not center on Grostefon, an analysis of petitioner's appellate counsel's behavior reveals that counsel's actions did not lead to petitioner suffering any prejudice. For the same reason that petitioner's trial counsel was not ineffective for failing to challenge the legitimacy of the Article 13 waiver provision, so too was petitioner's appellate counsel-the Article 13 waiver simply was not contrary to public policy. Accordingly, counsel was not deficient for not raising that claim, and his failure to do so equally did not prejudice petitioner.

The second portion of Ground Four states that**{2020 U.S. Dist. LEXIS 23}** appellate counsel was ineffective for his failure to raise the issue of petitioner's post-trial conditions in an effort to obtain a sentence reduction or alteration. Petitioner cites to United States v. Gay, 75 M.J. 264 (C.A.A.F. 2016), for the proposition that a military criminal court of appeal "is not prohibited from granting sentence appropriateness relief arising from complaints of post-trial confinement conditions." Dkt. No. 4, p. 20. But it does not follow that just because military criminal courts of appeal are empowered to adjust sentences based on a petitioner's post-trial confinement that they must do so. In any event, petitioner has not offered a single allegation of fact relevant to the conditions he actually did face following the entry of his guilty plea. On this sparse record, this Court cannot conclude that the military court would have reduced petitioner's sentence in reaction to learning of the conditions of his post-trial confinement. In other words, petitioner has not established that, but for counsel's failure to raise this claim, the result would have been different. Ground Four is denied.

3. Grounds Three and Five

Petitioner's Grounds Three and Five shall be analyzed in concert because they appear to highlight**{2020 U.S. Dist. LEXIS 24}** a single error in petitioner's military proceedings, albeit from two

different perspectives-the court-martial level and the appellate court level. Reduced to their simplest form, petitioner argues in these grounds that, during his plea colloquy, the military judge erred in failing to elicit information related to the conditions of petitioner's pretrial confinement, something that is required pursuant to United States v. McFadyen, 51 M.J. 289 (C.A.A.F. 1999). In failing to extract this information, petitioner argues, the inquiry "fell short of what is required by R.C.M. 910(f)" and thereby divested the military judge of all the information required "to determine in a meaningful way an appropriate sentence in this case."11 Dkt. No. 4.

The McFadyen court upheld an accused's right to waive his ability to move for sentencing credit on the basis of unlawful pretrial punishment but imposed several procedural safeguards to ensure such a waiver's propriety. The court stated, "[w]e are concerned that any Article 13 waiver be executed with full knowledge of the implications of the waiver . . . . Therefore, for all cases ... where a military judge is faced with a pretrial agreement that contains an Article 13 waiver, the judge should inquire into the**{2020 U.S. Dist. LEXIS 25}** circumstances of the pretrial confinement and the voluntariness of the waiver, and ensure that the accused understands the remedy to which he would be entitled if he made a successful motion." McFadyen at 289.

Petitioner asserts that, in his court-martial proceedings, the military judge inquired only as to the voluntariness of the waiver, neglecting to cover the other two issues discussed in McFadyen-the circumstances of confinement and the potential remedy for a successful motion. Dkt. No. 4. This, in fact, is undisputed; respondent concedes that the military judge "did not go into specific details about the circumstances of Petitioner's pretrial confinement." Dkt. No. 12. Respondent argues, however, that "the military judge's inquiry with the Petitioner in this case evinced far more discussion of the ... waiver provision than was necessary." Id. In support of his argument, respondent cites to United States v. Felder, 59 M.J. 444 (C.A.A.F.), in which the CAAF affirmed a conviction even where the military judge failed entirely to mention an Article 13 waiver during a plea colloquy.

Petitioner counters, highlighting that the Felder court deemed the military judge's failure to conduct a full inquiry improper and upheld the conviction only because**{2020 U.S. Dist. LEXIS 26}** Felder's "defense counsel informed the military judge on the record that [Felder] had not been punished in any way cognizable under Article 13;" Felder therefore had not been prejudiced by the military judge's improper inquiry. See Felder at 445-46; Dkt. No. 11. Petitioner further cites to United States v. Nye, No. 201600362; 2018 CCA LEXIS 13, 2018 WL 458948 (NMCCA Jan. 18, 2018), for the proposition that a military judge may validly respect an Article 13 waiver "while making a good faith effort nonetheless to ensure ... appropriate credit for the appellant's pretrial restriction." Nye 2018 CCA LEXIS 13, [WL] at *3.

Respondent also asserts that petitioner's claim fails because petitioner has not shown-as he must-that he suffered material prejudice to a substantial right based on the military judge's failure to inquire as to the circumstances of petitioner's pretrial confinement. Dkt. No. 7 (citing Felder; 10 U.S.C. § 859(a)). But petitioner has averred-somewhat convincingly-that the military judge's failure to conduct a full McFadyen inquiry prejudiced his opportunity to receive a sentence predicated on all of the relevant facts. That petitioner has not, as respondent notes, "pointed to ... tangible evidence of mistreatment during his pretrial confinement" is not relevant in this light; had the military**{2020 U.S. Dist. LEXIS 27}** judge inquired about petitioner's pretrial confinement, he feasibly could have considered that information as a mitigating factor at sentencing irrespective of the Article 13 waiver provision in petitioner's pretrial agreement. Adding to the potential for prejudice, petitioner avers that his counsel believed they had a legitimate basis to assert that petitioner was unlawfully punished prior to his sentencing. See Dkt. No. 4, p. 8.

This is not to say that that petitioner has proven his outcome would have been more favorable had

the judge abided by his duties-respondent's argument that it is unlikely that the sentence would have been different in light of petitioner's record of misbehavior during pretrial confinement is compelling. But on the current record, the Court cannot conclude that petitioner was not prejudiced by the military judge's failure to inquire as to the circumstances of petitioner's pretrial confinement.12 See Nye 2018 CCA LEXIS 13, [WL] at *4 (finding that, in considering "the duration of pretrial restraint and the conditions of that restraint in determining an appropriate sentence," the judge "eliminat[ed] any potential prejudice to the appellant."). Accordingly, the motion to dismiss will be denied**{2020 U.S. Dist. LEXIS 28}** as to this argument, and the parties will be directed to submit additional briefing as to this issue. If appropriate, respondent may renew his motion to dismiss at the time of filing the supplementary brief.

IV. Conclusion

Based on the foregoing, it is clear that petitioner is not entitled to relief as to four of the five grounds he raises in his petition. But, on the current record, the Court cannot conclude that petitioner is not entitled to relief as to his arguments regarding the inadequacy of the McFadyen inquiry he received during his plea colloquy and the potential that failure had to negatively affect the sentence petitioner ultimately received. In that light, the parties shall be directed to provide additional briefing on this question. Additionally, the parties are directed to brief the question of what remedy petitioner would be entitled to in the event that the petitioner's argument regarding the McFadyen inquiry is deemed meritorious.13 If appropriate, respondent may renew his motion to dismiss when filing his supplemental brief.

For the foregoing reasons, respondent's motion to dismiss is granted in part and denied in part. An appropriate order shall**{2020 U.S. Dist. LEXIS 29}** issue.

Entered this 4th day of March 2020.

Alexandria, Virginia

/s/ Liam O'Grady

United States District Judge

Footnotes

1

In deference to petitioner's *pro se* status, the Court will consider both of these documents in their entirety, except to the extent that, through them, petitioner attempts to add novel claims not raised in his petition. See U.S. ex rel. Owens v. First Kuwaiti Gen. Trading & Contracting Co., 612 F.3d 724, 731 (4th Cir. 2010) ("[A] plaintiff may not raise new claims ... without amending his complaint."); Bridgeport Music, Inc. v. WM Music Corp., 508 F.3d 394, 400 (6th Cir. 2007) ("To the extent [plaintiff-appellant] seeks to expand its claims to assert new theories, it may not do so in response to summary judgment....").

2

The specifications included offenses such as conspiracy to rape a child, rape of a child, taking indecent liberties with a child, possession and distribution of child pornography, communicating a threat, and more. See Dkt. No. 1; United States v. Anderson, NMCCA201200499, 2013 CCA LEXIS 517, 2013 WL 3242397.. at *1 (N-M. Ct. Crim. App. June 27, 2013).

3

Entitled "Automatic Review," section (b)(3) of Article 66 states, "A Court of Criminal Appeals shall have jurisdiction over a court-martial in which the judgment entered into the record ... includes a sentence of ... 2 years or more." 10 U.S.C. § 866(b)(3).
4

See, e.g., Grafmuller v. Wegner, No. 2:13cv50, 2013 U.S. Dist. LEXIS 130236, 2013 WL 4808881 (E.D. Va. Aug. 9, 2013), report and recommendation adopted by 2013 U.S. Dist. LEXIS 129449, 2013 WL 4804288 (E.D. Va. Sept. 5, 2013), aff'd 571 F. App'x 184 (4th Cir. 2014); Miller v. Air Force Clemency & Parole Bd., No. 10-2621, 2011 U.S. Dist. LEXIS 106340, 2011 WL 4403497 (D. Md. Sept. 20, 2011); Romey v. Vanyur, 9 F. Supp. 2d 565 (E.D.N.C. 1998).

These courts consistently justify adoption of the Tenth Circuit's standard on the basis that the United States Disciplinary Barracks are located at Fort Leavenworth, Kansas, which has enabled the Tenth Circuit to develop expertise and a significant body of case law in this area.
5

Rather than approaching these factors rigidly, though, the Tenth Circuit advises that this test is meant to aid courts in applying Burns. See Roberts v. Callahan, 321 F.3d 994, 997 (10th Cir. 2003) ("[T]he four-factor test ... does not constitute a separate hurdle but merely aids our determination of whether the federal court may reach the merits of the case.").
6

To erect an enforceable procedural bar, the military courts must actually have relied on the procedural bar as an independent basis for [their] disposition of the case .... Because they did not, it is inappropriate for us to enforce a procedural bar as to this claim." Brimeyer, 712 F. App'x at 737 (quoting Harris v. Reed, 489 U.S. 255, 261-62, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989) (internal quotation marks omitted)).
7

Whether the military judge took those steps is the basis of Ground Three of the instant petition.
8

Petitioner's true complaint appears to be that the military judge did not abide by the requirements of McFadyen in conducting the plea colloquy. That argument is addressed thoroughly in the Ground Three subsection.
9

This may be due, in part, to respondent's briefs, which address an issue not actually raised by petitioner. Respondent addresses the Article 13 portion of petitioner's argument directly but, instead of addressing petitioner's argument that appellate counsel was ineffective for failure to raise *post-trial* conditions of confinement, discusses counsel's reasons for not raising the *pretrial* conditions issue. Petitioner appears to have sought to respond to those arguments in his subsequent filings. But the pretrial confinement argument shall not be considered under this ground. Indeed, the Court declines to assume petitioner intended to argue both grounds where petitioner not only did not mention pretrial confinement but also cited to a case, United States v. Gay, 75 M.J. 264 (C.A.A.F. 2016), that deals specifically with post-trial confinement issues. See Dkt. No. 4.
10

Consequently, petitioner's belated efforts to impute additional error to his appellate counsel for his alleged "failure to discover and raise the issue of ineffective assistance of counsel regarding Petitioner's trial defense counsel," see Dkt. No. 11, will not be addressed here.

Nor will any argument that recasts the original Article 13 waiver argument be addressed. Under

Ground Four in his petition, petitioner does not invoke McFadyen or the plea inquiry even once. See Dkt. No. 4. Instead, petitioner discusses the "source of a provision" as an important factor in its legitimacy. See Dkt. No. 4. This indicates that, in this ground, petitioner sought to raise the already debunked argument that the Article 13 waiver was invalid by virtue of the fact that the Convening Authority-not petitioner himself-sponsored this provision's inclusion in the pretrial agreement.
11

The crux of petitioner's Ground Five is that the appellate military court failed to notice this apparent error. This argument exemplifies the redundant nature of petitioner's filings and the extent to which the entire petition revolves on the military judge's actions taken-or not taken-in relation to the Article 13 waiver. If this Court were to find that the military judge did not err, it could not find that the appellate court erred in not detecting such an error below. And because it is not clear that the military appellate court's alleged omission would entitle petitioner to any different relief than that associated with a finding that the military judge erred in the first instance, there is no need to parse the merits of both grounds as petitioner has presented them.
12

This conclusion is not inconsistent with the previous conclusions that petitioner's trial and appellate counsel were not ineffective for failing to raise this the inadequacy of the McFadyen inquiry when they had the chance. As noted, petitioner's trial counsel could have declined to press the judge on this issue from a strategic perspective while still recognizing that the judge did not conduct the full McFadyen inquiry. The judge's failure to conduct the full inquiry represents a distinct issue to that of trial counsel's efficacy and strategic decisions. And petitioner's appellate ineffective assistance claim did not raise the completeness of the McFadyen inquiry as an issue; instead, that claim dealt only with the legitimacy of the Article 13 waiver as proposed by the Convening Authority.
13

Petitioner's hope that this Court will "set aside the findings of guilt ... and either order a new trial or the release of Petitioner from confinement within 120 days," see Dkt. No. 4, may be misplaced. Although petitioner successfully cites to cases in which pleas were set aside after violations were found, this does not appear to be a universally-imposed remedy for such a scenario. The Manual for Courts-Martial itself refers to the following cases which cast doubt on petitioner's claim: Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971); United States v. Kraffa, 11 M.J. 453 (C.M.A. 1981) (when a prejudicial defect in a plea agreement is found, as a result of an inadequate inquiry or otherwise, allowing withdrawal of the plea is not necessarily the appropriate remedy); United States v. Steck, 10 M.J. 412 (C.M.A. 1981) (proceedings in revision may be appropriate to correct a defect discovered after final adjournment).

APPENDIX E

Joshua Gary Anderson, Petitioner, v. Mark J. Bolster, Respondent.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION
2020 U.S. Dist. LEXIS 156859
1:19cv75 (LO/TCB)
August 27, 2020, Decided
August 27, 2020, Filed

Editorial Information: Subsequent History

Petition denied by, As moot In re Anderson, 2021 U.S. App. LEXIS 3673 (4th Cir., Feb. 8, 2021)

Editorial Information: Prior History

Anderson v. Bolster, 2020 U.S. Dist. LEXIS 38322, 2020 WL 1056504 (E.D. Va., Mar. 4, 2020)

Counsel **{2020 U.S. Dist. LEXIS 1}**Joshua Gary Anderson, Petitioner, Pro se, Petersburg, VA.

For Mark J. Bolster, Respondent: John E. Swords, Yolanda Dee McCray Jones, LEAD ATTORNEYS, US Attorney's Office (Alexandria-NA), NA, Alexandria, VA.

Judges: Liana O'Grady, United States District Judge.

Opinion

Opinion by: Liana O'Grady

Opinion

ORDER

Under consideration is respondent Mark Bolster's renewed motion to dismiss Joshua Anderson's petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2241. See Dkt. No. 20. Petitioner received the notice required by Local Civil Rule 7(K) and Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975), and opposes respondent's motion. See Dkt. Nos. 22, 26. This matter is thus ripe for adjudication. For the reasons explained below, respondent's motion to dismiss must be granted, and the petition must be dismissed with prejudice.

I. Background

Petitioner, a prisoner at the Federal Correctional Institution Petersburg, is serving a thirty-year sentence having pleaded guilty before a military trial judge to offenses including rape of a child, conspiracy to rape a child, taking indecent liberties with a child, possession and distribution of child pornography, communicating a threat, and more. See Dkt. No. 1; United States v. Anderson, NMCCA201200499, 2013 CCA LEXIS 517, 2013 WL 3242397, at *1 (N-M. Ct. Crim. App. June 27, 2013). As part of his pretrial plea agreement, petitioner agreed to waive his**{2020 U.S. Dist. LEXIS 2}** right to move the military court for Article 13, Uniform Code of Military Justice ("UCMJ"), credit, which is credit issued by a military judge when an accused has been subjected to pretrial confinement that constituted punishment or imposed unusually harsh conditions or circumstances.

See Dkt. Nos. 4, 7-7. The military judge in this case did not inquire into the specific circumstances of petitioner's pretrial confinement and accepted the agreement in the form it was proposed. See Dkt. Nos. 1, 4, 7-7. Then, in addition to ordering petitioner incarcerated, the judge ordered that petitioner be dishonorably discharged. See Dkt. No. 1; Anderson, 2013 CCA LEXIS 517, 2013 WL 3242397, at * 1. The court-martial convening authority approved petitioner's sentence as adjudged on November 20, 2012. See Dkt. Nos. 4, 7-7 (Respondent's Exhibit ("REX") 7).

Next, pursuant to Article 66, UCMJ, the Navy and Marine Corps Court of Criminal Appeals ("NMCCA") conducted a mandatory review of petitioner's case.1Anderson, 2013 CCA LEXIS 517, 2013 WL 3242397. Through appellate counsel, petitioner raised four specific assignments of error:

> (1) The appellant's plea to conspiracy to rape a child was improvident because the military judge failed to elicit facts sufficient to prove each element of the offense;
>
> (2)**{2020 U.S. Dist. LEXIS 3}** The appellant's plea to rape of a child was improvident because the military judge failed to elicit facts sufficient to prove each element of the offense;
>
> (3) The military judge erred when he did not *sua sponte* find that separate specifications for the possession of the same child pornography on different media represented an unreasonable multiplication of charges; and
>
> (4) The appellant's plea to taking indecent liberty with a child was improvident because the military judge failed to elicit facts sufficient to support a finding that the appellant's conduct was committed in the presence of an "aware" child.2013 CCA LEXIS 517, [WL] at *1. The NMCCA found no error with respect to the first three grounds but did find merit with respect to petitioner's fourth claim. 2013 CCA LEXIS 517, [WL] at * 1-6. Accordingly, on June 27, 2013, the NMCCA set aside petitioner's conviction for indecent liberties with a child and affirmed a guilty finding for the lesser included offense of commission of an indecent act. Id. The NMCCA reassessed petitioner's sentence in light of this decision and affirmed it without modification. 2013 CCA LEXIS 517, [WL] at *7. Petitioner did not file an appeal with the Court of Appeals for the Armed Forces ("CAAF"). His court-martial case became final for the purposes**{2020 U.S. Dist. LEXIS 4}** of Article 71, UCMJ, when the time limit to do so expired. See Dkt. No. 1; 10 U.S.C. § 871(c)(1)(A). On December 16, 2013, petitioner's dishonorable discharge from the United States Navy was executed, and his case became final for the purposes of Article 76, UCMJ. See REX 5.

Five years later, on July 9, 2018, petitioner filed a petition for writ of habeas corpus in the NMCCA requesting that the court (1) set aside the sentence and findings of guilt and (2) grant petitioner a new trial. Dkt. Nos. 1, 4; REX 6. Petitioner raised the following five grounds for relief in his petition:

> (1) The Convening Authority, pursuant to R.C.M.2 705(d)(1), unlawfully sponsored a provision in Petitioner's pretrial agreement requiring him to waive the Article 13, UCMJ, 10 U.S.C.S. § 813 (2000), motion which he intended to raise at trial in violation of public policy and appellate case law, rendering the agreement void, and invalidating his pleas of guilty.
>
> (2) Petitioner's trial defense counsel was ineffective by incorrectly advising him, either negligently or intentionally to accept the Convening Authority's provision and to sign the pretrial agreement.
>
> (3) The Military Judge's inquiry into Petitioner's waiver of motion for relief under **{2020 U.S. Dist. LEXIS 5}**Article 13, UCMJ, 10 U.S.C.S. § 813 (2000) fell short of what is required by R.C.M. 910(f). The error substantially prejudiced the rights of the Petitioner by depriving him of a complete sentencing hearing. The Military Judge also erred when he accepted the pretrial

agreement because the Government sponsored provision violated public policy.

(4) Appellate defense counsel was ineffective pursuant to § 15-2(c)(3) of the Military Criminal Justice Practice and Procedure, by refusing to raise the argument that Petitioner's Article 13 waiver was against public policy and Petitioner's allegation of the conditions of his post-trial confinement, as well as failing to discover violations of R.C.M. 705(c)(1)(B), 705(d)(1), and 910(f).

(5) This Court [the NMCCA] failed to consider the Petitioner's entire record when it affirmed the findings and sentence. The government overreach in Petitioner's case is plain error that any legally trained professional should have discovered upon reviewing the entire record. A complete Article 66 review is a "substantial right" of an accused and a CCA may not rely on only selected portions of a record or allegations alone.Id. On July 24, 2018, the NMCCA dismissed petitioner's habeas petition for**{2020 U.S. Dist. LEXIS 6}** lack of jurisdiction. Id. Petitioner then appealed the NMCCA's dismissal to the CAAF, which, on November 2, 2018, dismissed petitioner's habeas petition, also for lack of jurisdiction. Dkt. Nos. 1, 4.

On January 17, 2019, petitioner filed the instant petition for writ of habeas corpus, invoking the same five grounds he raised in his petition for writ before the military courts. See Id By Order dated March 4, 2020, the Court dismissed all but one of petitioner's claims, finding that they lacked merit. See Dkt. No. 18. The Court requested additional briefing from the parties with regard to the single remaining issue: whether petitioner faced any cognizable prejudice as a result of the military judge's failure to inquire as to the specific conditions of petitioner's pretrial confinement. Id. The parties have now submitted the requested briefing, and respondent has renewed his motion to dismiss. See Dkt. Nos. 20-21, 26, 27. For the reasons explained below, that motion must be granted.

II. Standard of Review

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) should be granted when a court determines that it lacks subject matter jurisdiction over the proceeding at hand. The burden of proving subject matter jurisdiction**{2020 U.S. Dist. LEXIS 7}** lies with the party asserting it, Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982), and, to determine if jurisdiction exists, the court "may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." Richmond, Fredericksburg & Potomac R.R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991).

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the sufficiency of a complaint; it does not resolve contests surrounding facts, the merits of a claim, or the applicability of defenses. Republican Party of N.C. v. Martin, 980 F.2d 943, 952 (4th Cir. 1992). To survive a 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). A claim is facially plausible if "the factual content of a complaint allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 256 (4th Cir. 2009) (quoting Iqbal, 556 U.S. at 678). A plaintiff must allege facts in support of each element of each claim he or she raises; "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, " are insufficient. Iqbal at 678.

When addressing a 12(b)(6) motion, a reviewing court generally may not look outside the facts contained within the complaint without converting the motion to one for summary judgment. Anand v. Ocwen Loan Servicing, LLC, 754 F.3d 195, 198 (4th Cir 2014). With that said, in consideration of a

motion to dismiss, a court may take{**2020 U.S. Dist. LEXIS 8**} judicial notice of matters of public record such as court filings or records, see Witthohn v. Fed. Ins. Co., 164 F. App'x 395 (4th Cir. 2006), without so converting the motion. See Philips v. Pitt Cty. Mem. Hosp., 572 F.3d 176, 180 (4th Cir. 2009). A district court may also consider documents attached to the complaint as well as those attached to the motion to dismiss, so long as they are integral to the complaint and authentic. See Blankenship v. Manchin, 471 F.3d 523, 526 n.l (4th Cir. 2006).

III. Analysis

As discussed in the previous Memorandum Opinion issued in this case, an Article III court may not freely review the merits of claims presented to it in petitions for writs of habeas corpus challenging court-martial convictions-the federal court must first assess the level of treatment those claims received in the military court system. Only where the military courts have failed to afford a petitioner's claims sufficient attention may a federal court entertain the merits of those claims. As discussed below, in a deviation from its original opinion, this Court finds that it is constrained to dismiss the instant petition based on the sufficient level of review given to petitioner's claims by the military courts. The Court finds in the alternative that the sole remaining claim is without merit.

A. Full and Fair Consideration

In its March 4, 2020 Memorandum{**2020 U.S. Dist. LEXIS 9**} Opinion, this Court rejected the notion that petitioner's claims were procedurally defaulted and thus unreviewable in the context of these § 2241 proceedings. See Dkt. No. 18. In his renewed motion, respondent again asserts that petitioner waived the claims raised in the instant petition and urges the Court to "reconsider its earlier ruling in that regard." See Dkt. No. 21, p. 9. For the reasons stated in the aforementioned Memorandum Opinion, respondent's request for reconsideration of the procedural default issue is denied.3 The additional argument, authority, and exhibits supplied by respondent in his renewed motion to dismiss have, however, convinced this Court to revisit and revise its decision with respect to whether petitioner received "full and fair consideration" of his claims in the military courts.

As previously stated, federal district courts have jurisdiction pursuant to 28 U.S.C. § 2241 over petitions for writs of habeas corpus filed by individuals challenging military court-martial convictions. See Burns v. Wilson, 346 U.S. 137, 73 S. Ct. 1045, 97 L. Ed. 1508 (1953). Before assessing the merits of such a petition, however, a district court must determine whether the petitioner exhausted his claims in the military courts and whether the claims were there given{**2020 U.S. Dist. LEXIS 10**} "full and fair consideration." Lips v. Commandant, United States Disciplinary Barracks, 997 F.2d 808, 810 (10th Cir. 1993). If the district court determines that the military court system gave such treatment to the claims presented, it should deny the § 2241 petition. Id. at 810. Only where the military review process is "legally inadequate" to resolve a petitioner's claims is that petitioner entitled to § 2241 merits review in a district court. See Watson v. McCotter, 782 F.2d 143, 144 (10th Cir. 1986) (citing Burns, 346 U.S. at 146).

Federal Circuit Courts of Appeal agree that whether a petitioner's claims received "full and fair consideration" in military tribunals is the correct threshold question in a military-court-related § 2241 action but do not agree as to what constitutes "full and fair consideration" to begin with. The Fourth Circuit has not implemented a definitive framework, but district courts within the circuit have near universally adopted the Tenth Circuit's approach.4 This approach states that review by a federal district court of a military conviction is appropriate when the four following conditions are met:

> (1) the asserted error is of substantial constitutional dimension; (2) the issue is one of law rather than of disputed fact already determined by the military tribunal; (3) there are no military considerations that warrant different treatment of constitutional{**2020 U.S. Dist. LEXIS 11**}

claims; and (4) the military courts failed to give adequate consideration to the issues involved or failed to apply proper legal standards.Lips, 997 F.2d at 811. This test is not a "separate hurdle" but instead "merely aids [a court's] determination of whether [it] may reach the merits of the case." See Roberts v. Callahan, 321 F.3d 994, 997 (10th Cir. 2003).

"Merits review" in a federal district court, though, is rare because the standard of determining whether a claim received adequate consideration is highly deferential to the military courts. For example, the length or brevity of a military court's discussion denying a petitioner's claims is not determinative as to whether those claims received "full and fair consideration." See, e.g., Watson, 782 F.2d at 145 ("When an issue is briefed and argued before a military board of review, we have held that the military tribunal has given the claim fair consideration, even though its opinion summarily disposed of the issue with the mere statement that it did not consider the issue meritorious or requiring discussion."); Faison v. Belcher, 496 F. App'x 890, 2012 WL 4354716, at *2 (10th Cir. 2012) (finding military court's summary dismissal of petitioner's double jeopardy claim, which petitioner raised for the first time in military habeas**{2020 U.S. Dist. LEXIS 12}** proceedings, had received full and fair consideration); Armann v. McKean, 549 F.3d 279, 292 (3d. Cir. 2008) ("Contrary to Armann's assertions, the fact that the CAAF issued a summary order disposing of his case without noting his Grostefon submission does not equate with a finding that it did not fully and fairly consider his mental competency claim.").

Nor does the government's failure to brief the military courts as to an issue mean that the issue did not receive full and fair consideration. See Armann, 549 F.3d at 294 ("We are not convinced that the Government's failure to file a brief in response to Armann's competency claim means that the military courts failed to adequately consider the claim Watson did not establish full briefing by both sides as a prerequisite to satisfying Burns, "). The same can be said of proceedings in which the military courts fail to hold an evidentiary hearing with respect to a petitioner's claims. See Watson, 782 F.2d at 145 ("There is no indication in any of our decisions that the military must provide an evidentiary hearing on an issue to avoid further review in the federal courts.").

The significant deference afforded to military court decisions renders petitioner's burden-to show that his claims did not receive full and fair consideration and**{2020 U.S. Dist. LEXIS 13}** that the military courts were legally inadequate to resolve those claims-an onerous one, and one that this Court finds petitioner has not met. Petitioner's habeas submissions to the military courts are appended to several filings in this case. See, e.g., Dkt. Nos. 1-1; 7-6. Those filings are full of thorough discussion similar to the discussion and argument now before this Court. Furthermore, petitioner admits that the government "answered the writ-appeal petition" in the Court of Appeals for the Armed Forces. See Dkt. No. 11, p. 45. The record, then, makes clear that the military courts were presented with thorough, two-party briefing with respect to petitioner's military habeas filings. This weighs in favor of a finding that petitioner's claims received full and fair consideration. See Watson, 782 F.2d at 145; cf Armann, 549 F.3d at 294. Indeed, a reviewing Article III court should not assume that the military court has failed to consider the issues presented to it before rendering a decision. See Thomas v. United States Disciplinary Barracks, 625 F.3d 667, 672 (10th Cir. 2010). And, as stated before, that the military courts disposed of petitioner's claims in a summary fashion does not mean that those courts failed, as a matter of law, to afford petitioner's claims "full and fair consideration." See, e.g.,**{2020 U.S. Dist. LEXIS 14}** Watson, 782 F.2d at 145; Faison, 496 F. App'x 890, 2012 WL 4354716, at *2; Armann, 549 F.3d at 292. The military courts' orders themselves state that the petitions were dismissed "*[o]n consideration*" of petitioner's submissions. See Dkt. No. 1-1, pp, 18, 34 (emphasis added).

The Lips test discussed above also counsels dismissal of the instant petition. First, with respect to the third element, whether there are "military considerations that warrant different treatment of

constitutional claims, " petitioner argues that "public policy is an inherent specific military justice system issue." See Dkt. No. 11, p. 47. In making this argument, petitioner appears to concede that *there do* exist special military considerations that could warrant different treatment of any constitutional claims present in this case. Moreover, in the supplemental brief requested by the Court, petitioner states that "[t]he military justice system imposes even stricter standards on military judges with respect to guilty pleas than those imposed on federal civilian judges." See Dkt. No. 27, p. 6. In combination, these two statements give this Court pause as to whether special "military considerations" exist with respect to the level of scrutiny imposed on court-martial pretrial agreements, considerations which**{2020 U.S. Dist. LEXIS 15}** would counsel against merits review in a district court. See Lips, 997 F.2d at 811.

Petitioner has also failed to satisfy the fourth element of the Lips test by failing to show that the military courts did not give adequate consideration to the issues involved or failed to apply proper legal standards. See id. For the reasons already stated, this Court declines to find that the military courts failed to give petitioner's arguments adequate consideration. And petitioner's assertion that the military courts "failed to apply proper legal standards" in finding that they lacked jurisdiction over his habeas petitions is, at best, dubious.

In support of his position that the military courts possessed jurisdiction over his petitions, petitioner repeatedly invokes Rule 19 of the Rules of Appellate Procedure for Courts of Criminal Appeals, which states that a petition for writ of habeas corpus "may be filed at any time." See R. App. P. Ct. Crim. App. 19(b)(1). Petitioner also repeatedly suggests that the Supreme Court in United States v. Denedo, 556 U.S. 904, 129 S. Ct. 2213, 173 L. Ed. 2d 1235 (2009), "rejected the argument that military prisoners have no post-conviction remedy in the military courts." See Dkt. No. 1, p. 3. These propositions are both true enough. But the simple fact that a petition**{2020 U.S. Dist. LEXIS 16}** may be filed at any time does not mean that the court which receives the petition will per se have jurisdiction to adjudicate it on the merits. Additionally, petitioner's summation of the discussion in Denedo is incomplete.

In Denedo, as petitioner asserts, the Supreme Court held that Article I military courts possess jurisdiction to entertain petitions for collateral relief from "final" court-martial convictions. See Denedo, 556 U.S. at 917. What petitioner neglects to state is that the Supreme Court explicitly held only that military courts could review coram nobis petitions related to final judgments; it reasoned that such petitions are "properly viewed as a belated extension of the original proceeding during which the error allegedly transpired." Id. at 912-13. The Court then directly distinguished such petitions from petitions for writs of habeas corpus-the type of submission filed by petitioner-which, it found, constitute "separate civil proceeding[s]." Id, (quoting United States v. Morgan, 346 U.S. 502, 505 n. 4, 74 S. Ct. 247, 98 L. Ed. 248 (1954)).

Compounding petitioner's incomplete analysis of Denedo is the fact that several appellate military courts have found that, where court-martial proceedings are complete for the purposes of Article 76, UCMJ, those courts lack jurisdiction to consider**{2020 U.S. Dist. LEXIS 17}** a petition for writ of habeas corpus. See, e.g., Loving v. United States, 62 M.J. 235 (C.A.A.F. 2005) ("[F]inality under Article 76 is the terminal point for proceedings within the court-martial and military justice system .... [J]urisdiction continues until a case is final."); Chapman v. United States, 75 M.J. 598 (A.F. Ct. Crim. App. 2016) (finding it lacked jurisdiction over petition for writ of habeas corpus because the petitioner's court-martial had "completed direct review under Article 71, UCMJ, and [was] final under Article 76, UCMJ."); Gray v. Belcher, 70 M.J. 646, 647 (Army Ct. Crim. App. 2012) (same); cf. In re Best, 79 M.J. 594 (N-M. Ct. Crim. App. 2019) (finding "Chapman and Gray compelling" but finding the petitioner's military proceedings not to have been final under Article 76 and therefore providing merits review of habeas petition).

Here, by the time petitioner filed his petitions for writ of habeas corpus in the military courts, his conviction had already become final for the purposes of Article 76; his sentence had been carried into execution, and he had been dishonorably discharged from the military. Cf. Chapman, 75 M.J. at 602 (case is final under Article 76, UCMJ, when "all portions of the sentence have been ordered executed"); cf In re Best, 79 M.J. at 599 (finding lack of finality where petitioner's sentence of confinement had been ordered executed but petitioner had not yet been dishonorably discharged**{2020 U.S. Dist. LEXIS 18}** as he had been sentenced to be). Accordingly, supported by a well-established field of Supreme Court and military case law, this Court rejects petitioner's argument that the military courts "failed to apply proper legal standards" in rejecting his petition for want of jurisdiction.

***

In light of the foregoing, this Court finds that the military courts afforded petitioner "full and fair consideration" of his claims; those courts were furnished with and considered briefs penned both by petitioner and the government. It is immaterial that the military courts disposed of petitioner's claims summarily. As was the case in Burns, petitioner has "failed to show that ... military review was legally inadequate to resolve the claims which [he has] urged upon the civil court[]. [Petitioner] simply demand[s] an opportunity to make a new record, to prove de novo in the District Court precisely the case [he] failed to prove in the military courts." Burns, 346 U.S. at 146. His petition shall therefore be dismissed.

B. Merits of Petitioner's Article 13 Waiver Claim

Even if this Court were to have the authority to consider the instant petition, it would deny the sole remaining claim on the merits. In the claim, petitioner**{2020 U.S. Dist. LEXIS 19}** argues that the inquiry the military judge conducted regarding the propriety of petitioner's Article 13 waiver was insufficient in light of United States v. McFadyen, which stated that a military judge "should inquire into the circumstances of [an accused's] pretrial confinement" whenever an Article 13 waiver is included in a plea agreement. 51 M.J. 289 (C.A.A.F. 1999). In failing to elicit information relevant to the conditions of his pretrial confinement, Anderson argues, the military judge provided an inquiry that "fell short of what is required by R.C.M. 910(f)" and deprived himself of all the information required "to determine in a meaningful way an appropriate sentence in [petitioner's] case." Dkt. No. 4.

A petitioner is not entitled to relief with respect to his court-martial conviction or sentence unless he demonstrates the existence of an "error [that] materially prejudice[d] [his] substantial rights." See 10 U.S.C. § 859(a). Thus, it is not the existence of an error itself which entitles a petitioner to relief, but the prejudice borne by that error. Here, there appears to be little real debate that the military judge technically erred in failing to elicit details with respect to petitioner's pretrial confinement. Cf.**{2020 U.S. Dist. LEXIS 20}** United States v. Felder, 59 M.J. 444, 446 (C.A.A.F. 2004) (holding that a "military judge's failure to inquire into the Article 13 ... provision of Appellant's pretrial agreement was error" but denying relief because no prejudice flowed from error). This case turns, instead, on whether petitioner's substantial rights were prejudiced by that error.

In what appears to be a new argument, petitioner now states that R.C.M. 705(c)(1)(B) affords him "the right to complete sentencing proceedings, " and that the judge's failure to inquire as to petitioner's pretrial confinement conditions deprived him of this right, resulting in prejudice. See Dkt. No. 27, pp. 8-9. But petitioner has invoked portions of R.C.M. 705 selectively, neglecting to describe the context of his quotation. Section (c)(1)(B) only serves to prohibit the inclusion in pretrial agreements of *terms* that would "deprive the accused of... the right to complete presentencing

proceedings ...." R.C.M. 705(c)(1)(B). It does not, in and of itself, entitle petitioner to an abstract, undefined "complete sentencing proceeding" in which an accused may present any and all information he feels is relevant. Critically, McFadyen explicitly upheld Article 13 waivers as valid with respect to R.C.M**{2020 U.S. Dist. LEXIS 21}** 705(c)(1)(B). Accordingly, this argument is a nonstarter.

Petitioner additionally argues that the deficient McFadyen inquiry resulted in a plea agreement that was violative of R.C.M. 910(f). But R.C.M. 910(f) only requires a military judge to ensure (1) that the accused understands his plea agreement and (2) that the parties agree to the terms of the agreement. See R.C.M. 910(f)(4)(A). It was this principle-that an accused knowingly executes his plea deal-that the McFadyen court contemplated when stating that a military judge should inquire into the circumstances of an accused's pretrial confinement. It reasoned:

> We are concerned that any Article 13 waiver be executed with full knowledge of the implications of the waiver.... Therefore, for all cases tried on or after 90 days from the date of this opinion, where a military judge is faced with a pretrial agreement that contains an Article 13 waiver, the judge should inquire into the circumstances of the pretrial confinement and the voluntariness of the waiver, and ensure that the accused understands the remedy to which he would be entitled if he made a successful motion.See McFadyen, 51 M.J. at 291. The McFadyen court, then, did not impose on military judges**{2020 U.S. Dist. LEXIS 22}** freestanding requirements the violation of which would automatically entitle an accused to relief. Instead, a reading of McFadyen makes clear that it is an accused's unknowing acceptance of an Article 13 waiver as a term of his plea agreement that entitles the accused to relief.

This proposition is confirmed by later CAAF case law. For example, in United States v. Felder, the Court of Appeals for the Armed Forces held that, although the military trial judge had erred in failing to abide by the instructions set out in McFadyen, the accused was not entitled to relief because the McFadyen violation did not lead to any cognizable prejudice. 59 M.J. 444 (C.A.A.F. 2004). The disposition in Felder thus dovetails with the requirements of Article 59, UCMJ, in that it stands for a proposition that there can be no relief where there is no cognizable prejudice. Indeed, the holding in Felder and the requirements of R.C.M. 705 and 910 combine to support the notion that a failure to abide by McFadyen, unaccompanied by resulting prejudice, entitles a petitioner to no relief. And here, where petitioner has failed to demonstrate that he suffered the type of prejudice against which McFadyen and R.C.M. 705 and 910 protect- namely**{2020 U.S. Dist. LEXIS 23}** an unknowing agreement to an Article 13 waiver-he has failed to demonstrate that he is entitled to relief on this basis.5

Indeed, the record makes abundantly clear that petitioner entered into his plea agreement with a full understanding of its terms and implications and that the military judge's colloquy was not offensive to R.C.M. 910(f)- In relevant part, the inquiry proceeded as follows:

> MJ:6 Paragraph 161 says that you are not going to raise any motion pursuant to Rule for Court-Martial 906 to seek any administrative or judicial credit for violations of Rule for Courts-Martial 305 of Article 13 of the Uniform Code of Military Justice. Now, those motions would normally deal with unlawful pretrial punishment or confinement. Is that your understanding?
>
> ACC:7 Yes, sir.
>
> MJ: And did you discuss this fully with your defense counsel?
>
> ACC: I did, sir.
>
> MJ: So you understand that this is one of those things that you can waive and you can give up

and it would be very unlikely that this would be valid during appellate review?

ACC: Yes, sir.

MJ: This provision goes on to talk about things that, as I just mentioned, there are things that you just can't waive even if you were to put it**{2020 U.S. Dist. LEXIS 24}** in writing and those are things like due process, the jurisdiction of the court-martial, the right to a speedy trial, the right to raise the issue of unlawful command influence or any other motion that cannot be waived. So you understand that you are only waiving that one narrow issue that would probably deal with unlawful pretrial confinement or that you were confined improperly?

ACC: Yes, sir.

MJ: Do you have any questions at all about any of the specially negotiated provisions in your pretrial agreement?

ACC: I don't, sir.

MJ: Do you have any questions about any of the other provisions of your pretrial agreement?

ACC: No, sir.

MJ: Are Parts I and II the only agreements, either oral or written, that you have with the government?

ACC: Yes, sir.

MJ: And are you sure you understand each and every provision of your pretrial agreement?

ACC: Yes, sir.

MJ: Do counsel for both parties agree with the court's interpretation of the pretrial agreement?

TC:8 Yes, sir.

CC:9 Yes, sir.

MJ: Hospitalman Apprentice Anderson, do you have any questions at all about your pleas of guilty, your pretrial agreement or anything else we've discussed so far today?

ACC: None, sir.

MJ: At this point, I find the pretrial agreement**{2020 U.S. Dist. LEXIS 25}** to be in accord with appellate case law, not contrary to public policy or my own notions of fairness and the agreement is accepted. Hospitalman Apprentice Anderson, do you have any questions at all about the meaning and effect of your pleas of guilty?

ACC: No, sir.REX 7.

This exchange makes abundantly clear that, in accordance with R.C.M. 910(f) and the reasoning of the McFadyen court, petitioner understood his plea agreement and entered into it voluntarily and with full knowledge of the implications of the Article 13 waiver provision. It further clarifies that the parties agreed to the terms of the agreement at the time of its execution.10

Having determined that petitioner's pretrial agreement was not offensive to R.C.M. 705 or 910 or the reasoning undergirding McFadyen, it is clear that petitioner's arguments fall flat in the instant case. Even to the extent petitioner argues that the judge's error impinged on some freestanding right created by McFadyen-a right this Court is not prepared to recognize for the reasons discussed above-he has failed to demonstrate that he suffered any prejudice as a result of that error. In his

many submissions, petitioner engages in no more than{**2020 U.S. Dist. LEXIS 26**} unbridled speculation that, had the military judge been better informed of the conditions of petitioner's pretrial confinement, petitioner would have been afforded a less severe sentence. See, e.g., Dkt. No. 4, pp. 17-18; Dkt. No. 11, p. 29. Petitioner admits that his arguments are tenuous, stating that "[w]hat the [Military Judge] would have done in this case had proper procedure been followed is only speculation " Dkt. No. 26-2, p. 4; see also Dkt. No. 27, p. 9 ("While it would be impossible to forecast all probable scenarios had the MJ been provided all the information, the following are a few likely scenarios:...").11

Unfortunately for plaintiff, one can speculate just as easily that, had the judge been informed of the fact that many of petitioner's pretrial confinement conditions were dictated by petitioner's routine misconduct, his opinion of petitioner's sentence would not have been changed for the better. See REX 8 (demonstrating that, while held in pretrial confinement, petitioner committed acts of "disobedience," "breach[ed] the peace, "used "provoking words/gestures, "possessed prohibited property, harassed staff, destroyed property, made false statements, and was labeled{**2020 U.S. Dist. LEXIS 27**} as "potentially violent," "dangerous," and an "escape risk").

In this light, assessing the record before it, this Court finds that petitioner has not proffered a "colorable showing" that he suffered prejudice to his substantial rights as a result of the military judge's plea inquiry. See United States v. Scalo, 60 M.J. 435, 437 (C.A.A.F. 2005) (articulating "colorable showing" standard): cf. United States v. Barraza, 2015 CCA LEXIS 63, 2015 WL 832577, at *4 n.10 (N-M Ct. Crim. App. Feb. 26, 2015) (finding that judge's failure to elicit certain facts from accused in providence inquiry did not result in prejudice to accused because it would not overcome the "gravamen of the [child pornography] offenses" and thus would not have impacted the length of the sentence imposed).

****

As stated above, it is clear that petitioner's claims received "full and fair consideration" in the military courts and are thus not properly before this Court. Even assuming that the military courts failed to provide petitioner's claims this level of attention, though, it is clear that the sole remaining claim is without merit. Indeed, the record makes clear that the military judge's failure to inquire as to the specific conditions of petitioner's pretrial confinement did not precipitate any prejudice with respect to petitioner's substantial{**2020 U.S. Dist. LEXIS 28**} rights.

Despite the judge's technical error, the plea agreement and the judge's inquiry were valid pursuant to the requirements of R.C.M. 705 and 910. The inquiry, albeit deficient in light of McFadyen, did not render petitioner's acceptance of the pretrial agreement anything less than knowing, intelligent, and voluntary. Fatal to his claim, petitioner has failed to demonstrate the basis for or existence of a right to present any and all information to a judge with respect to sentencing. And the information petitioner *has* presented falls short of convincing this Court that the judge's possession of that information would have resulted in any change to petitioner's sentence. The claim is thus dismissed.

IV. Conclusion

For the reasons stated above, respondent's renewed motion to dismiss must be granted. An appropriate Order shall issue.

Entered 27th day of August, 2020.

Alexandriam Virginia

/s/ Liana O'Grady

Liana O'Grady

United States District Judge

ORDER

For the reasons stated in the accompanying Memorandum Opinion, respondent's motion to dismiss [Dkt. No. 20] is GRANTED: and it is hereby

ORDERED that the petition be and is DISMISSED WITH PREJUDICE.

To appeal this decision, petitioner must file**{2020 U.S. Dist. LEXIS 29}** a written notice of appeal with the Clerk's Office within sixty (60) days of the date of this Order. See Fed. R, App, P. 4(a). A written notice of appeal is a short statement indicating a desire to appeal, noting the dale of the Order over which the party seeks review. Failure to file a timely notice of appeal waives the right to appeal this decision.

The Clerk is directed to enter judgment in favor of respondent Mark Bolster pursuant to Rule 58 of the Federal Rules of Civil Procedure; to send copies of this Order to petitioner and counsel of record for respondent: and to close this civil action.

Entered 27th day of August, 2020.

Alexandriam Virginia

/s/ Liana O'Grady

Liana O'Grady

United States District Judge

Footnotes

1

Entitled "Automatic Review, " section (b)(3) of Article 66 states, "A Court of Criminal Appeals shall have jurisdiction over a court-martial in which the judgment entered into the record ... includes a sentence of... 2 years or more." 10 U.S.C. § 866(b)(3).

2

R.C.M. stands for "Rules for Courts-Martial" and will be hereinafter abbreviated as "R.C.M."

3

To rely on a double negative, this is not to say that it appears petitioner did not waive his claims in the military courts. Based on the reasoning in Brimeyer v. Nelson, 712 Fed. Appx. 732 (10th Cir. 2017), though, the Court hesitates to find that it is prohibited from considering those claims on waiver-related procedural bar grounds. This is so because the military courts themselves did not explicitly find that petitioner had waived his claims.

4

See, e.g., Grafmuller v. Wegner, No. 2:13cv50, 2013 U.S. Dist. LEXIS 130236, 2013 WL 4808881 (E.D. Va. Aug. 9, 2013), report and recommendation adopted by 2013 U.S. Dist. LEXIS 129449, 2013 WL 4804288 (E.D. Va. Sept. 5, 2013), aff'd 571 F. App'x 184 (4th Cir. 2014); Miller v. Air Force Clemency & Parole Bd., No. 10-2621, 2011 U.S. Dist. LEXIS 106340, 2011 WL 4403497 (D. Md. Sept. 20, 2011); Romey v. Vanyur, 9 F. Supp. 2d 565 (E.D.N.C. 1998).

These courts consistently justify adoption of the Tenth Circuit's standard on the basis that the United States Disciplinary Barracks are located at Fort Leavenworth, Kansas, which has enabled the Tenth Circuit to develop expertise and a significant body of case law in this area.
5

The Court's prior statement that petitioner's failure to proffer tangible evidence of mistreatment during his pretrial confinement was irrelevant to whether he had suffered cognizable prejudice warrants a brief note in light of this analysis. As discussed herein, the record-supplemented as it is by new argument and citations to relevant authority-makes clear that petitioner did not suffer the type of prejudice McFadyen sought to protect against. It additionally makes clear that, even if petitioner *had* introduced evidence of pretrial mistreatment, it would not undercut this Court's finding that petitioner's execution of his plea agreement was intelligent, knowing, and voluntary, and thus not offensive to R.C.M. 910(f), the principles of which McFadyen sought to uphold.
6

"MJ" stands for "military judge."
7

"ACC" stands for "accused." Here, the accused was petitioner.
8

"TC" stands for "trial counsel."
9

"CC" stands for "civilian defense counsel."
10

One of the major arguments asserted in petitioner's supplemental brief and response to the renewed motion to dismiss is that, even if the agreement was knowing and intelligent, it was not voluntary. In support of this position, petitioner asserts that the government sponsored the Article 13 waiver provision after the parties had already come to an agreement with respect to proposed terms of a pretrial agreement. See Dkt. No. 27, p. 3; Dkt. No. 26-2, p. 8. But petitioner concedes the voluntariness argument as quickly as he raises it, stating that, "he could have chosen to reject the PTA and go to trial, where he could have presented a motion for relief of art. 13 violations." See Dkt. No. 27, p. 3. Indeed, he admits that "[a]n accused may withdraw from the agreement at any point, even after acceptance of the plea agreement pursuant to R.C.M. 705(d)(4)(A)." See Dkt. No. 27, p. 11. In this case, petitioner had that option and declined to exercise it, demonstrating the voluntariness of his agreement to the term.
11

As noted above, the Court previously stated that petitioner's failure to provide "tangible evidence of mistreatment during his pretrial confinement" was not relevant to a finding of potential prejudice to petitioner's substantial rights. See Dkt. No. 18, p. 19. The additional briefing and argument furnished to the Court makes clear that any such evidence was, indeed, irrelevant to whether there existed violations of R.C.M. 705 or 910 as petitioner asserts. And because petitioner has not demonstrated a right to furnish any and all information relevant to sentencing to a military judge, this Court stands by its statement, albeit for different reasons.

APPENDIX F

JOSHUA ANDERSON, Petitioner - Appellant, v. MARK BOLSTER, Respondent - Appellee.
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
2022 U.S. App. LEXIS 27874
No. 20-7707
October 4, 2022, Decided
July 26, 2022, Submitted

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Subsequent History

Rehearing denied by, En banc, Rehearing denied by Anderson v. Bolster, 2022 U.S. App. LEXIS 35425 (4th Cir., Dec. 20, 2022)

Editorial Information: Prior History

{2022 U.S. App. LEXIS 1}Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. (1:19-cv-00075-LO-TCB). Liam O'Grady, Senior District Judge.Anderson v. Bolster, 2020 U.S. Dist. LEXIS 38322, 2020 WL 1056504 (E.D. Va., Mar. 4, 2020)

Disposition:
AFFIRMED.

Counsel Joshua Anderson, Appellant, Pro se.
Matthew James Mezger, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

Judges: Before QUATTLEBAUM and RUSHING, Circuit Judges, and MOTZ, Senior Circuit Judge.

Opinion

PER CURIAM:

Joshua Gary Anderson appeals from the district court's orders denying relief on his 28 U.S.C. § 2241 petition in which he challenged his convictions by a general court-martial. We have reviewed the record and find no reversible error. Accordingly, although we grant Anderson's motions to file supplemental informal briefs, we affirm the court's orders. *Anderson v. Bolster*, No. 1:19-cv-00075-LO-TCB (E.D. Va. Mar. 4, 2020; filed Aug. 27, 2020 & entered Aug. 28, 2020). We deny Anderson's motion to substitute party, and we dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

APPENDIX G

JOSHUA ANDERSON, Petitioner - Appellant v. MARK BOLSTER, Respondent - Appellee
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
2022 U.S. App. LEXIS 35425
No. 20-7707
December 20, 2022, Filed

Editorial Information: Prior History

{2022 U.S. App. LEXIS 1}(1:19-cv-00075-LO-TCB).Anderson v. Bolster, 2022 U.S. App. LEXIS 27874, 2022 WL 4998074 (4th Cir. Va., Oct. 4, 2022)

Counsel JOSHUA ANDERSON, Petitioner - Appellant, Pro se, Lisbon, OH.
For MARK BOLSTER, Respondent - Appellee: Matthew James Mezger, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, VA.

Judges: Entered at the direction of the panel: Judge Quattlebaum, Judge Rushing, and Senior Judge Motz.

Opinion

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Quattlebaum, Judge Rushing, and Senior Judge Motz.