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, 82 M.J. 313, 2022 CAAF LEXIS 282, 2022 WL 1525455 (C.A.A.F., Apr. 13, 2022)Writ of habeas corpus dismissed, Certificate of appealability denied Anderson v. Garza, 2023 U.S. Dist. LEXIS 174763 (N.D. Ohio, Sept. 29, 2023)

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

In re Joshua G. ANDERSON1, Petitioner;UNITED STATES, Respondent
UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
2022 CCA LEXIS 3
NMCCA No. 201200499
January 5, 2022, Decided

Editorial Information: Prior History

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

Opinion

PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF HABEUS CORPUS

Panel 3

ORDER

Dismissing Petition for Lack of Jurisdiction

On 2 November 2021, Petitioner once again filed a Petition for Extraordinary Relief without providing a prima facie basis for this Court's jurisdiction to consider it. Accordingly, it is, this 5th day of January 2022,

ORDERED:

That the Petition is **DENIED** for lack of jurisdiction.2

Footnotes

1 Prior to his discharge being executed, Petitioner was a Hospitalman Apprentice (E-2), U.S. Navy.

2 *See In re **Anderson***, No. 201200499, 2021 CCA LEXIS 225 (N-M. Ct. Crim. App. May 11, 2021) (unpublished).

APPENDIX C

Joshua G. Anderson, Appellant v. United States, Appellee.
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES
82 M.J. 276; 2022 CAAF LEXIS 228
No. 22-0125/NA.
March 22, 2022, Decided

Notice:

DECISION WITHOUT PUBLISHED OPINION

Editorial Information: Prior History

CCA 201200499.United States v. Anderson, 2013 CCA LEXIS 517 (N-M.C.C.A., June 27, 2013)

Opinion

On consideration of the writ-appeal petition, it is ordered that the writ-appeal petition is dismissed for lack of jurisdiction.

APPENDIX D

JOSHUA GARY ANDERSON, Petitioner, v. WARDEN F. GARZA, Respondent.
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION
2023 U.S. Dist. LEXIS 174763
CASE NO. 4:22CV0718
September 29, 2023, Decided
September 29, 2023, Filed

Editorial Information: Subsequent History

Affirmed by Anderson v. Garza, 2024 U.S. App. LEXIS 19928 (6th Cir. Ohio, Aug. 7, 2024)

Editorial Information: Prior History

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

Counsel **{2023 U.S. Dist. LEXIS 1}**Joshua Gary Anderson, Petitioner, Pro se, Lisbon, OH.

For Warden F. Garza, Respondent: Kimberly L. Lubrani, Office of the U.S. Attorney - Cleveland, Northern District of Ohio, Cleveland, OH.

Judges: Benita Y. Pearson, United States District Judge.

Opinion

Opinion by: Benita Y. Pearson

Opinion

MEMORANDUM OF OPINION AND ORDER

[Resolving ECF No. 6]

Pending is Respondent's Motion to Dismiss (ECF No. 6). The Court has been advised, having reviewed the record, the parties' briefs, and the applicable law. For the reasons that follow, the Court dismisses the petition for failure to (1) state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6) and (2) properly exhaust administrative remedies.

I. Background

Pro Se Petitioner Joshua Gary Anderson is a court-martialed prisoner currently confined in FCI Elkton in Lisbon, Ohio, which is located within the Northern District of Ohio.1 On May 1, 2022,2 he filed a Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2241 (ECF No. 1).

Petitioner is a prolific litigant, whom has sought release from incarceration prior to the filing of the present Petition. *See Anderson v. United States*, No. 22-0125/NA, 82 M.J. 276 (C.A.A.F. March 22, 2022) (writ-appeal petition summarily dismissed for lack of jurisdiction); *In re Anderson*, No. 201200499, 2022 CCA LEXIS 3 (N-M. Ct. Crim. App. Jan. 5, 2022) (dismissing petition for extraordinary relief in the nature of a writ of habeas**{2023 U.S. Dist. LEXIS 2}** corpus for lack of jurisdiction); *In re Anderson*, No. 201200499, 2021 CCA LEXIS 225, 2021 WL 1884633 (N-M. Ct.Crim.App. May 11, 2021) (per curiam) (petition for extraordinary relief in the nature of a writ of

habeas corpus denied); *Anderson v. Bolster*, No. 1:19cv75(LO/TCB), 2020 U.S. Dist. LEXIS 156859, 2020 WL 5097516 (E.D. Va. Aug. 27, 2020) (granting respondent's renewed motion to dismiss § 2241 petition for writ of habeas corpus filed when petitioner was a prisoner at FCI Petersburg); *In re Anderson*, NMCCANo. 201200499, 2020 CCA LEXIS 72 (N-M. Ct. Crim. App. March 11, 2020) (denying petition for lack of jurisdiction).

Petitioner is serving a 30-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 United States v. Anderson*, No. 201200499, 2013 CCA LEXIS 517, 2013 WL 3242397, at *1 (N-M. Ct. Crim. App. June 27, 2013). In addition to ordering Petitioner incarcerated, the military judge ordered that he be dishonorably discharged. The court-martial convening authority approved the sentence as adjudged. *See id.*

Petitioner sets forth two grounds in support of the within Petition. First, Petitioner claims he is entitled to a four-for-one day credit towards his sentence for each day that he was confined in immediate association with a foreign national in violation of Article 12 of the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. § 812. Second, Petitioner claims he is entitled to a five-for-one day credit towards his sentence for each day he was allegedly subjected to cruel**{2023 U.S. Dist. LEXIS 3}** and unusual punishment under Article 55 of the UCMJ, 10 U.S.C. § 855, and in violation of the Eighth Amendment by virtue of having his trust account encumbered by Warden Justin Andrews when he was confined at FCI Petersburg. *See* ECF No. 1 at PageID #: 6; 7-19.

II. Standard of Review

Respondent has filed a pre-answer motion to dismiss the § 2241 Petition. Rules 4 and 5 of the Rules Governing Section 2254 Cases in the United States District Courts permit a respondent to file a pre-answer motion to dismiss a petition for writ of habeas corpus under 28 U.S.C. § 2254, and those rules may be applied to § 2241 petitions. *See* Rule 1(b) of the Rules Governing Section 2254 Cases in the United States District Courts. Courts have considered pre-answer motions to dismiss § 2241 petitions alleging a failure to exhaust administrative remedies under Fed. R. Civ. P. 12(b)(6). *See, e.g.*, *Cook v. Spaulding*, 433 F. Supp.3d 54, 56-57 (D. Mass. 2020).

"To survive a [Rule 12(b)(6)] motion to dismiss, [the petition] must allege 'enough facts to state a claim to relief that is plausible on its face.'" *Traverse Bay Area Intermediate Sch. Dist. v. Mich. Dep't of Educ.*, 615 F.3d 622, 627 (6th Cir. 2010) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)); *see Cook*, 433 F. Supp. 3d at 55. When making the determination to dismiss under Rule 12(b)(6) the court will accept all well-pleaded facts as true and make all reasonable inferences in favor of the non-movant. *Phila. Indem. Ins. Co. v. Youth Alive, Inc.*, 732 F.3d 645, 649 (6th Cir. 2013). *Pro se* pleadings are construed liberally. *Haines v. Kerner*, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972) (*pro se* complaints are held to less stringent standards than formal pleadings drafted by lawyers).

III. Analysis

A. Grounds Asserted in the § 2241 Petition

1. Petitioner Cannot Challenge the Conditions of his Confinement Via a Petition for Habeas Relief{2023 U.S. Dist. LEXIS 4}

Petitioner concedes that violations of 10 U.S.C. § 812 concern the conditions of his confinement. *See* Petitioner's Memorandum in Opposition (ECF No. 10) at PageID #: 165. Prisoners challenging the conditions of their confinement must do so through a civil rights action. *See Preiser v. Rodriguez*,

411 U.S. 475, 487-88, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973). "[A] § 2241 habeas petition is not the appropriate vehicle for challenging the conditions of [a prisoner's] confinement." *Hernandez v. Lamanna*, 16 Fed.Appx. 317, 320 (6th Cir. 2001). "[H]abeas review is limited to claims challenging the fact or duration of a prisoner's confinement, and constitutional challenges to the conditions of a confinement are more appropriately brought in a § 1983 civil rights action." *Richards v. Taskila*, No. 20-1316, 2020 U.S. App. LEXIS 28230, 2020 WL 6075666, at *1 (6th Cir. Sept. 3, 2020).

2. Ground Two

Section 855, Title 10 provides:

> Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by any court-martial or inflicted upon any person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited.Petitioner alleges that in 2020 Warden Andrews at FCI Petersburg acted outside of his authority by encumbering his trust account; and that the encumbrance on his account forced him to choose between purchasing things such as toothpaste, deodorant, stamps, and medications,**{2023 U.S. Dist. LEXIS 5}** thereby amounting to cruel and unusual punishment in violation of Article 55 of the UCMJ and the Eighth Amendment. *See* ECF No. 1 at PageID #: 15-19; *see also* Informal Resolution Attempt (ECF No. 1-33). Only after a prisoner has exhausted his remedies through the BOP may the inmate then seek judicial review pursuant to 28 U.S.C. § 2241. *United States v. Wilson*, 503 U.S. 329, 335, 112 S. Ct. 1351, 117 L. Ed. 2d 593 (1992).

Respondent argues that Petitioner failed to exhaust his administrative remedies set forth at 28 C.F.R. § 542.10 *et seq.* 3 relative to Petitioner's allegations that he was subjected to cruel and unusual punishment in violation of 10 U.S.C. § 855 and the Eighth Amendment. *See* ECF No. 6 at PageID #: 141-42. Respondent also argues that those alleged constitutional violations cannot be brought via a habeas petition. *See* ECF No. 6 at PageID #: 137-38. Petitioner's Memorandum in Opposition (ECF No. 10) does not address these arguments. Accordingly, these claims have been waived, abandoned, and conceded and are rejected as a matter of law. *See, e.g., Santo's Italian Café LLC v. Acuity Ins. Co.*, 508 F. Supp.3d 186, 207 (N.D. Ohio 2020) ("It is well understood . . . that when a plaintiff files an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded.") (quoting *Lewis v. Cleveland Clinic Found.*, No. 1:12CV3003, 2013 U.S. Dist. LEXIS 168836, 2013 WL 6199592, at *4 (N.D. Ohio Nov. 27, 2013)).

Therefore, the Court will dismiss Ground Two for failure**{2023 U.S. Dist. LEXIS 6}** to properly exhaust administrative remedies. In addition, these claims have been waived, abandoned, and conceded and are rejected as a matter of law.

3. Ground One

a.

Petitioner claims he is entitled to a four-for-one day credit towards his sentence for each day that he was confined in immediate association with a foreign national in violation of Article 12 of the UCMJ, 10 U.S.C. § 812. Section 812 provides:

> No member of the armed forces may be placed in confinement in *immediate association* with-
>
> (1) enemy prisoners; or
>
> (2) other individuals-

(A) who are detained under the law of war and are foreign nationals; and

(B) who are not members of the armed forces.(Emphasis added.) Petitioner urges a broad interpretation of § 812 that would grant him relief simply for being housed near foreign nationals. *See* ECF No. 10 at PageID #: 169-70. Petitioner, however, was not confined to a cell with foreign nationals.4 The following testimonial exchange between Mr. Felix Larkin, Assistant General Counsel in the Office of the Department of Defense and Rep. John Anderson addresses the legislative intent behind the phrase "immediate association":

MR. ANDERSON: [I]s there any place in the code that expresses prohibition against confining our men in foreign jails?**{2023 U.S. Dist. LEXIS 7}**

MR. LARKIN: No; but this one prevents them being confined with enemy prisoners of war or foreign nationals not members [of the military] *in the same cell.*

. . . .

MR. ANDERSON: [U]nder this code, could a commanding officer have an enlisted man . . . confined in a foreign jail?

MR. LARKIN: Yes, he could, for a short time or whatever time is necessary. But if they are so confined they may not be in immediate association with any [foreign nationals].*United States v. Wise*, 64 M.J. 468, 476 (C.A.A.F. 2007) (quoting *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Services*, 81st Cong. 915 (1949), *reprinted in Index and Legislative History, Uniform Code of Military Justice* (1950) (not separately paginated) (emphasis added).5

Whether Petitioner's claims are examined against the prior or current version of § 812, the congressional intent makes clear that a violation of Article 12 of the UCMJ requires evidence that he was confined to the same cell with certain foreign nationals - evidence that Petitioner does not even allege that he has. "In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress." *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542, 60 S. Ct. 1059, 84 L. Ed. 1345 (1940). Congressional Committee reports are the authoritative source of the legislature's intent because they represent "the considered and collective understanding**{2023 U.S. Dist. LEXIS 8}** of those Congressmen involved in drafting and studying proposed legislation." *Garcia v. United States*, 469 U.S. 70, 76, 105 S. Ct. 479, 83 L. Ed. 2d 472 (1984) (quoting *Zuber v. Allen*, 396 U.S. 168, 186, 90 S. Ct. 314, 24 L. Ed. 2d 345 (1969)).

b.

Petitioner improperly attempts to shift the burden of proof to Respondent. *See* ECF No. 10 at PageID #: 172-73. Specifically, Petitioner declares "Respondent has not attempted to obtain information from the BOP about whether [Petitioner] was, or currently is, confined in immediate association with foreign nationals." ECF No. 10 at PageID #: 172. Without agreement from Respondent that Petitioner was confined to a cell with a foreign national(s), it is not enough for Petitioner to simply list the names of individuals whom he believes to be foreign nationals, *see* ECF Nos. 1-7, 1-8, 1-9, 1-10, 1-11, 1-12, 1-13, and 1-14), without additional information that: (1) he was confined to the same cell as such individuals; (2) such individuals are the type of foreign national described in § 812; and, (3) Petitioner is entitled to the relief he seeks. *See Erie Cnty., Ohio v. Morton Salt, Inc.*, 702 F.3d 860, 867 (6th Cir. 2012) (court need not "accept conclusory allegations or conclusions of law dressed up as facts.") (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable**{2023 U.S. Dist. LEXIS 9}** for the misconduct

alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). Petitioner has failed to meet this minimal plausibility requirement.

c.

Finally, a four-for-one day sentencing credit Petitioner believes he should be awarded by the Court is not a proper remedy for violations of 10 U.S.C. § 812. There is no express remedy provided for a violation of Article 12 of the UCMJ. And the Court declines to find that Congress intended § 812 to allow prisoners to shorten their sentences due to the nationality of other inmates or the BOP's housing decisions. Rather, the statute is aimed at shielding the United States from foreign enemies obtaining its military secrets.

Therefore, the Court will dismiss Ground One for failure to state a claim upon which relief can be granted.

IV. Conclusion

For the foregoing reasons and those that have been articulated in the memoranda of the points and authorities on which Respondent relies, Respondent's Motion to Dismiss (ECF No. 6) is granted, and this action is dismissed pursuant to 28 U.S.C. § 2243. The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

September 29, 2023

Date

/s/ Benita Y. Pearson

Benita**{2023 U.S. Dist. LEXIS 10}** Y. Pearson

United States District Judge

ORDER OF DISMISSAL

Having filed its Memorandum of Opinion and Order, the Court hereby dismisses the Petition for a Writ of Habeas Corpus.

The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

September 29, 2023

Date

/s/ Benita Y. Pearson

Benita Y. Pearson

United States District Judge

Footnotes

1

According to the Bureau of Prisons ("BOP") website (http://www.bop.gov/inmateloc/) (last visited Sept. 28, 2023), Petitioner has a May 19, 2035 release date.

2

Under Sixth Circuit precedent, the petition is deemed filed when handed to prison authorities for mailing to the federal court. *Cook v. Stegall*, 295 F.3d 517, 521 (6th Cir. 2002). Even though the Court did not receive the petition until May 3, 2022, Petitioner dated his petition on May 1, 2022. *See Brand v. Motley*, 526 F.3d 921, 925 (6th Cir. 2008) (holding that the date the prisoner signs the document is deemed under Sixth Circuit law to be the date of handing to officials) (citing *Goins v. Saunders*, 206 Fed.Appx. 497, 498 n. 1 (6th Cir. 2006) (per curiam)).

3

28 C.F.R. § 542.14(a) requires a grievance to be filed with the warden within 20 days of the event complained of. *See Jordan v. LeMaster*, No. 0:22-CV-43-REW, 2023 U.S. Dist. LEXIS 105024, 2023 WL 4052485, at *6 (E.D. Ky. June 16, 2023) (denying a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 filed by a court-martialed prisoner demanding at least 12 years of credit against his sentence for alleged violations of 10 U.S.C. §§ 812 and 855).

4

Petitioner does make an unsupported allegation that he was placed in a cell at FCI Edgefield with a foreign national in 2015. *See* ECF No. 1 at PageID #: 9. Petitioner, however, has failed to exhaust his administrative remedies regarding that incident.

5

See also United States v. McPherson, 73 M.J. 393, 400 (C.A.A.F. 2014) (Baker, C.J., concurring in part and dissenting in part) ("The legislative history demonstrates the overriding purpose of Article 12, UCMJ, was to prohibit confinement of a servicemember in the same cell with a foreign national, particularly one engaged in military service, in times of war.")

APPENDIX E

JOSHUA GARY ANDERSON, Petitioner-Appellant, v. WARDEN FERNANDO GARZA, Respondent-Appellee.
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
2024 U.S. App. LEXIS 19928
No. 23-3846
August 7, 2024, Filed

Notice:

CONSULT 6TH CIR. R. 32.1 FOR CITATION OF UNPUBLISHED OPINIONS AND DECISIONS.

Editorial Information: Prior History

{2024 U.S. App. LEXIS 1}ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.Anderson v. Garza, 2023 U.S. Dist. LEXIS 174763, 2023 WL 6383604 (N.D. Ohio, Sept. 29, 2023)

Counsel JOSHUA GARY ANDERSON (Federal Prisoner: #17608-035), Petitioner - Appellant, Pro se, Lisbon, OH.

For WARDEN FERNANDO GARZA, Respondent - Appellee: Kimberly L. Lubrani, Rema Alberta Ina, Office of the U.S. Attorney, Cleveland, OH.

Judges: Before: GRIFFIN, KETHLEDGE, and NALBANDIAN, Circuit Judges.

Opinion

ORDER

Joshua Gary Anderson, court-martialed and confined in federal prison, appeals pro se the district court's dismissal of his 28 U.S.C. § 2241 petition for a writ of habeas corpus. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a). For the reasons below, we affirm.

In 2012, Anderson pleaded guilty to and was convicted of conspiracy to rape a child and multiple related charges. A military judge sentenced him to 30 years of confinement and ordered him dishonorably discharged. *See United States v. Anderson*, No. NMCCA201200499, 2013 CCA LEXIS 517, 2013 WL 3242397, at *1 (N-M. Ct. Crim. App. June 27, 2013).

In 2022, Anderson filed this § 2241 petition asserting, among other claims not at issue here, that he was confined with foreign nationals, in violation of Article 12 of the Uniform Code of Military Justice, 10 U.S.C. § 812. For relief, he sought a "four-for-one[-]day credit" amounting "to 9,092 days (24 years 11 months and counting) of credit for the**{2024 U.S. App. LEXIS 2}** 2,273 days (6 years 3 months and counting) of violations."

The district court dismissed Anderson's petition for three reasons: (1) it concerned his conditions of confinement and thus could not be pursued under § 2241; (2) he did not plausibly allege a violation of Article 12; and (3) he sought relief that is not provided for in Article 12. *Anderson v. Garza*, No. 4:22CV718, 2023 U.S. Dist. LEXIS 174763, 2023 WL 6383604, at *2-4 (N.D. Ohio Sept. 29, 2023). On appeal, Anderson argues that the district court erred in each of those rulings.

"We review de novo a district court's order dismissing a habeas corpus petition filed pursuant to 28 U.S.C. § 2241." *Fazzini v. Ne. Ohio Corr. Ctr.*, 473 F.3d 229, 231 (6th Cir. 2006); *see also Witham v. United States*, 355 F.3d 501, 504 (6th Cir. 2004) (§ 2241 petition in a court-martial case).

A district court may grant relief under § 2241 to a petitioner who "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). "The Supreme Court has held that release from confinement . . . is 'the heart of habeas corpus.'" *Wilson v. Williams*, 961 F.3d 829, 838 (6th Cir. 2020) (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 498, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973)). But "§ 2241 is not the proper vehicle for a prisoner to challenge conditions of confinement." *Luedtke v. Berkebile*, 704 F.3d 465, 466 (6th Cir. 2013).

Anderson claimed that the government was housing him in conditions that violated federal law, and he asked for credit for the days that he spent in those allegedly illegal conditions. Thus, his claim was a conditions-of-confinement claim not appropriately considered under § 2241. *Id.* ***{2024 U.S. App. LEXIS 3}*** Indeed, as the district court noted, *Anderson*, 2023 U.S. Dist. LEXIS 174763, 2023 WL 6383604, at *2, Anderson conceded that his "Article 12 claim focuses on conditions that arose during his confinement." What is more, all of the cases that Anderson cites to support his request for confinement credit were court martials; none was a § 2241 petition. *See, e.g., United States v. Meakin*, No. ACM 38968, 2018 CCA LEXIS 306, 2018 WL 3120781, at *2 (A.F. Ct. Crim. App. June 21, 2018), *aff'd*, 78 M.J. 396 (C.A.A.F. 2019); *United States v. Spinella*, No. ACM S31708, 2010 CCA LEXIS 423, 2010 WL 8033026, at *1 (A.F. Ct. Crim. App. Dec. 17, 2010) (per curiam). Thus, because the district court did not err by dismissing Anderson's claim as inappropriate under § 2241, we need not review his other arguments.

Therefore, we **AFFIRM** the district court's judgment.

APPENDIX F

JOSHUA GARY ANDERSON, Petitioner-Appellant, v. WARDEN FERNANDO GARZA, Respondent-Appellee.
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
2024 U.S. App. LEXIS 28132
No. 23-3846
November 5, 2024, Filed

Editorial Information: Prior History

Anderson v. Garza, 2024 U.S. App. LEXIS 19928 (6th Cir. Ohio, Aug. 7, 2024)

Counsel **{2024 U.S. App. LEXIS 1}**JOSHUA GARY ANDERSON, Petitioner - Appellant, Pro se, Lisbon, OH.

For WARDEN FERNANDO GARZA Respondent - Appellee: Kimberly L. Lubrani, Rema Alberta Ina, Office of the U.S. Attorney, Cleveland, OH.

Judges: BEFORE: GRIFFIN, KETHLEDGE, and NALBANDIAN, Circuit Judges.

Opinion

ORDER

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.