

No. 25-6668

IN THE
SUPREME COURT OF THE UNITED STATES

MATTHEW EVAN DAVIS SR. – PETITIONER,

v.

DOUGLAS CURTIS– RESPONDENT

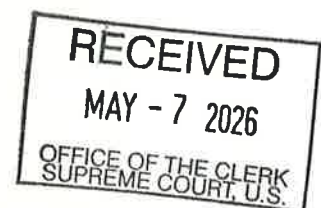
PETITION FOR A REHEARING PURSUANT TO SUPREME COURT RULE 44.2

ON WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR REHEARING

MATTHEW E. DAVIS SR.
1300 N. Warehouse Road
Fort Leavenworth, KS 66027



QUESTIONS PRESENTED IN WRIT OF CERTIORARI

QUESTION 1: WHETHER, IN THE UNIFORM CODE OF MILITARY JUSTICE, THE CLAIMS OF JUDICIAL BIAS AND IMPROPER REFERRAL OF CHARGES ARE JURISDICTIONAL IN NATURE.

QUESTION 2: WHETHER THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT'S USE OF THE FACTORS ENUMERATED IN DODSON V. ZELEZ, 917 F.2D 1250 (10TH CIR. 1990), KNOWN COEQUALLY AS THE "DODSON FACTORS", CREATES AN UNCONSTITUTIONAL BAR TO HABES REVIEW FOR MILITARY COURT MARTIAL PETITIONERS IN VIOLATION OF THE SUSPENSIONS CLAUSE OF THE U.S. CONSTITUTION, ARTICLE 1 § 9 CL. 2.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

United States v. Davis, ARMY 20200659, 2022 CCA LEXIS 24, 2022 WL 135317 (a. Ct. Crim. App. Jan. 14, 2022)

United States v. Davis, 83 M.J. 26, 2022 CAAF LEXIS 616, 2022 WL 4182557 (C.A.A.F., Aug. 26, 2022)

Davis v. Curtis, 2024 U.S. Dist LEXIS 167292, 2024 WL 4215763 (D. Kan., Sep. 14, 2024)

Davis v. Colonel, 2025 CAAF LEXIS 13, 2025 WL 463198 (C.A.A.F., Jan. 2, 2025)

Davis v. Curtis, 2025 CAAF LEXIS 42, 2025 WL 463321 (C.A.A.F. Jan. 16, 2025)

Davis v. Commandant, 2025 CAAF LEXIS 148 (C.A.A.F., Feb. 26, 2025)

Davis v. Curtis, 2025 U.S. App. LEXIS 24899, 2025 LX 409403 (10th Cir., Sept. 25, 2025)

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR REHEARING

Petitioner respectfully prays this Court to grant this Petition for Rehearing and for a writ of certiorari issue to review the judgement below.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit appears at Appendix E and is unpublished.

The opinion of the United States District Court for the District of Kansas appears at Appendix C and is reported at Davis v. Curtis, 2024 U.S. Dist LEXIS 167292, 2024 WL 4215763 (D. Kan., Sep. 14, 2024)

JURISDICTION

The date on which the United States Court of Appeals for the Tenth Circuit decided my case was September, 25 2025.

A timely petition for rehearing was denied by the United States Court of Appeals for the Tenth Circuit on the November 17, 2025, and a copy of the order denying rehearing appears at Appendix G.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Article 1 § 9 cl. 2

U.S. Constitution, Amendment V

U.S. Constitution, Amendment VI

10 U.S.C. §§ 801 - 946

STATEMENT OF THE CASE

The proceeding involves one or more questions of exceptional importance that involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

Petitioner contends that the petition involves one or more questions of exceptional importance. Petitioner raises the following issues in this petition:

1. The use of the “Dodson Factors”, as they are currently applied to cases involving military habeas review creates an unconstitutional bar to habeas review.
2. The Panel’s decision in its assessment of Petitioner’s additional jurisdictional claims conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issues, namely the United States Court of Appeals for the Armed Forces (CAAF), as well as precedent set by this Court.

REASONS FOR GRANTING THE PETITION

This case raises issues of significant jurisprudential importance and involved a conflict in controlling precedent. There is a split between the two main Courts of Appeals that deal with a majority of military cases, the Court of Appeals for the Armed Forces and the Court of Appeals for the Tenth Circuit.

The United States Court of Appeals for the Tenth Circuit, in their unpublished decision, determined that the only requirement for jurisdiction of a military petitioner is the status of the accused at the time of the alleged incident. (Appendix E, Page 4) This conflicts with and is contrary to the decision of the United States Court of Appeals for the Armed Forces on this issue in *United States v. Singleton*, 21 C.M.A. 432, 434, 45 C.M.R. 206 (C.M.A. 1972); *United States v. Watkins*, 29 M.J. 421, 9, (C.M.A. 1990); *United States v. Alexander*, 61 M.J. 266, 269 (C.A.A.F. 2005); *United States v. Harmon*, 63 M.J. 98, 101 (C.A.A.F. 2006) ; and *United States v. Adams*, 66 M.J. 255, 258 (C.A.A.F. 2008) all of which lay out other factors necessary for Jurisdiction. In *Harmon* the Court of Appeals for the Armed Forces established three prerequisites that must be met for Courts-Martial jurisdiction to vest.

- (1) Jurisdiction over the Offense
- (2) Personal Jurisdiction over the accused
- (3) **A properly convened and composed Court-Martial.**

Also in *Harmon* the Court of Appeals for the Armed Forces stated this “Court has held that a ‘court-martial is the creature of statute, and, as a body or tribunal, it must be convened and constituted in entire conformity with the provisions of the statute, or else it is without jurisdiction.’” The Tenth Circuit decision is also contrary to the decision of this court in *McClaughry v. Deming*, 186 U.S. 49, 63, 22 S. Ct. 786,

46 L. Ed. 1049 (1902) which stated "To give effect to [court-martial] sentences it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings has been complied with, and that its sentence was comfortable to law...There are no presumptions in its favor, so far as these matters are concerned"

By limiting the question of jurisdiction to only the status of the accused, the Tenth Circuit ignores precedent set by this court as well as Statutes and regulations governing court-martials. Thus, eliminating their statutory requirement to make sure that military court martials have jurisdiction to convict a service member of a violation of the Uniform Code of Military Justice. Doing so, they have denied Petitioner a fair adjudication of the legality of his detention under the Constitution and laws of the United States. The interest of justice is not fulfilled by ignoring the pleadings of the men and women of the Armed Forces in their quest for fair and equal treatment in the eyes of the law.

The Writ of Habeas Corpus was one of the only rights to be enumerated in the original drafting of the Constitution of the United States. This shows the importance that the Founding Fathers placed on the Writ of Habeas Corpus. That being said, the precedent set in the Tenth Circuit by use of the Dodson Factors and their decision in *Watson* has effectively eliminated the Writ for all service members. Since the implementation of the Dodson Factors in 1990, not a single Military Habeas Corpus case has been reviewed on the merits in the Tenth Circuit.

The Tenth Circuit has ridden roughshod over the rights of Military Habeas Petitioners for decades without relief. It is beyond time for this court to affirm the rights of service members who, rightly or not, has found themselves on the wrong side of the Military Judicial System.

The questions presented in the Petition for Writ of Certiorari deal with fundamental rights of Service Members everywhere. These men and women have decided to dedicate their life, whether it is 8 years or 32, to the service and protection of the United States of America. In doing so, they accept a certain risk associated with that life, they understand that, but they do not and never have given up the basic rights provided to them by the Constitution of the United States.

CONCLUSION

For the reasons stated, Petitioner humbly implores this court to take up this case and resolve these questions once and for all.

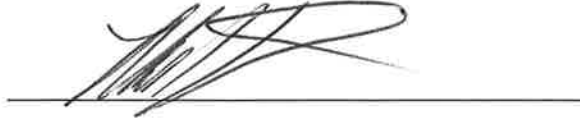
Respectfully Submitted



Matthew Evan Davis SR., Obl.S.B.
March 23, 2026

SUPREME COURT RULE 29.2 DECLARATION

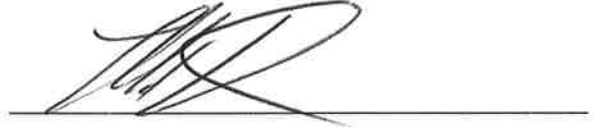
This petition was placed in the prison mail system for Submission to the Supreme Court of the United States on April 25, 2025 via pre-paid First-Class mail.¹



MATTHEW E. DAVIS SR. Obl.S.B.
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Petitioner-Appellant

DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury that the information in this petition is true and correct. I understand that a false statement of a material fact may serve as the basis for prosecution for perjury



MATTHEW E. DAVIS SR. Obl.S.B.
1300 N. Warehouse Rd
Fort Leavenworth, KS 66027
Petitioner-Appellant

¹ In accordance with Supreme Court Rule 29.2, A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing and is accompanied by a notarized statement or declaration in compliance with 28 U.S.C. § 1746 setting out the date of deposit and stating that first-class postage has been prepaid

APPENDIX A

UNITED STATES, Appellee v. Sergeant MATTHEW E. DAVIS, United States Army, Appellant
UNITED STATES ARMY COURT OF CRIMINAL APPEALS
2022 CCA LEXIS 24
ARMY 20200659
January 14, 2022, Decided
January 14, 2022, Filed

Notice:

NOT FOR PUBLICATION

Editorial Information: Subsequent History

Petition for review filed by United States v. Davis, 82 M.J. 265, 2022 CAAF LEXIS 203 (C.A.A.F., Mar. 14, 2022) Motion granted by United States v. Davis, 82 M.J. 432, 2022 CAAF LEXIS 495, 2022 WL 3161218 (C.A.A.F., July 15, 2022) Review denied by United States v. Davis, 83 M.J. 26, 2022 CAAF LEXIS 616, 2022 WL 4182557 (C.A.A.F., Aug. 26, 2022) Writ of habeas corpus denied, Motion denied by Davis v. Curtis, 2024 U.S. Dist. LEXIS 167292, 2024 WL 4215763 (D. Kan., Sept. 17, 2024)

Editorial Information: Prior History

Headquarters, U.S. Army Combined Arms Support Command. Tyesha L. Smith, Military Judge, Colonel Jeffrey A. Miller, Staff Judge Advocate.

Counsel

For Appellant: Major Rachel P. Gordienko, JA; Captain Nandor F.R. Kiss,

JA.

For Appellee: Lieutenant Colonel Craig J. Schapira, JA.

Judges: Before BURTON, FLEMING, and PARKER, Appellate Military Judges. Senior Judge BURTON and Judge PARKER concur.

CASE SUMMARY An appellant's defense counsel was not ineffective for failing to advise him of the impact his guilty plea would have regarding waiver of motions on appellate review of the military judge's ruling because there was no reasonable probability the appellant would have changed his plea to not guilty due to the strength of the government's case.

OVERVIEW: HOLDINGS: [1]-An appellant's defense counsel was not ineffective for failing to properly advise him of the impact his guilty plea would have regarding waiver of motions on appellate review of the military judge's ruling because there was no reasonable probability the appellant would have changed his plea to not guilty due to the overall strength of the government's case and aggravating circumstances of his crimes.

OUTCOME: Findings of guilty and sentence affirmed.

LexisNexis Headnotes

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

Military & Veterans Law > Military Justice > Counsel

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Ineffective Assistance Claims

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1

Criminal Law & Procedure > Counsel > Effective Assistance > Pleas
Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review

The appellate court reviews an appellant's claim of ineffective assistance of counsel de novo. Military courts evaluate ineffective assistance of counsel claims using the U.S. Supreme Court's framework from Strickland. Under Strickland, an appellant bears the burden of demonstrating that (a) defense counsel's performance was deficient, and (b) this deficient performance was prejudicial. In the context of a guilty plea, the prejudice inquiry is modified to focus on whether the ineffective performance affected the outcome of the plea process.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Criminal Law & Procedure > Counsel > Effective Assistance > Pleas

To establish prejudice, an appellant must show there is a reasonable probability that, but for counsel's errors, the appellant would not have pleaded guilty and would have insisted on going to trial. An appellant's assertion he would not have pleaded guilty but for counsel's deficient performance is not, in and of itself, sufficient to establish prejudice. The following factors are considered: 1) the favorability of the appellant's plea agreement; 2) the strength of the Government's case; and 3) the lack of extenuating or mitigating circumstances that would have led to a lower sentence.

Criminal Law & Procedure > Counsel > Effective Assistance > Trials

A post-trial evidentiary hearing is not required in any case simply because an affidavit is submitted by an appellant. In most instances in which an appellant files an affidavit in the Court of Criminal Appeals making a claim such as ineffective assistance of counsel at trial, the authority of the Court to decide that legal issue without further proceedings should be clear.

Opinion

Opinion by: FLEMING

Opinion

SUMMARY DISPOSITION

FLEMING, Judge:

Appellant raises multiple issues before this Court pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), one of which merits discussion but no relief. Appellant argues his defense counsel were ineffective for failing to properly advise him of the impact his guilty plea would have regarding waiver of motions on appellate review. As explained below, we find appellant's defense counsel were not ineffective.¹

BACKGROUND

A military judge sitting as a general court-martial convicted appellant, pursuant to his plea, of three specifications of sexual abuse of a child, two specifications of sexual assault of a child, one specification of battery upon a child under the age of sixteen, and one specification of possession of child pornography, in violation of Articles 120b, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920b, 928, 934 [UCMJ]. The military judge sentenced appellant to a dishonorable discharge, confinement for forty years, and reduction to the grade of E-1. Appellant was credited with

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twenty-four days of confinement credit. In accordance with the pretrial agreement, the convening authority only approved the dishonorable discharge, confinement for twenty years, and reduction to the grade of E-1.

LAW AND DISCUSSION

We review appellant's claim of ineffective assistance of counsel de novo. *United States v. Furth*, 81 M.J. 114, 117 (C.A.A.F. 2021) (citing *United States v. Carter*, 79 M.J. 478, 480 (C.A.A.F. 2020)). Military courts evaluate ineffective assistance of counsel claims using the Supreme Court's framework from *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Id.* "Under *Strickland*, an appellant bears the burden of demonstrating that (a) defense counsel's performance was deficient, and (b) this deficient performance was prejudicial." *Id.* (citing *Strickland*, 466 U.S. at 687). In the context of a guilty plea, "the prejudice inquiry is modified to focus on whether the ineffective performance affected the outcome of the plea process." *Id.* (quoting *United States v. Bradley*, 71 M.J. 13, 16 (C.A.A.F. 2012) (internal quotation marks omitted)).

Defense Counsel's Performance

Appellant argues "[t]he first prong of *Strickland* is clearly satisfied because [his] counsel failed to provide him with available advice regarding the waiver of his right to appeal the military judge's ruling on his motion to suppress." We pause to first clarify that appellant's motion to suppress involved evidence obtained from his cellular phone. Even a successful suppression motion would have merely served to impact his possession of child pornography. Despite the limited applicability of the suppression motion, we ordered affidavits from appellant's trial defense counsel. As best stated in appellant's civilian defense counsel's affidavit:

[Appellant] was still facing a young credible witness who was going to testify that appellant raped her multiple times. She was going to describe the incidents of rape with specificity, clarity, and emotion. In particular, she was going to describe the details of how he penetrated her. She remembered those details clearly and [the defense team] assessed that her testimony would be credible.

Appellant's military defense counsel's affidavit outlined "three separate occasions when the motion to suppress was brought up [with appellant]. Each time, we told the appellant that his unconditional guilty plea would waive appellate review of the motion to suppress." As to the waiver of any other motions, beyond the suppression motion, appellant's civilian defense counsel stated the following in his affidavit:

I also specifically recall articulating the meaning of an unconditional guilty plea being that all motions and trial issues would be waived, I recall informing appellant that this was one of the benefits to the Government of an unconditional plea. I honestly do not recall discussing the motion to dismiss for a defective withdrawal and re-referral specifically in this context, and I do not recall appellant asking specifically about this motion as he did with the motion to suppress. There is no doubt in my mind, however, that we informed the appellant that the unconditional guilty plea would prevent him from appealing the military judge's decisions on the motions filed during trial.

Although we have serious doubts about the veracity² of appellant's post-trial assertions in light of his counsels' affidavits, given appellant's assertions directly contradict the affidavits from his two defense counsel, and his claim is not "conclusively refuted as to the alleged facts by the files and records of the case," we turn to the second prong of the *Strickland* test. *Id.* at 244.

Prejudice

Even assuming arguendo deficient performance, appellant fails the second *Strickland* prong, prejudice. To establish prejudice, appellant must show "there is a 'reasonable probability that, but for

counsel's errors, [the appellant] would not have pleaded guilty and would have insisted on going to trial." *Furth*, 81 M.J. at 117 (quoting *Lee v. United States*, 137 S. Ct. 1958, 1965, 198 L. Ed. 2d 476 (2017) (brackets in original)). Appellant's assertion he would not have pleaded guilty but for counsel's deficient performance is not, in and of itself, sufficient to establish prejudice. See *Id.* Our higher court has considered the following factors: 1) the favorability of the appellant's plea agreement; 2) the strength of the Government's case; and 3) the lack of extenuating or mitigating circumstances that would have led to a lower sentence. *Id.* at 117-18.

Appellant received very favorable terms in his pretrial agreement. His maximum confinement was limited to 20 years by his pretrial agreement, in stark contrast to the maximum confinement of 122 years authorized for the offenses to which he pleaded guilty. If he had proceeded to a fully contested trial, he would have faced a possible maximum confinement of life with or without the possibility of parole for one of the offenses charged by the government. Further emphasizing the severity of his crimes, the military judge sentenced appellant to twice the amount of confinement (40 years) than the cap (20 years) provided for in his pretrial agreement. As recognized by his civilian counsel "[a]ppellant pled guilty because he was guilty, and he gained the advantage of the plea agreement sentence limitation. He gained the benefit of a 20-year maximum sentence instead of [facing] life in prison [at a contested trial] in exchange for his unconditional plea." Further, the pretrial agreement included a term "direct[ing] the assigned Trial Counsel to offer no evidence to prove the offenses to which [appellant] plead[ed] not guilty." This term encompassed the offense of the rape of a child, to which the military judge found appellant not guilty in accordance with his pretrial agreement.

The government's case was strong. Even if the motion to suppress was granted, it would have only impacted the offense of his possession of child pornography. The child victim was present at trial to testify, she was assessed as credible by the defense team, and she fully participated in the presentencing proceedings.

Finally, instead of mitigating or extenuating circumstances that might have led to a reduced sentence, the facts of this case are extremely aggravating. In her presentencing statement, the child victim stated:

One night, as I drifted off to sleep his hands crept into my shirt and under my panties. My body froze. My body took over and I fell asleep. I woke up with [appellant] inside of me. I remember running to the bathroom and seeing the blood. It wouldn't stop pouring out me. I put tissue paper in my size extra-small underwear and went back to bed.

Appellant argues had his "defense counsel preserved [his suppression] issue for appeal, he would have been able to successfully appeal the military judge's ruling and likely eliminated any possibility of conviction." We disagree. The limited applicability of the suppression motion to the child rape, sexual assault, and other sexual abuse offenses and the overall strength of the government case, combined with the aggravating circumstances of his crimes, all strongly suggest the contrary. We view the other denied defense pretrial motions in the same light. We conclude there is no reasonable probability appellant would have changed his plea to not guilty even assuming defense counsel failed to advise him of the impact of his plea on appellate review of his suppression or any other pretrial motions he filed.

Accordingly, we find appellant has not established prejudice, and no post-trial evidentiary hearing is needed. See *Ginn*, 47 M.J. at 248 (IA) post-trial evidentiary hearing was not required in this case and is not required in any case simply because an affidavit is submitted by an appellant. In most instances in which an appellant files an affidavit in the Court of Criminal Appeals making a claim such as ineffective assistance of counsel at trial, the authority of the Court to decide that legal issue without further proceedings should be clear.").

CONCLUSION

On consideration of the entire record the findings of guilty and sentence are AFFIRMED.

Senior Judge BURTON and Judge PARKER concur.

Footnotes

1

As discussed in more detail throughout this opinion, we see no need to order a post-trial evidentiary hearing under *United States v. DuBay*, 17 U.S.C.M.A 147, 37 C.M.R. 411 (1967). See *United States v. Ginn*, 47 M.J. 236, 246 (C.A.A.F. 1997) (reviewing appellant's claim in light of the entire record and concluding its proper resolution did not require a fact finding hearing).

2

Although not dispositive to our decision, we note the military judge made detailed findings of fact regarding appellant's lack of veracity by concluding he "attempted to delay [his] case by indicating that he had been exposed to coronavirus when there was no indication of his exposure" and he had twice asserted, as a matter of strategy, a "lost faith" in his entire defense team's abilities and fired them on the eve of trial to purposely attempt to delay his case.

APPENDIX B

U.S. v. Matthew E. Davis.
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES
83 M.J. 26; 2022 CAAF LEXIS 616
No. 22-0137/AR.
August 26, 2022, Decided

Notice:

DECISION WITHOUT PUBLISHED OPINION

Editorial Information: Prior History

CCA 20200659, 2022 CCA LEXIS 24 .United States v. Davis, 2022 CCA LEXIS 24, 2022 WL 135317 (A.C.C.A., Jan. 14, 2022)

Opinion

Petitions for Grant of Review Denied

APPENDIX C

ATTHEW E. DAVIS, Petitioner, v. DOUGLAS CURTIS, Commandant, United States Disciplinary Barracks, Respondent.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

2024 U.S. Dist. LEXIS 167292; 2024 LX 116429

Case No. 24-3074-JWL

September 17, 2024, Decided

September 17, 2024, Filed

Editorial Information: Subsequent History

Reconsideration denied by, Habeas corpus proceeding at Davis v. Curtis, 2024 U.S. Dist. LEXIS 189124, 2024 WL 4683075 (D. Kan., Oct. 17, 2024) Affirmed by, Motion denied by Davis v. Curtis, 2025 U.S. App. LEXIS 24899 (Sept. 25, 2025)

Editorial Information: Prior History

United States v. Davis, 2022 CCA LEXIS 24, 2022 WL 135317 (A.C.C.A., Jan. 14, 2022)

Counsel {2024 U.S. Dist. LEXIS 1} Matthew Evan Davis, Sr., Petitioner, Pro se, Fort Leavenworth, KS.

For Douglas Curtis, 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 Matthew Davis, a military prisoner at the United States Disciplinary Barracks in Leavenworth, Kansas, filed *pro se* a petition for habeas corpus relief under 28 U.S.C. § 2241, by which he challenges his convictions by a court martial. For the reasons set forth below, the Court **denies** the petition.

I. Background and Standard of Review

In 2020, a military judge sitting as a general court martial convicted petitioner, pursuant to his plea, of various offenses stemming from his alleged sexual abuse of a child. The United States Army Court of Criminal Appeals (ACCA) affirmed the convictions, and the Court of Appeals for the Armed Forces (CAAF) denied review of that decision. See *United States v. Davis*, 2022 CCA LEXIS 24, 2022 WL 135317 (Army Ct. Crim. App. Jan. 14, 2022), *rev. denied*, 83 M.J. 26 (Ct. App. Armed Forces 2022). In May 2024, petitioner initiated the present action, in which he asserts the following six grounds for relief: (1) the military court lacked jurisdiction to convict him because his term of {2024 U.S. Dist. LEXIS 2} service had ended; (2) petitioner received ineffective assistance of counsel; (3) petitioner's motion to suppress was improperly denied; (4) petitioner's charges were improperly withdrawn and

re-referred, resulting in a violation of petitioner rights; (5) the record of his proceedings was not substantially verbatim as required; and (6) the military judge was biased against petitioner. Respondent has filed a brief in answer to the petition, and petitioner has filed a traverse, and the matter is therefore ripe for ruling. 1

The parties agree on the applicable standards of review for petitioner's claims. The Court reviews petitioner's jurisdictional claim *de novo*. See *Fricke v. Secretary of the Navy*, 509 F.3d 1287, 1290 (10th Cir. 2007) (fair-consideration standard does not apply to jurisdictional claims; review of such claims by a habeas court is independent of the military courts' consideration).

With respect to petitioner's non-jurisdictional claims, the Court must first determine whether it may reach their merits. In 2023, the Tenth Circuit 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.), *cert. denied*, 144 S. Ct. 191, 217 L. Ed. 2d 78 (2023). Other than questions of jurisdiction, a{2024 U.S. Dist. LEXIS 3} 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. 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.

In addition, a military habeas petitioner is required to have exhausted any claims by raising them in the military courts. A failure to exhaust results in a waiver{2024 U.S. Dist. LEXIS 4} of the claim, unless cause and prejudice are shown. See *Roberts v. Callahan*, 321 F.3d 994, 995 (10th Cir. 2003).

II. Jurisdiction

For his first claim, petitioner argues that the military courts lacked jurisdiction over him at the time of his convictions. After petitioner was charged, the period of his original service obligation expired, and the Army then extended his service obligation three times. He concedes that the Army retained jurisdiction over him during the periods covered by those extensions. He argues, however, that the Army lost jurisdiction over him after the third extension ended shortly before his convictions and the Army did not execute a fourth extension. Petitioner relies on the following language from Rule 202(c)(1) from the military's Manual for Courts-Martial: "[A] service member is subject to court-martial jurisdiction until lawfully discharged or, when the service member's term of service has expired, the Government fails to act within a reasonable time on objection by the service member to continued retention." See Rules for Courts-Martial 202(c)(1). Petitioner asserts that he objected by raising the issue of the expiration of his service obligation and that the Government did not respond appropriately to that objection. Petitioner concedes that a superior officer{2024 U.S. Dist. LEXIS 5} then executed a memorandum ordering that petitioner's active service be extended pending the outcome of the court martial; but he argues essentially that that order did not take effect because the proper form, by which his previous extensions had been effected, was never executed.

Petitioner has not shown that the military lacked jurisdiction over him at the time of his convictions,

and the Court therefore denies this claim. The applicable provisions demonstrate that jurisdiction over petitioner attached and continued through his court martial. 10 U.S.C. § 802(a)(1) provides for jurisdiction over members of the armed forces "including those awaiting discharge after expiration of their terms of enlistment." See *id.* 10 U.S.C. § 1168(a) provides that a member "may not be discharged or released from active duty until his discharge certificate or certificate of release from active duty, respectively, and his final pay or a substantial part of that pay, are ready for delivery to him." See *id.* In the present case, petitioner may have been awaiting discharge after expiration of his term of service, but Section 802 explicitly provides for jurisdiction over such a person. Moreover, petitioner has not shown that he was discharged, nor has he argued{2024 U.S. Dist. LEXIS 6} that a discharge certificate was prepared for him.

Petitioner relies on Rule 202(c), but the entirety of that rule makes clear that once jurisdiction attached to him with the initiation of court-martial proceedings, it continued throughout that process. The rule states that a person becomes subject to court-martial jurisdiction at enlistment or induction into the military, and that generally three criteria are considered to determine when jurisdiction terminates (the delivery of a discharge certificate, a final accounting of pay, completion of any clearing process). See Rules for Courts-Martial 202(a)(2). The rule notes, however, that there are several exceptions and qualifications to those general guidelines. See *id.* One such qualification is as follows:

(B) *Termination of jurisdiction over active duty personnel.* As indicated in this rule, the delivery of a valid discharge certificate or its equivalent ordinarily serves to terminate court-martial jurisdiction.

(i) *Effect of completion of term of service.* Completion of an enlistment or term of service does not by itself terminate court-martial jurisdiction. An original term of enlistment may be adjusted for a variety of reasons, such as making up time lost for unauthorized absence.{2024 U.S. Dist. LEXIS 7} Even after such adjustments are considered, court-martial jurisdiction normally continues past the time of scheduled separation until a discharge certificate or its equivalent is delivered and certain other criteria are satisfied or until the Government fails to act within a reasonable time after the person objects to continued retention. As indicated in subsection (c) of this rule, service members may be retained past their scheduled time of separation, over protest, by action with a view to trial while they are still subject to the UCMJ. Thus, if action with a view to trial is initiated before discharge or the effective terminal date of self-executing orders, a person may be retained beyond the date that the period of service would otherwise have expired or the terminal date of such orders. See *id.* Rule 202(c) then provides as follows:

Court-martial jurisdiction attaches over a person when action with a view to trial of that person is taken. Once court-martial jurisdiction over a person attaches, such jurisdiction shall continue for all purposes of trial, sentence, and punishment, notwithstanding the expiration of that person's term of service or other period in which that person was subject to the UCMJ or{2024 U.S. Dist. LEXIS 8} trial by court-martial. When jurisdiction attaches over a Servicemember on active duty, the Servicemember may be held on active duty over objection pending disposition of any offense for which held and shall remain subject to the UCMJ during the entire period.

Court-martial jurisdiction exists to try a person as long as that person occupies a status as a person subject to the UCMJ. Thus, a service member is subject to court-martial jurisdiction until lawfully discharged or, when the service member's term of service has expired, the Government fails to act within a reasonable time on objection by the service member to continued retention. ...

Court-martial jurisdiction attaches over a person upon action with a view to trial. Once court-martial jurisdiction attaches, it continues throughout the trial and appellate process, and for purposes of punishment.

If jurisdiction has attached before the effective terminal date of self-executing orders, the person may be held for trial by court-martial beyond the effective terminal date. See *id.* R. 202(c)(1). Finally, the rule states that actions by which court-martial jurisdiction attaches include arrest, confinement, and the preferral of charges. See *id.* R. 202(c)(2).

It{2024 U.S. Dist. LEXIS 9} is true that Rule 202 includes the language on which petitioner relies, regarding the Government's failure to act within a reasonable time to extend a term of service. By language both before and after that provision, however, the rule also explicitly states that once jurisdiction attaches (by arrest or charging, for example), it continues throughout the court-martial proceedings. In this case, the Government took action "with a view to trial" when it charged petitioner, and as petitioner was still on active duty then, jurisdiction attached at that time, and it continued throughout his court martial. While petitioner may have objected after the expiration of the third extension, the Government had already "acted within a reasonable time" by initiating court-martial proceedings. Moreover, the Government further acted within a reasonable time when petitioner's superior ordered that petitioner remain on active duty through the pendency of the court martial. Petitioner has not provided any authority to suggest that that order somehow was not effective for purposes of Rule 202 because a particular form was not also used.

In summary, petitioner has not shown that he was in fact discharged from active duty{2024 U.S. Dist. LEXIS 10} before his court martial, and in the absence of such discharge, by rule and by statute, jurisdiction continues throughout court-martial proceedings. Thus, petitioner has failed to show that the military court lacked jurisdiction over him at the time of his convictions, and the Court therefore denies this claim.

III. Non-Jurisdictional Claims

A. Ineffective Assistance of Counsel

In his second claim, petitioner contends that his counsel's performance was constitutionally defective because counsel failed to advise him that by pleading guilty he would be waiving his right to appeal rulings on his motion to suppress and his motion to dismiss and because counsel failed to preserve that right to appeal. The Court does not reach the merits of this claim, however, because petitioner cannot satisfy all four factors of the *Dodson* test.

Petitioner cannot satisfy the fourth *Dodson* factor because the ACCA did directly address and reject this claim of ineffective assistance of counsel. See *Davis*, 2022 CCA LEXIS 24, 2022 WL 135317, at *1-3. Thus, the military courts gave adequate consideration to this claim. Petitioner argues that the ACCA did not consider his claim as it related to the ability to appeal the denial of his motion to dismiss. Although the ACCA focused{2024 U.S. Dist. LEXIS 11} its analysis on the waiver of the right to appeal the denial of the motion to suppress, the court concluded that there was a lack of prejudice under the governing *Strickland* standard even assuming that counsel failed to advise petitioner of the impact of the plea on appeals from rulings regarding his suppression motion "or any other pretrial motions he filed." See 2022 CCA LEXIS 24, [WL] at *3. Thus, the ACCA did address and reject the full scope of petitioner's ineffective-assistance claim. Petitioner also argues that the ACCA misapplied the *Strickland* standard. The ACCA identified *Strickland* as the correct standard for an ineffective-assistance claim, however, see 2022 CCA LEXIS 24, [WL] at *1-3, and thus petitioner cannot satisfy the fourth *Dodson* factor. See *Drinkert v. Payne*, 90 F.4th 1043, 1048-49 (10th Cir. 2024) (with respect to the fourth *Dodson* factor, clarifying that it is not enough for a petitioner merely to argue that the military courts failed to apply the proper standard correctly; rather, the petitioner must show that the military courts did not identify and apply the standard that governs the inquiry).

Petitioner also fails to satisfy the second *Dodson* factor because the claim necessarily involves issues

of fact. See *Gray v. Payne*, 2023 U.S. Dist. LEXIS 76604, 2023 WL 3204004, at *2 (D. Kan. May 2, 2023) (Lungstrum, J.) (ineffective-assistance claim did not present a question of law for{2024 U.S. Dist. LEXIS 12} purposes of the second *Dodson* factor), *aff'd*, 2023 U.S. App. LEXIS 32150, 2023 WL 8433977 (10th Cir. Dec. 5, 2023) (unpub. op.) (claim presented mixed question of law and fact under *Strickland*, thus petitioner failed to satisfy second *Dodson* factor), *cert. denied*, 144 S. Ct. 2622, 219 L. Ed. 2d 1263 (2024). Petitioner argues that the claim does not involve a question of fact "already determined" by the ACCA because the ACCA deemed the claim waived and thus declined to review it. In fact, the ACCA did address the merits of this claim. See *Davis*, 2022 CCA LEXIS 24, 2022 WL 135317, at *1-3. Moreover, in ruling that petitioner had failed to show prejudice as required under the second prong of the *Strickland* standard, the ACCA made the factual determination that petitioner would have accepted the plea offer even assuming counsel's failure to advise him properly, based in part on the consideration of factual issues such as the favorability of the plea agreement, the strength of the case against petitioner, and the presence or absence of extenuating or mitigating circumstances that could have led to a lower sentence. See 2022 CCA LEXIS 24, [WL] at *2-3. Thus, because this claim presents a question that is more factual than legal, it does not present an issue of pure law, and petitioner cannot satisfy this factor. See *Drinkert*, 90 F.4th at 1048.2 The Court therefore denies this claim.

B. Motion to Suppress{2024 U.S. Dist. LEXIS 13}

In his third claim, petitioner challenges the trial court's denial of his motion to suppress evidence found on his cell phone. Again, however, petitioner cannot satisfy all four requirements of the *Dodson* test with respect to this claim. First, as petitioner conceded in his brief to the ACCA, this claim presents a mixed question of law and fact, as the Court would need to consider the actions and knowledge of the persons who seized the phone, particularly with respect to the application of good-faith exception to the exclusionary rule (on which the trial judge relied). Second, to the extent that petitioner raised the issue to the ACCA in the context of his ineffective-assistance claim (he did not raise the issue as a stand-alone claim), the ACCA considered and rejected the claim in affirming petitioner's convictions. Thus, the Court may not reach the merits of this claim, which is therefore denied.³

C. Re-Referral of Charges

For his fourth claim, petitioner asserts that the Government improperly withdrew and then re-referred the charges against him, with the result that his speedy trial rights were violated. This issue was the subject of petitioner's motion to dismiss, which the trial judge{2024 U.S. Dist. LEXIS 14} denied after an evidentiary hearing. Petitioner did not appeal that ruling to the ACCA. Rather, in his brief to the ACCA, petitioner in one sentence merely requested that if the ACCA found counsel to have been ineffective, the court also assess the merits of other pretrial motions filed by petitioner. In his brief to the CAAF seeking review, petitioner expanded on that argument slightly, arguing that the improper referral had cost him his attorney of choice, although he still raised the issue in the context of a claim of ineffective assistance of counsel. Thus, petitioner failed to exhaust this stand-alone claim challenging the denial of the motion to dismiss (and he has not identified any applicable exception or argued that cause and prejudice exists here).

Petitioner argues that the issue was presented to the appellate courts by his raising it in the context of the ineffective-assistance claim. The Court notes, however, that the premise of that claim was that counsel was deficient in failing to advise petitioner that after pleading guilty he could *not* appeal the denial of the motion to dismiss. Thus, by pursuing the ineffective-assistance claim, petitioner was effectively denying{2024 U.S. Dist. LEXIS 15} the existence of any appeal of the ruling on the motion to dismiss (with the merits of that ruling relevant only to the issue of prejudice).

At any rate, even if the Court were to agree that petitioner did raise the issue on appeal, it still could

not reach the merits of this claim, as petitioner could not satisfy the *Dodson* test. As noted, the trial judge required an evidentiary hearing to resolve the issue, and thus the claim does not present an issue of law. Moreover, to the extent the issue was raised to the appellate courts (and therefore not abandoned), it was considered and rejected by those courts in affirming the convictions and denying review. The Court therefore denies this claim for relief.

D. Substantially Verbatim Record

For his fifth claim, petitioner argues that one digital exhibit containing images taken from his phone - an exhibit that the trial court declined to view after petitioner conceded that the images constituted child pornography - proved to be unreadable, which resulted in a violation of the military rule requiring a substantially verbatim record of the proceedings. Petitioner cannot satisfy the fourth *Dodson* factor as applied to this claim, however, as petitioner raised{2024 U.S. Dist. LEXIS 16} this same issue in his unsuccessful appeals to the ACCA and the CAAF. See *Livingston v. Payne*, 2024 U.S. Dist. LEXIS 119048, 2024 WL 3328584, at *3-4 (D. Kan. July 8, 2024) (Lungstrum, J.) (citing cases in ruling that the fourth *Dodson* factor weighs against a petitioner even if the military appellate courts rejected without discussion a claim that was briefed to them). Petitioner argues that the appellate courts must have unreasonably applied federal law in rejecting the claim, but he has not shown how those courts failed to apply the correct standards in denying relief. Petitioner also suggests that those courts could not have adequately considered the claim without a readable copy of the exhibit, but the courts could have found that the record was substantially complete (the standard, as conceded by petitioner in his appellate briefs) even without viewing the omitted exhibit.⁴ Accordingly, the Court does not reach the merits of this claim, which is therefore denied.

E. Bias of the Judge

Finally, for his sixth claim, petitioner contends that the trial judge was biased against him. Respondent argues that petitioner failed to exhaust this claim because he failed to make such a claim in the military courts until he raised it in his petition for review by the CAAF. Respondent{2024 U.S. Dist. LEXIS 17} has not provided any authority to support that argument that raising an issue initially to the CAAF is not sufficient for exhaustion. The Court need not decide that issue, however, as petitioner cannot satisfy the *Dodson* test, and this Court therefore cannot reach the merits of this claim. Actual bias or the appearance of bias is judged under an objective standard, see *United States v. Nickl*, 427 F.3d 1286, 1298 (10th Cir. 2005), and thus the claim presents factual issues instead of purely legal ones. Moreover, the CAAF is presumed to have considered this issue in summarily rejecting the petition for review. The Court therefore denies this claim, and the petition is denied in its entirety.

IV. Motion for Appointment of Counsel

Petitioner has not presented a reasonable argument for a lack of jurisdiction; nor has he shown that he is entitled to a review of the merits of his other claims. Accordingly, the Court in its discretion denies petitioner's motion for appointment of counsel to pursue the claims here.

IT IS THEREFORE ORDERED BY THE COURT THAT the petition for habeas corpus 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. # 4) is hereby **denied**.

IT IS SO ORDERED.

Dated this 17th day{2024 U.S. Dist. LEXIS 18} of September, 2024, in Kansas City, Kansas.

/s/ John W. Lungstrum

Hon. John W. Lungstrum
United States District Judge

Footnotes

1

The Court previously denied two motions by petitioner for default judgment.

2

Moreover, although the ACCA declined to rule on *Strickland*'s first prong, to succeed on this claim petitioner would need to prevail on the disputed factual issue of whether his counsel's performance was deficient.

3

Moreover, even if petitioner were to argue that this issue was *not* raised to and considered by the ACCA as a stand-alone claim, then petitioner would be conceding that he failed to exhaust with respect to this claim.

4

As respondent points out, and as the trial judge noted, military law does not require the admission in a guilty plea case of images that admittedly represent child pornography. See *United States v. Rominger*, 2009 CCA LEXIS 315, 2009 WL 6842667, at *2 (Army Ct. Crim. App. June 8, 2009), rev. denied, 68 M.J. 230 (2009). Petitioner made such an admission in this case prior to the plea.

APPENDIX D

MATTHEW E. DAVIS, Petitioner, v. DOUGLAS CURTIS, Commandant, United States Disciplinary Barracks, Respondent.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

2024 U.S. Dist. LEXIS 189124

Case No. 24-3074-JWL

October 17, 2024, Decided

October 17, 2024, Filed

Counsel {2024 U.S. Dist. LEXIS 1} Matthew Evan Davis, Sr., Petitioner, Pro se,
Fort Leavenworth, KS.

For Douglas Curtis, 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

Matthew Davis, a military prisoner, filed *pro se* a petition for habeas corpus relief under 28 U.S.C. § 2241, by which he challenged his convictions by a court martial. By Memorandum and Order of September 17, 2024, the Court denied the petition. See *Davis v. Curtis*, 2024 U.S. Dist. LEXIS 167292, 2024 WL 4215763 (D. Kan. Sept. 17, 2024) (Lungstrum, J.). Petitioner has now filed a motion for reconsideration of that ruling (Doc. #20). For the reasons set forth below, the Court **denies** the motion.

Petitioner seeks reconsideration pursuant to Fed. R. Civ. P. 59(e), which provides for a motion to alter or amend a judgment. See *id.* 1 "A Rule 59(e) motion is appropriate where the court has misapprehended the facts, a party's position, or the controlling law." See *ORP Surgical, LLC v. Howmedica Osteonics Corp.*, 92 F.4th 896, 922 (10th Cir. 2024) (internal quotations omitted) (quoting *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000)). "Grounds warranting a motion to reconsider [under Rule 59(e)] include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest {2024 U.S. Dist. LEXIS 2} injustice." See *Servants of Paraclete*, 204 F.3d at 1012. In making such a motion, "[i]t is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing." See *id.*

In denying the petition, the Court addressed each of petitioner's six asserted grounds for relief. See *Davis*, 2024 U.S. Dist. LEXIS 167292, 2024 WL 4215763. By his motion, petitioner seeks reconsideration with respect to all six claims, and the Court thus addresses each claim in turn.

First, the Court denied petitioner's claim that the military lacked jurisdiction over him at the time of his convictions. See 2024 U.S. Dist. LEXIS 167292, [WL] at * 2-4. Petitioner argues that the Court erred in stating that petitioner had conceded that a superior executed a memorandum ordering that

petitioner's active service be extended pending the outcome of the court martial. See 2024 U.S. Dist. LEXIS 167292, [WL] at *2. The Court made that statement based on petitioner's own allegation that after he objected that his service obligation had ended, prosecutors provided the military judge with that order. Petitioner argues that in fact the order was executed months before and thus was not executed in response to petitioner's objection as the Court had assumed. That correction by petitioner does not change the outcome, however, as the Court concluded{2024 U.S. Dist. LEXIS 3} that the military had obtained jurisdiction over petitioner when it charged him while he was still in active service. See 2024 U.S. Dist. LEXIS 167292, [WL] at *3-4. Thus, this alleged error by the Court does not present a basis for relief.

Petitioner also argues that the Court erred in its interpretation of Rules for Courts-Martial 202(c). Petitioner, however, makes the same arguments that he made or could have made previously, and thus reconsideration is not appropriate. Moreover, petitioner has not persuaded the Court that its interpretation is incorrect. As the Court explained in the prior order, the rules make clear that jurisdiction attaches at the time of charging and continues until discharge, and petitioner did not show that he was in fact discharged from active duty. See 2024 U.S. Dist. LEXIS 167292, [WL] at *2-4. The Court therefore denies the motion as it relates to this claim.

Second, the Court denied petitioner's claim of ineffective assistance of counsel. See 2024 U.S. Dist. LEXIS 167292, [WL] at *4. Petitioner argues that although the military appellate court identified the correct standard for this claim, it unreasonably applied that standard. As the Court explained, however, under Tenth Circuit law, the military's court's identification of the correct standard forecloses habeas consideration under the fourth factor of{2024 U.S. Dist. LEXIS 4} the applicable *Dodson* test. See 2024 U.S. Dist. LEXIS 167292, [WL] at *4. Moreover, petitioner has failed to address the Court's conclusion that review is also foreclosed under the second *Dodson* factor because the claim does not present a purely legal issue. See *id.* The Court therefore denies the motion as it relates to petitioner's second claim.

Third, the Court denied petitioner's claim challenging the denial of his motion to suppress. See 2024 U.S. Dist. LEXIS 167292, [WL] at *5. Petitioner insists that he met any exhaustion requirement with respect to this claim. Petitioner also argues that the fourth *Dodson* factor is satisfied here because the military court unreasonably determined the facts and thus did not give this claim full and fair consideration. As the Court explained, however, the fourth *Dodson* factor forecloses review because the military court did reject the claim. See *id.* Moreover, by arguing that the military court erred in its factual determination, petitioner effectively concedes that the claim presents issues of fact, and petitioner has not explained why the second *Dodson* factor does not therefore foreclose review. See *id.* The Court thus denies the motion as it relates to this claim.

Fourth, the Court denied petitioner's claim concerning the{2024 U.S. Dist. LEXIS 5} re-referral of charges against him. See 2024 U.S. Dist. LEXIS 167292, [WL] at *5. Petitioner argues that the Court erred in concluding that petitioner had not exhausted military remedies by asserting this claim as a stand-alone claim on direct appeal. Even assuming that petitioner satisfied the exhaustion requirement with respect to this claim (an issue the Court need not and does not decide), he has not addressed the Court's additional conclusions that the second and fourth *Dodson* factors foreclose review of this claim. See *id.* The Court therefore denies the motion as it relates to the fourth claim.

Fifth, the Court denied petitioner's claim of a violation of the requirement of a substantially-verbatim record. See 2024 U.S. Dist. LEXIS 167292, [WL] at *5. Petitioner argues that the military court could not have given this claim full and fair consideration without a copy of the omitted exhibit. This argument was available to petitioner in originally arguing the claim, however, and therefore he may not raise the claim for the first time by this motion. Moreover, as the Court explained, the military court did

address this precise claim (and could have done so without having the actual exhibit before it), and thus petitioner cannot show satisfaction of the fourth{2024 U.S. Dist. LEXIS 6} *Dodson* factor. *See id.* The motion is denied with respect to this claim. Sixth, the Court denied petitioner's claim that his military judge was biased. *See* 2024 U.S. Dist. LEXIS 167292, [WL] at *6. The Court concluded that petitioner failed to show that the second and fourth *Dodson* factors permit review here. Petitioner argues that the claim does not present any *disputed* issues of fact, but the ultimate fact issue - whether the judge was in fact biased - was indeed disputed before the military judge. Petitioner also argues that the highest military court did not give full and fair consideration to this claim in summarily rejecting it on appeal. As this Court has explained, however, a military court is presumed to have considered claims that are briefed and rejected. *See Livingston v. Payne*, 2024 U.S. Dist. LEXIS 119048, 2024 WL 3328584, at *3-4 (D. Kan. July 8, 2024) (Lungstrum, J.), *cited in Davis*, 2024 U.S. Dist. LEXIS 167292, 2024 WL 4215763, at *5. Thus the Court denies the motion as it relates to this claim, and accordingly, it denies the motion in its entirety.

IT IS THEREFORE ORDERED BY THE COURT THAT petitioner's motion for reconsideration of the Court's denial of his habeas petition (Doc. # 20) is hereby **denied**.

IT IS SO ORDERED.

Dated this 17th day of October, 2024, in Kansas City, Kansas.

/s/ John W. Lungstrum

Hon. John W. Lungstrum

United States District Judge

Footnotes

1

Petitioner also cites Fed. R. Civ. P. 52(b). That rule, however, provides for a motion to amend or make additional findings of fact after an action has been tried to the court, *see id.*, and thus would not apply here.

APPENDIX E

MATTHEW EVAN DAVIS, SR., Petitioner - Appellant, v. DOUGLAS CURTIS, Respondent - Appellee.
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
2025 U.S. App. LEXIS 24899; 2025 LX 409403
No. 24-3166
September 25, 2025, Filed

Notice:

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

Editorial Information: Prior History

{2025 U.S. App. LEXIS 1}(D.C. No. 5:24-CV-03074-JWL). (D. Kan.). Davis v. Curtis, 2024 U.S. Dist. LEXIS 167292, 2024 WL 4215763 (Sept. 17, 2024)

Counsel MATTHEW EVAN DAVIS, SR., Petitioner - Appellant, Pro se, Fort Leavenworth, KS.

For DOUGLAS J. CURTIS, Respondent - Appellee: Jared S. Maag, Office of the United States Attorney, Topeka, KS.

Judges: Before HARTZ, EID, and CARSON, Circuit Judges.

Opinion

Opinion by: Harris L Hartz

Opinion

ORDER AND JUDGMENT*

Petitioner Matthew Davis is a military prisoner at the United States Disciplinary Barracks in Leavenworth, Kansas. Proceeding pro se,¹ he appeals the district court's denial of his application for a writ of habeas corpus filed under 28 U.S.C. § 2241. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

In November 2020, in accordance with a plea agreement, Davis was convicted by a military judge sitting as a general court-martial on three specifications of sexual abuse of a child, two specifications of sexual assault of a child, one specification of battery upon a child under the age of 16, and one specification of possession of child pornography, in violation of Articles 120b, 128, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 920b, 928, 934. He was sentenced to 20 years' confinement, reduction to the grade of E-1, and a dishonorable discharge. Davis appealed, and the United States Army Court of Criminal Appeals (ACCA) affirmed his convictions and sentence. See {2025 U.S. App. LEXIS 2} *United States v. Davis*, ARMY 20200659, 2022 CCA LEXIS 24, 2022 WL 135317, at *3 (A. Ct. Crim. App. Jan. 14, 2022). He then sought review from the United States Court of Appeals for the Armed Forces (CAAF), but his petition was denied. See *United States v. Davis*, 83 M.J. 26 (C.A.A.F. 2022).

In May 2024 Davis filed his § 2241 application in the United States District Court for the District of Kansas. The district court denied relief. *See Davis v. Curtis*, No. 24-3074-JWL, 2024 U.S. Dist. LEXIS 167292, 2024 WL 4215763 (D. Kan. Sept. 17, 2024).

II. DISCUSSION

A. Standard of Review

"Federal courts are empowered under 28 U.S.C. § 2241 to entertain habeas petitions from military prisoners." *Santucci v. Commandant, U.S. Disciplinary Barracks*, 66 F.4th 844, 853 (10th Cir. 2023). But our review "is limited generally to jurisdictional issues and to determination of whether the military gave fair consideration to each of the petitioner's constitutional claims." *Fricke v. Sec'y of Navy*, 509 F.3d 1287, 1290 (10th Cir. 2007) (emphasis and internal quotation marks omitted).

B. Jurisdictional Claim

Davis first argues that the court-martial tribunal lacked jurisdiction to try the charges against him. We review the merits of jurisdictional issues "independent of the military courts' consideration of such issues." *Fricke*, 509 F.3d at 1290. Davis acknowledges that although his military term of service was originally scheduled to end on February 1, 2020, it had been extended three times pending the outcome of his court-martial. But he points out that the last extension expired on November 3, 2020-eight days before his court-martial convened. He therefore contends{2025 U.S. App. LEXIS 3} that the military lost jurisdiction over him.

"It is well-settled, however, that the military's jurisdiction over a servicemember, once established while he is still a member of the military, continues past the scheduled expiration of his military commitment." *Williams v. Weathersbee*, 280 F. App'x 684, 686 (10th Cir. 2008) (relying on *Smith v. Vanderbush*, 47 M.J. 56, 57-58 (C.A.A.F. 1997)). In particular, the Rules for Courts-Martial provide:

Court-Martial jurisdiction attaches over a person when action with a view to trial of that person is taken. Once court-martial jurisdiction over a person attaches, such jurisdiction shall continue for all purposes of trial, sentence, and punishment, *notwithstanding the expiration of that person's term of service*."R.C.M. 202(c)(1) (emphasis added).

Court-martial jurisdiction over Davis attached when he was initially charged on January 7, 2019, while he was still on active duty, well before the scheduled expiration of his military commitment. *See id.* 202(c)(2) ("Actions by which court-martial jurisdiction attaches include . . . preferral of charges."). Thus, even if his term of service expired before his court-martial convened, the military's jurisdiction to try him continued through the conclusion of the court-martial proceedings.

Davis recognized as much during the court-martial{2025 U.S. App. LEXIS 4} proceedings. Before pleading guilty on November 6, 2020, he stipulated to the following: "The Accused acknowledges that this Court has both personal jurisdiction over the Accused and subject matter jurisdiction over the charged offenses." R. at 713. And during his plea colloquy, after the military judge asked, "Defense, do you know of any impediment to this court's jurisdiction," defense counsel responded, "no-we agree that the court has jurisdiction over the accused." *Id.* at 448-49.

We conclude that the district court properly rejected Davis's jurisdictional claim.

C. Non-Jurisdictional Claims

Davis raises several issues that he acknowledges are not jurisdictional. We discuss our standard of review before addressing the specific issues.

1. Standard of review

When considering nonjurisdictional claims, we must first determine whether we may review the merits at all. "A merits review is warranted only if the petitioner shows that the military tribunals failed to consider his claims fully and fairly." *Drinkert v. Payne*, 90 F.4th 1043, 1046 (10th Cir. 2024) (internal quotation marks omitted). In determining the adequacy of the tribunals' consideration, we address whether the following factors (the *Dodson* factors), have been satisfied: "(1) the asserted{2025 U.S. App. LEXIS 5} error is of substantial constitutional dimension, (2) the issue is one of law rather than disputed fact, (3) no military considerations warrant a different treatment of constitutional claims, and (4) the military courts failed to give adequate consideration to the issues involved or failed to apply proper legal standards." *Thomas v. U.S. Disciplinary Barracks*, 625 F.3d 667, 670-71 (10th Cir. 2010) (internal quotation marks omitted); see *Dodson v. Zelez*, 917 F.2d 1250, 1252-53 (10th Cir. 1990)). "Satisfaction of each factor is critical to the invocation of our merits review. That is, we cannot grant such review even if just one of the *Dodson* factors is unfavorable to the petitioner." *Drinkert*, 90 F.4th at 1047 (brackets, ellipsis, citation, and internal quotation marks omitted). We review de novo whether the district court properly denied habeas relief under these standards. See *Fricke*, 509 F.3d at 1289.

Davis contends that the *Dodson* test "creates an unconstitutional and self-fulfilling bar to Habeas Corpus . . . that slams the door of Habeas review for all Military Petitioners." Aplt. Br. at 29-30. But "[w]e are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court," *McCracken v. Gibson*, 268 F.3d 970, 981 (10th Cir. 2001) (internal quotation marks omitted), and Davis does not direct us to any Supreme Court or en banc decision that would allow us to overrule{2025 U.S. App. LEXIS 6} *Dodson*.

2. Ineffective Assistance of Counsel

Davis argues that the district court erred in declining to review the merits of his claim that his trial counsel was constitutionally ineffective by failing to advise him that pleading guilty would waive his right to appeal several pretrial rulings. He asserts that this claim was not fully and fairly considered by the military courts. In support he says that although "ACCA identified the correct legal rule for [an ineffective-assistance-of-counsel claim], . . . ACCA made an unreasonable application of the legal rule." Aplt. Br. at 56 (emphasis added).

But the fourth *Dodson* factor is whether the military tribunal applied the proper standard, not whether it properly applied that standard. See *Drinkert*, 90 F.4th at 1050. The proper standard for reviewing a claim of ineffective assistance of counsel is *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), which states that the client "must show [1] that counsel's performance was deficient" and "[2] that the deficient performance prejudiced the defense." Davis concedes that the military tribunals applied that standard. He therefore fails to show that his claim was not fully and fairly considered by the military courts.

3. Failure to examine exhibit

Davis contends that the district court{2025 U.S. App. LEXIS 7} erred in declining to address the merits of his claim that the military judge violated his rights when it convicted him of possession of child pornography without viewing the images at issue (the exhibit file was unreadable). He says that it would have been "impossible" for the court "to give full and fair consideration [to his claim] when the record . . . contains an unreadable exhibit" and "is not complete." Aplt. Br. at 60.

But this argument turned on a question of fact, not an issue of law, because there was evidence in the record that Davis conceded in the court-martial proceedings that the images were child pornography. This failure to establish the second *Dodson* factor precludes our review of this issue.

4. Motion to Suppress

Davis argues that the district court erred in dismissing his claim that the military judge improperly denied his motion to suppress evidence of child pornography found on his cell phone. The validity of a search or seizure, however, generally depends on the facts, and Davis has not pointed to an error on an issue of "pure law." *Drinkert*, 90 F.4th at 1048. We therefore cannot review the matter.

D. Other Purported Jurisdictional Claims

Finally, Davis raises two additional claims that he contends{2025 U.S. App. LEXIS 8} are jurisdictional. One is a claim that the military judge was biased against him. The other is that his rights were violated when the government withdrew the charges against him and then re-referred the charges so that they could be tried with new additional charges.

Neither claim is jurisdictional. Davis has not countered the government's contention that the military status of the accused is what determines jurisdiction over the offense and jurisdiction of the person. See *Solorio v. United States*, 483 U.S. 435, 107 S. Ct. 2924, 97 L. Ed. 2d 364 (1987). Neither of these purported jurisdictional claims concerns his military status.

Nor can either of these claims survive the *Dodson* test. The question of bias is fact intensive, so the issue cannot survive the second factor. And Davis has not suggested how re-referral raises a question of substantial constitutional dimension, thereby failing the first factor.

III. CONCLUSION

We **AFFIRM** the district court's judgment and **DENY** Davis's Motion for Leave to Supplement Brief.

Entered for the Court

Harris L Hartz

Circuit Judge

Footnotes

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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 Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

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Although we "liberally construe" Davis's pro se filings, "we do not assume the role of advocate." *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008) (internal quotation marks omitted).

No. 25-6668

IN THE
SUPREME COURT OF THE UNITED STATES

MATTHEW EVAN DAVIS SR. – PETITIONER,

v.

DOUGLAS CURTIS– RESPONDENT

CERTIFICATION OF PARTY

I, Matthew Evan Davis Sr, do swear or declare that this Petition for Rehearing is restricted to the grounds specified in Supreme Court Rule 44(2) and is presented in good faith and not for delay. Petitioner believes this case contains issues of importance to himself and similarly situated individuals.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 25, 2026



MATTHEW E. DAVIS SR. Obl.S.B.
1300 N. Warehouse Rd
Fort Leavenworth, KS 66027

No. 25-6668

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v.

DOUGLAS CURTIS– RESPONDENT

PROOF OF SERVICE

I, Matthew Evan Davis Sr, do swear or declare that on this date, March 20, 2026, as required by Supreme Court Rule 29, I have served the enclosed PETITION FOR REHEARING and CERTIFICATE OF PARTY on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

D. John Sauer, Solicitor General
U.S. Department of Justice
Office of the Solicitor General
Room 5612
Washington, DC 20530

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 25, 2026



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