Appendix

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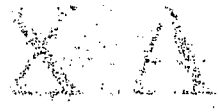
APPENDIX A



UNITED STATES COURT OF APPE

FOR THE TENTH CIRCUIT

EVERALD S. ALLEN, JR.,

Petitioner - Appellant,

v.

KEVIN PAYNE, Commandant, United States Disciplinary Barracks,

Respondent - Appellee.

No. 23-3138
(D.C. No. 5:23-CV-03061-JWL)
(D. Kan.)

ORDER

Before **McHUGH**, **MURPHY**, and **CARSON**, Circuit Judges.

Appellant's petition for panel rehearing is denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

APPENDIX B

FILED
United States Court of Appeals
Tenth Circuit

December 4, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

EVERALD S. ALLEN, JR.,

Petitioner - Appellant,

v.

KEVIN PAYNE, Commandant, United States Disciplinary Barracks,

Respondent - Appellee.

No. 23-3138
(D.C. No. 5:23-cv-03061-JWL)
(D. Kan.)

ORDER AND JUDGMENT*

Before **McHUGH**, **MURPHY**, and **CARSON**, Circuit Judges.

Petitioner Everald S. Allen, Jr., proceeding *pro se*,[1] appeals from the district court's denial of his petition for a writ of habeas corpus filed under 28 U.S.C. § 2241. Mr. Allen, who is confined at the United States Disciplinary Barracks at Fort Leavenworth, Kansas, argues that the district court erred in declining to reach the merits

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

[1] Because Mr. Allen proceeds *pro se*, "we liberally construe his filings, but we will not act as his advocate." *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

supplemental brief raising two additional assignments of error: (4) that Mr. Allen was denied a fair and impartial panel; and (5) that the military trial judge erred by denying a panel member's request for a transcript of testimony during deliberations.

In support of his first assignment of error—that the panel's findings were factually and legally insufficient—Mr. Allen argued that the victim's testimony contained "many inconsistencies and unreliable aspects" and was largely not credible because of her intoxicated state at the time of the assault. ROA Vol. III at 61–62. Mr. Allen also noted that there was "no conclusive evidence of rape" and there was "no DNA linking [Mr. Allen] to the offense of rape." *Id.* at 64. In support of his second assignment of error—that military commanders exercised UCI over his court-martial proceedings—Mr. Allen argued that military commanders and the President of the United States exercised UCI by giving orders "to fix the sexual assault problem in the military." *Id.* at 67.

Considering all assignments of error raised by Mr. Allen and arguments in support thereof, the ACCA affirmed the findings and sentence of the general court-martial. *United States v. Allen*, 2016 WL 1221908, at *1 (A. Ct. Crim. App. Mar. 28, 2016). The ACCA held that although Mr. Allen raised five assignments of error in his appeal, only "[o]ne assignment of error"—whether the military judge erred by denying a panel request to have a copy of court transcripts to review in the deliberation room—"merit[ed] discussion but no relief." *Id.* The ACCA declined to discuss the remaining assignments of error. *Id.*

proceedings. The ACCA found that it "lack[ed] jurisdiction to reconsider [Mr. Allen's] case given that appellate review of [the] case has been completed," and accordingly returned the motion for reconsideration back to the Mr. Allen without action.

Several years later, Mr. Allen filed a petition for a writ of habeas corpus in district court under 28 U.S.C. § 2241. In his petition, Mr. Allen asserted three grounds for the challenge: (1) UCI, (2) factual and legal insufficiency of the panel's findings, and (3) a lack of unanimous verdict by the military panel. The district court deemed Mr. Allen's third ground—lack of unanimous verdict—to be unexhausted, and he ultimately proceeded with only the first two grounds.

In support of his claim that the panel's findings were factually and legally insufficient, Mr. Allen argued that "there was no evidence or anything of evidentiary value found" linking Mr. Allen to the assault. ROA Vol. I at 10. In support of his claim that military commanders exercised UCI over his court-martial proceedings, Mr. Allen stated that the military panel was prejudiced by "then-president Obama's repeated and angered public comments demanding military leaders to prosecute every allegation of sexual assault by court-martial" and similar sentiments expressed by the Secretary of Defense. *Id.*

The district court denied Mr. Allen's request for habeas corpus relief, holding that the "the military courts gave full and fair consideration to [Mr. Allen's] claims." *Allen v. Payne*, 2023 WL 4361209, at *2 (D. Kan. June 30, 2023). The district court also explained that relief is not warranted because "neither claim involves a pure

> warrant different treatment of constitutional claims[;] [and] 4. [t]he military courts must give adequate consideration to the issues involved and apply proper legal standards.

Dodson v. Zelez, 917 F.2d 1250, 1252–53 (10th Cir. 1990) (quotation marks omitted). "*Dodson*'s four-factor test illuminates the contours of the full-and-fair-consideration standard and thereby helps us in determining whether military tribunals have not fully and fairly considered a petitioner's claims." *Santucci v. Commandant, U.S. Disciplinary Barracks*, 66 F.4th 844, 856 (10th Cir. 2023) (quotation marks omitted). "[P]etitioners must establish—in substance—that each of the four *Dodson* factors weighs in their favor to be eligible for full merits review of their claims." *Id.* In other words, "a petitioner's favorable showing regarding [some] *Dodson* factors," but not others, "is not sufficient to set the table for full merits review." *Id.* at 857. A petitioner's failure to make a showing on any one of the *Dodson* factors is "fatal to their efforts to secure full merits review." *Id.* at 858.

B. Analysis

With this deferential framework in mind, we turn to Mr. Allen's habeas petition. Mr. Allen asserts two claims before this court: the evidence supporting his convictions is factually and legally insufficient, and his court-martial proceedings

Santucci, 66 F.4th at 875 ("[I]t [was] *not* the duty of the civil courts simply to repeat that process—to re-examine and reweigh each item of evidence of the occurrence of events which tend to prove or disprove one of the allegations in the applications for habeas corpus." (second and third alteration in original) (quoting *Burns*, 346 U.S. at 144)). Therefore, Mr. Allen's first claim raises a factual question that renders improper our review.

Likewise, Mr. Allen's claim of UCI necessarily involves questions of fact. Mr. Allen claims that his court-martial proceeding was prejudiced by statements to the media made by former President Barack Obama, former Secretary of Defense Chuck Hagel, and former Senator Claire McCaskill urging "a more aggressive stance on sexual abuse" in the military. Appellant's Br. at 4. Considering this claim would require us to evaluate several issues of fact, including whether the statements by President Obama and other officials "constitute unlawful influence," whether there was "unfairness in the court-martial proceedings," and whether "the unlawful influence caused that unfairness." *See United States v. Barry*, 78 M.J. 70, 77 (C.A.A.F. 2018) (listing the elements required to state a claim for UCI). Therefore, each of Mr. Allen's claims involves factual issues rendering improper review on the merits. Mr. Allen's failure to show that the second *Dodson* factor weighs in his favor with respect to either of his two claims is "fatal to [his] efforts to secure full merits review." *Santucci*, 66 F.4th at 858. Accordingly, we affirm the district court's order declining to conduct a full review of his habeas petition on the merits.

all the issues presented to it before making a decision." *Thomas v. U.S. Disciplinary Barracks*, 625 F.3d 667, 672 (10th Cir. 2010). Rather, "[w]hen 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." *Watson v. McCotter*, 782 F.2d 143, 145 (10th Cir. 1986); *see also Roberts v. Callahan*, 321 F.3d 994, 997 (10th Cir. 2003) ("[W]here an issue is adequately briefed and argued before the military courts the issue has been given fair consideration, even if the military court disposes of the issue summarily."); *see also Thomas*, 625 F.3d at 671 ("[F]ull and fair consideration does not require a detailed opinion by the military court."); *Lips*, 997 F.2d at 812 n.2 (holding that a court gave full and fair consideration to claims that were not specifically addressed in the opinion because the court stated that it had "examined the remaining assignments of error and resolved them against the appellant").

The ACCA gave full and fair consideration to Mr. Allen's claims. Mr. Allen fully briefed the issues of insufficiency of evidence and the presence of UCI in his petition before the ACCA. The ACCA found that the claims did not "merit[] discussion," and affirmed the findings and sentence as adjudged by the court-martial. *Allen*, 2016 WL at *1. Therefore, we may conclude that the ACCA court fully and fairly considered the claims currently before us. We also conclude that the CAAF gave full and fair consideration to Mr. Allen's claims when it denied his petition following "consideration of the petition for grant of review of the decision of the

courts and are replete with issues of fact. Thus, it is well established that this court is precluded from conducting a full merits review of Mr. Allen's claims. *Santucci*, 66 F.4th at 856. "An appeal is frivolous when the result is obvious, or the appellant's arguments of error are wholly without merit." *Olson v. Coleman*, 997 F.2d 726, 728 (10th Cir. 1993) (quotation marks omitted). Because Mr. Allen's arguments of error are wholly meritless, we hold that Mr. Allen advanced no nonfrivolous arguments in this habeas petition and accordingly deny his application to proceed IFP.

III. CONCLUSION

Because Mr. Allen fails to satisfy all four *Dodson* factors, we DENY his petition for a writ of habeas corpus and DISMISS this matter. We also DENY his motion to proceed IFP.

Entered for the Court

Carolyn B. McHugh
Circuit Judge

APPENDIX C

EVERALD S. ALLEN JR., Petitioner, v. KEVIN PAYNE, Commandant, United States Disciplinary Barracks, Respondent.
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS
2023 U.S. Dist. LEXIS 113943
Case No. 23-3061-JWL
June 30, 2023, Decided
June 30, 2023, Filed

Editorial Information: Subsequent History

Appeal filed, 07/28/2023Reconsideration denied by, Motion denied by, Habeas corpus proceeding at **Allen v. Payne**, 2023 U.S. Dist. LEXIS 137207 (D. Kan., Aug. 7, 2023)

Counsel {2023 U.S. Dist. LEXIS 1}Everald S. Allen, Jr., Petitioner, Pro se, Fort Leavenworth, KS.

For Kevin Payne, Commandant, United States Disciplinary Barracks, Respondent: Jared S. Maag, LEAD ATTORNEY, Office of United States Attorney - Topeka, Topeka, KS.

Judges: Hon. John W. Lungstrum, United States District Judge.

Opinion

Opinion by: John W. Lungstrum

Opinion

MEMORANDUM AND ORDER

Petitioner, a military prisoner, filed a petition for habeas corpus under 28 U.S.C. § 2241, in which he challenges his convictions by court martial. For the reasons set forth below, the Court **denies** the petition. The Court also **denies** petitioner's motion for appointment of counsel (Doc. # 2).

Petitioner was convicted by military court martial of one specification of aggravated sexual assault, one specification of abusive sexual contact, and one specification of obstruction of justice. The United States Army Court of Criminal Appeals (ACCA) affirmed the convictions and petitioner's sentence, and the United States Court of Appeals for the Armed Forces (CAAF) denied review of that decision. *See United States v. Allen*, 2016 CCA LEXIS 185, 2016 WL 1221908 (A.C.C.A. Mar. 28, 2016) (unpub. op.), *rev. denied*, 75 M.J. 404 (C.A.A.F. July 25, 2016). The CAAF also denied petitioner's petition for rehearing *en banc* and a subsequent *pro se* motion for reconsideration. *See United States v. Allen*, 2018 CAAF LEXIS 351, 78 M.J. 32 (C.A.A.F. June 26, 2018). By his present petition challenging his convictions,{2023 U.S. Dist. LEXIS 2} petitioner asserts two claims: the factual and legal insufficiency of the evidence; and unlawful command influence.1

The Tenth Circuit recently clarified and reaffirmed the standard for a district court's consideration of a habeas petition filed by a military prisoner convicted by court martial. *See Santucci v. Commandant*, 66 F.4th 844, 852-71 (10th Cir. 2023). Other than questions of jurisdiction, a district court may consider the merits upon habeas review only if "the military justice system has failed to give full and fair consideration to the petitioner's claims." *See id.* at 855 (citing *Burns v. Wilson*, 346 U.S. 137, 142,

73 S. Ct. 1045, 97 L. Ed. 1508 (1953)). A court determines whether such full and fair consideration has been given by examining the following four factors (referred to as the *Dodson* factors):

> 1. The asserted error must be of substantial constitutional dimension. 2. The issue must be one of law rather than of disputed fact already determined by the military tribunals. 3. Military consideration may warrant different treatment of constitutional claims. 4. The military courts must give adequate consideration to the issues involved and apply proper legal standards. *See id.* at 856 (quoting *Dodson v. Zelez*, 917 F.2d 1250, 1252-53 (10th Cir. 1990)). Military petitioners must establish that all four factors weigh in their favor in order to have the merits of their claims reviewed. **{2023 U.S. Dist. LEXIS 3}** *See id.* "Putting the matter differently, petitioners' failure to show that even one factor weighs in their favor is fatal to their efforts to secure full merits review." *See id.* at 858. "[T]his is especially so, when the factor in question is one that [the Tenth Circuit has] described as 'the most important,' that is, the fourth, adequate-consideration factor." *See id.* (quoting *Thomas v. U.S. Disciplinary Barracks*, 625 F.3d 667, 671 (10th Cir. 2010)).

Petitioner cannot satisfy all four factors for either of his claims. Applying the second factor, the Court notes that neither claim involves a pure question of law. The military court panel heard the facts in evidence and weighed those facts against petitioner in finding them sufficient to support the convictions, and any challenge to the sufficiency of the evidence necessarily involves consideration of all of the facts in evidence and the credibility of the witnesses. Petitioner has not identified a legal issue involved in this claim that does not depend upon a consideration of the particular facts of the case. Petitioner's claim of unlawful command influence necessarily involves a consideration of fact-dependent elements, including the alleged statements by the President and by military commanders, whether panel members **{2023 U.S. Dist. LEXIS 4}** heard and were influenced by those statements, whether the proceedings were unfair, and whether the influence caused any such unfairness. *See United States v. Barry*, 78 M.J. 70, 77 (C.A.A.F. 2018) (listing the elements of a claim of unlawful command influence). The fourth *Dodson* factor also weighs against petitioner, as he failed to prevail on each of these claims before each appellate court. The fact that neither court deemed the issues sufficiently meritorious to warrant discussion does not favor petitioner, as the issues were specifically raised on appeal, and it may be presumed that the courts gave the issues adequate consideration in upholding the convictions. *See Watson v. McCotter*, 782 F.2d 143, 145 (10th Cir. 1986) ("When an issue is briefed and argued before a military board of review . . . the military tribunal has given the claim fair consideration, even though its opinion summarily disposed of the issue . . . ."), *quoted in Santucci*, 66 F.4th at 875. Finally, as respondent notes, the third factor also weighs against review of the unlawful command influence claim, as that claim is peculiar to the military courts and thus uniquely military considerations could affect any constitutional analysis.

Therefore, the Court must conclude that the military courts gave full and fair consideration to petitioner's claims. **{2023 U.S. Dist. LEXIS 5}** Accordingly, the Court cannot review the merits of those claims, and it thus denies the petition for habeas relief.

The Court also denies petitioner's pending motion for appointment of counsel. A prisoner has no constitutional right to counsel in a federal habeas corpus action. *See Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987). Rather, unless the court conducts an evidentiary hearing, the decision whether to appoint counsel rests in the discretion of the court. *See Swazo v. Shillinger*, 23 F.3d 332, 333 (10th Cir. 1994). A court may appoint counsel for a Section 2241 petitioner if it "determines that the interests of justice so require." *See* 18 U.S.C. § 3006A(a)(2)(B). "The burden is on the applicant to convince the court that there is sufficient merit to his claim to warrant the appointment of counsel." *See Steffey v. Orman*, 461 F.3d 1218, 1223 (10th Cir. 2006) (quoting *Hill v. SmithKline Beecham Corp.*, 393 F.3d 1111, 1115 (10th Cir. 2004)). When deciding whether to appoint counsel, a court must consider "the merits of a prisoner's claims, the nature and

complexity of the factual and legal issues, and the prisoner's ability to investigate the facts and present his claims." *See Hill, 393 F.3d at 1115* (citing *Rucks v. Boergermann*, 57 F.3d 978, 979 (10th Cir. 1995)).

In this case, the application of the *Dodson* factors does not present a complex issue, and as discussed above, petitioner has not shown that those factors allow for a substantive review of his claims. Accordingly, the Court concludes that the interests of justice{**2023 U.S. Dist. LEXIS 6**} do not require the appointment of counsel to represent petitioner in this matter.

IT IS THEREFFORE ORDERED BY THE COURT THAT the petition for habeas corpus relief under 28 U.S.C. § 2241 is hereby **denied**.

IT IS FURTHER ORDERED BY THE COURT THAT petitioner's motion for appointment of counsel (Doc. # 2) is hereby **denied**.

IT IS SO ORDERED.

Dated this 30th day of June, 2023, in Kansas City, Kansas.

/s/ John W. Lungstrum

Hon. John W. Lungstrum

United States District Judge

Footnotes

1

Petitioner also asserted a claim challenging the lack of a requirement of a unanimous verdict, but he abandoned that claim after the Court noted that he had not exhausted the claim in the military courts.

APPENDIX D

UNITED STATES, Appellee v. Staff Sergeant (E-6) EVERALD S. ALLEN United States Army, Appellant
UNITED STATES ARMY COURT OF CRIMINAL APPEALS
2016 CCA LEXIS 185
ARMY 20130521
March 28, 2016, Decided

Notice:

NOT FOR PUBLICATION

Editorial Information: Subsequent History

Motion granted by United States v. **Allen**, 2016 CAAF LEXIS 464 (C.A.A.F., June 1, 2016)Review denied by United States v. **Allen**, 2016 CAAF LEXIS 604 (C.A.A.F., July 25, 2016)

Editorial Information: Prior History

Headquarters, XVIII Airborne Corps and Fort Bragg. David H. Robertson, Military Judge, Colonel Paul S. Wilson, Staff Judge Advocate.

Counsel For Appellant: Mr. C. Ed Massey, Esquire (argued); Captain Michael J. Millios, JA; Mr. C. Ed Massey, Esquire (on brief); Captain Michael J. Millios, JA; Mr. C. Ed Massey, Esquire (on supplemental brief); Captain James D. Hammond, JA; Mr. C. Ed Massey, Esquire (on reply brief).

For Appellee: Captain Christopher A. Clausen, JA (argued); Major A.G. Courie III, JA; Major Daniel D. Derner, JA; Captain Christopher A. Clausen, JA (on brief).

Judges: Before TOZZI, SALADINO, and CELTNIEKS Appellate Military Judges. Senior Judge TOZZI and Judge CELTNIEKS concur.

CASE SUMMARY Plain reading of, inter alia, Uniform Code of Military Justice (Unif. Code Mil. Justice art. 46, 10 U.S.C.S. § 846) revealed that in order for a military judge to be found to have committed error, he must first summarily dismiss reasonable requests of members, without any thoughtful reasoned analysis based upon law. Here that simply did not happen.

OVERVIEW: HOLDINGS: [1]-A plain reading of the Uniform Code of Military Justice (court referenced Unif. Code Mil. Justice art. 46, 10 U.S.C.S. § 846), the Rules for Courts-Martial, the Military Rules of Evidence, and repeated holdings in case law revealed that in order for a military judge (MJ) to be found to have committed error, he must first summarily dismiss the reasonable requests of the members, without any thoughtful reasoned analysis based upon the law. Here that simply did not happen; [2]-Had he done so, the court may have reached a different conclusion, but without such conduct, it did not find error; [3]-Moreover, the defense did not object to the MJ's denial of the member's general request to have a copy of the entire transcript brought back with them into the deliberation room, nor did the defense seek to clarify the witness requested or evidence sought. The court found no error.

OUTCOME: The findings of guilty and the sentence were affirmed.

LexisNexis Headnotes

Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review
Military & Veterans Law > Military Justice > Evidence

A court of criminal appeals reviews for plain error the military judge's denial of the panel members' request for testimony from additional witnesses. Generally speaking, it reviews a military judge's denial of a panel member's request to recall a witness or replay a witness's testimony for abuse of discretion. However, absent an objection from defense counsel at trial, the court reviews the military judge's instructions to the panel for plain error in the context of non-constitutional error. Under a plain error analysis, the court will grant relief in a case of non-constitutional error only if an appellant can demonstrate that (1) there was error; (2) the error was plain and obvious; and (3) the error materially prejudiced a substantial right of the accused.

Military & Veterans Law > Military Justice > Evidence
Military & Veterans Law > Military Justice > Trials > Examination of Witnesses

The members are at liberty to request that witnesses be called or recalled or to have testimony reread by the court reporter. Moreover, the court's precedents make clear that, even after the court members have begun their deliberations, they may seek additional evidence. The ability of the members to request evidence derives from Unif. Code Mil. Justice art. 46, 10 U.S.C.S. § 846, which states in part "the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." R.C.M. 921(b), Manual Courts-Martial, also permits the members to "request that the court-martial be reopened and that portions of the record be read to them or additional evidence introduced. The military judge may, in the exercise of discretion, grant such request." R.C.M. 801(c), Manual Courts-Martial, contains a similar provision and states "the court-martial may act to obtain evidence in addition to that presented by the parties. The right of the members to have additional evidence obtained is subject to an interlocutory ruling by the military judge." Finally, the Military Rules of Evidence also contain a provision reiterating the members' ability to call and interrogate witnesses; refer to Mil. R. Evid. 614(a), Manual Courts-Martial.

Military & Veterans Law > Military Justice > Evidence

The members may request and the military judge may require that a witness be recalled, or that a new witness be summoned, or other evidence produced. The members or military judge may direct trial counsel to make an inquiry along certain lines to discover and produce additional evidence. R.C.M. 801(c), Discussion, Manual Courts-Martial.

Military & Veterans Law > Military Justice > Evidence
Military & Veterans Law > Military Justice > Trials > Examination of Witnesses

The military judge may, sua sponte, or at the request of the members or the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called. When the members wish to call or recall a witness, the military judge shall determine whether it is appropriate to do so under these rules or this Manual. Mil. R. Evid. 614(a), Manual Courts-Martial. While the military judge may properly exercise his discretion and deny a member's request for additional evidence, the U.S. Court of Appeals for the Armed Forces has set forth a nonexclusive list of factors the judge must consider prior to doing so. Difficulty in obtaining witnesses and concomitant delay; the materiality of the testimony that a witness could produce; the likelihood that the testimony sought might be subject to a claim of privilege; and the

objections of the parties to reopening the evidence are among the factors the trial judge must consider.

Military & Veterans Law > Military Justice > Trials > Deliberations & Voting
Military & Veterans Law > Military Justice > Evidence

According to R.C.M. 921(b), Manual Courts-Martial, only those items admitted into evidence may be taken with the panel members to the deliberation room.

Military & Veterans Law > Military Justice > Evidence

Clearly, a military judge cannot exercise his discretion in an informed manner without obtaining some indication from the court members as to the witnesses whom they desire to call. A plain reading of the Uniform Code of Military Justice, the Rules for Courts-Martial, the Military Rules of Evidence, and repeated holdings in case law reveals that in order for a military judge to be found to have committed error, he must first summarily dismiss the reasonable requests of the members, without any thoughtful reasoned analysis based upon the law.

Opinion

Opinion by: SALADINO

Opinion

MEMORANDUM OPINION

SALADINO, Judge:

A panel with enlisted representation sitting as a general court-martial, convicted appellant, contrary to his pleas, of one specification of aggravated sexual assault, one specification of abusive sexual contact, and one specification of obstruction of justice, in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920 and 934. (2006 and Supp. V).1 The panel sentenced appellant to a dishonorable discharge, confinement for twenty years, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the findings and sentence as adjudged.

Appellant raises five assignments of error. One assignment of error merits discussion but no relief. We hold that the military judge did not commit plain error by answering in the negative a panel request to "have a copy of the court transcripts to review in the deliberation room." Accordingly, we affirm the findings and sentence.

FACTS

Appellant stands convicted of sexually assaulting a fellow soldier in April 2012 and obstructing justice in July 2010. After both sides completed presenting their evidence and rested, the military judge gave instructions and the panel heard closing arguments. During the members' deliberations the panel returned to the courtroom to inquire of the military judge whether the members could obtain a copy of the entire transcript to take back with them to the deliberation room. The following colloquy ensued:

> MJ: Colonel Church [Panel President], it's the Court's understanding that the members have a question.
>
> PRES: Yes, Your Honor.

MJ: And the question is?

PRES: The question is can we have a copy of the court transcripts to review in the deliberation room?

MJ: The answer to that question is no. Taking a transcript of a witness' testimony and allowing that to go back into the deliberation room would be like allowing an individual witness to follow you into the deliberation room and be able to testify to you again there in the deliberation room. So does that answer your question?

[Pause]

MJ: And I'll give you another instruction. Recall the instruction I gave you is that as to reasonable doubt that extends to every element of each offense although not to each particular fact advanced by the prosecution which does not amount to an element. So, when you all discuss the case, you do not have to come to a perfect agreement on what each fact was or what each witness stated. That's part of the discussion. And then you can take your vote.

PRES: All right, Your Honor. May any of the other panel members speak?

MJ: Who needs to speak, and what is it in reference to? PRES: Your Honor, unfortunately, I don't recall the specific question that generated the request for the court transcripts. I know it dealt with one of the testimonies [sic] and rather than just having us ask for that one particular transcript, we asked for the entire court record.

MJ: You cannot have the entire court record. As I stated, you may use your recollection of what evidence was presented here in court. You may use your notes, although you may not show them to other members. I encourage you to go back and discuss those matters amongst yourselves and this additional instruction I gave you. If that is still not satisfactory, then you may then come in and let this Court know. There are other procedures where testimony could be either replayed or reread-specific portions of testimony. Although that is a procedure not easily done and will result in delay in this trial. However, if you all feel it is absolutely necessary for your resolution of the charges in this case, let the Court know.

PRES: Yes, Your Honor.

MJ: The Court is closed.

Neither party objected to the military judge's ruling, nor asked for additional information. The military judge then entered into an Article 39(a), UCMJ, session wherein he and counsel for both sides discussed how to proceed should the members return to the courtroom with a request to replay certain testimony. After approximately two more hours of deliberation, the members returned to the courtroom to announce they had reached a verdict:

MJ: Colonel Church, has the jury reached findings? PRES: Yes, Your Honor.

MJ: I take it that since you did not request to come back into court and have any of the testimony replayed that the Court's previous instructions resolved the issue and the jury was able to resolve it without the need for that?

PRES: Correct, Your Honor.

The defense post-trial submissions and its oral argument before this court emphasizes the tone of the military judge's language, characterizing it as having a squelching effect on the panel's desires to rehear the testimony of witnesses after the close of the evidence. The defense also argues the military

judge's ruling to disallow the testimony transcripts served to eliminate the panel's ability to receive the information it desired in order to reach a verdict.

LAW AND DISCUSSION

A. Standard of Review

We review for plain error the military judge's denial of the panel members' request for testimony from additional witnesses. *United States v. Lampani*, 14 M.J. 22, 25 (C.M.A. 1982). Generally speaking, this court reviews a military judge's denial of a panel member's request to recall a witness or replay a witness's testimony for abuse of discretion. *United States v. Clifton*, 71 M.J. 489, 491 (C.A.A.F. 2013); *United States v. Rios*, 64 M.J. 566, 569 (Army Ct. Crim. App. 2007). However, absent an objection from defense counsel at trial, we review the military judge's instructions to the panel for plain error in the context of non-constitutional error. *Clifton*, 71 M.J. at 491. "Under a plain error analysis, this Court will grant relief in a case of non-constitutional error only if an appellant can demonstrate that (1) there was error; (2) the error was plain and obvious; and (3) the error materially prejudiced a substantial right of the accused." *Id.* (citing *United States v. Powell*, 49 M.J. 460, 464-65 (C.A.A.F. 1998)).

B. The Members' Right to Request that the Court-Martial be Reopened and Portions of the Record be Read to Them

The members are "at liberty to request that witnesses be called or recalled or to have testimony reread by the court reporter . . . ." *United States v. Lampani*, 14 M.J. 22, 26 (C.M.A. 1982). "Moreover, our precedents make clear that, even after the court members have begun their deliberations, they may seek additional evidence." *Id.* at 25 (citations omitted). The ability of the members to request evidence derives from Article 46, UCMJ, which states in pertinent part "[t]he trial counsel, the defense counsel, *and the court-martial* shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." UCMJ art. 46 (emphasis added); *see United States v. Martinsmith*, 41 M.J. 343, 347 (C.A.A.F. 1995). Rule for Courts-Martial [hereinafter R.C.M.] 921(b) also permits the members to "request that the court-martial be reopened and that portions of the record be read to them or additional evidence introduced. The military judge may, in the exercise of discretion, grant such request." *See Rios*, 64 M.J. at 568 (holding that the military judge abused his discretion by summarily denying the members' request to rehear the testimony of two witnesses). Rule for Courts-Martial 801(c) contains a similar provision and states "[t]he court-martial may act to obtain evidence in addition to that presented by the parties. The right of the members to have additional evidence obtained is subject to an interlocutory ruling by the military judge."2 Finally, the Military Rules of Evidence also contain a provision reiterating the members' ability to call and interrogate witnesses. *See* Mil. R. Evid. 614(a).3

While the military judge may properly exercise his discretion and deny a member's request for additional evidence, our superior court has set forth a nonexclusive list of factors the judge must consider prior to doing so:

> Difficulty in obtaining witnesses and concomitant delay; the materiality of the testimony that a witness could produce; the likelihood that the testimony sought might be subject to a claim of privilege; and the objections of the parties to reopening the evidence are among the factors the trial judge must consider.*Lampani*, 14 M.J. at 26.

Here the military judge received a request to provide a copy of the transcript of the testimony of the entire proceedings. Notwithstanding there was no physical transcript to produce as the trial was ongoing, the request to have the testimony reduced to writing and delivered to the members was met by an appropriate response from the military judge. *See* R.C.M. 921(b) (only those items admitted into evidence may be taken with the panel members to the deliberation room). The military judge then

reiterated the reasonable doubt standard. Further, he explained it was permissible not to come to a perfect agreement on what each fact was or what each witness stated, and why. He explained the instructions he had given anticipated situations wherein members may not completely agree about facts in the case, but they may still agree upon a verdict.

Because the panel made no additional request for replaying specific testimony of one or more witnesses, the military judge did not analyze any of the factors set forth in *Lampani*, but did in fact mention delay as a factor to consider when requesting the playback of testimony. "[C]learly, a military judge cannot exercise his discretion in an informed manner without obtaining some indication from the court members as to the witnesses whom they desire to call." *Lampani*, 14 M.J. at 26. A plain reading of the UCMJ, the Rules for Courts-Martial, the Military Rules of Evidence, and repeated holdings in case law reveals that in order for a military judge to be found to have committed error, he must first summarily dismiss the reasonable requests of the members, without any thoughtful reasoned analysis based upon the law. *Rios*, 64 M.J. at 569. Here that simply did not happen.

The record reveals that the military judge sought to clarify the difference between having transcripts in the deliberation room and the ability for the panel to rehear specific testimony in the courtroom if that testimony would aid in their deliberations. This case is distinguished from the holdings in cases cited by appellate defense counsel for the proposition that the judge erred in summarily dismissing panel members' request for additional witnesses or the replaying of testimony. *Id.* Had he done so, this court may have reached a different conclusion. Without such conduct, we do not find error. *Rios*, 64 M.J. at 569; *see also Lampani*, 14 M.J. at 26 (holding that the court members "were at liberty to request that witnesses be called or recalled or to have testimony reread by the court reporter even though they had commenced their deliberations [, and,] to the extent that the military judge indicated to the contrary, he was wrong."); *United States v. Lents*, 32 M.J. 636, 638 (A.C.M.R. 1991) (military judge abused his discretion by summarily denying the members request for additional evidence).

Moreover, the defense did not object to the military judge's denial of the member's general request to have a copy of the entire transcript brought back with them into the deliberation room, nor did the defense seek to clarify the witness requested or evidence sought. *See Lampani*, 14 M.J. at 27. "While we do not equate this silence with a waiver of appellant's right to have the court correctly instructed by the judge," we can infer, as the court did in *Lampani*, that this failure was consistent with the defense strategy at trial. *Id.* "Whether defense counsel realized that the judge had erred . . . he obviously perceived that his advice had not prejudiced his client and we reach the same conclusion." *Id.* Having found no error, we do not reach the issue of prejudice to the appellant.

CONCLUSION

The findings of guilty and the sentence are AFFIRMED.

Senior Judge TOZZI and Judge CELTNIEKS concur.

Footnotes

1

The panel found appellant not guilty, in accordance with his pleas, of one specification of rape and one specification of aggravated sexual contact in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2006 and Supp. V).

2

The discussion to R.C.M. 801(c) notes:

The members may request and the military judge may require that a witness be recalled, or that a new witness be summoned, or other evidence produced. The members or military judge may direct trial counsel to make an inquiry along certain lines to discover and produce additional evidence.
3

Military Rule of Evidence 614(a) states:

> The military judge may, *sua sponte*, or at the request of the members or the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called. When the members wish to call or recall a witness, the military judge shall determine whether it is appropriate to do so under these rules or this Manual.

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