No. 22-540

In the Supreme Court of the United States

PAUL ANTHONY RIOJAS, PETITIONER

v.

DEPARTMENT OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly rejected petitioner's non-custodial collateral attack on his court-martial conviction for sexual abuse of a child and disobeying an order from a superior commissioned officer.

ADDITIONAL RELATED PROCEEDINGS

United States Army Court of Criminal Appeals:

United States v. *Riojas*, No. 20170097 (Oct. 26, 2018)

Riojas v. *United States,* No. 20200078 (Feb. 24, 2020)

United States Court of Appeals for the Armed Forces:

United States v. *Riojas*, No. 19-96 (Feb. 4, 2019)

United States v. *Riojas*, No. 20-170 (Mar. 31, 2020)

United States Court of Appeals (5th Cir.):

Riojas v. *Department of the Army*, No. 22-50019 (July 21, 2022)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 20-22) is not published in the Federal Reporter but is available at 2022 WL 2871204.[1] The orders of the district court (Pet. App. 23-30, 31-43) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 2022. A petition for rehearing was denied on September 7, 2022 (Pet. App. 44-45). The petition for a writ of certiorari was filed on December 6, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] This brief uses the page numbers printed in the petition appendix, which is paginated consecutively with the petition itself.

STATEMENT

Following a guilty plea before a general court-martial, petitioner was convicted on one specification of sexually abusing a child, in violation of 10 U.S.C. 920b(c), and one specification of disobeying an order from a superior commissioned officer, in violation of 10 U.S.C. 890 (2012). Pet. App. 24; see C.A. ROA 167. The court-martial sentenced petitioner to nine months of confinement, forfeiture of all pay and allowances, and dismissal from the service. C.A. ROA 169. The Army Court of Criminal Appeals (Army CCA) set aside a portion of his sentence but affirmed the convictions, and the Court of Appeals for the Armed Forces (CAAF) denied review. Pet. App. 24.

Petitioner subsequently sought extraordinary writs of error coram nobis from the Army CCA and the CAAF. Pet. App. 21; C.A. ROA 361-377, 378-395. The Army CCA dismissed his petition and the CAAF, construing his petition as a writ-appeal, denied it. C.A. ROA 314, 356. Petitioner thereafter filed a complaint in the district court collaterally attacking his court-martial conviction on Fifth and Sixth Amendment grounds. Pet. App. 21. The district court dismissed his complaint for failure to state a claim. *Ibid.* The court of appeals affirmed. *Id.* at 20-22.

1. Petitioner, who was assigned to United States Army forces in Germany, frequently took morning runs in a park, usually finishing around the time that young girls walked by the park on their way to school. 2018 WL 5619958, at *1. On one such occasion, petitioner's penis accidentally came out of the bottom of his "short jogging shorts." *Ibid.* Some girls saw this and giggled. *Ibid.* Petitioner, excited by the event, then intentionally

exposed himself to teenage girls on three or four occasions. *Ibid.*

Petitioner eventually pleaded guilty to charges that included a specification of sexual abuse of seven children, based on having exposed himself multiple times to seven different girls who ranged in age from 12 to 14. 2018 WL 5619958, at *1-*2; see 10 U.S.C. 920b(c) and (h)(5)(B). Although it would have been a defense if petitioner had reasonably believed that the victims were 16 or older at the time of the offense conduct, see 10 U.S.C. 920b(d)(2), petitioner admitted as part of the plea colloquy that he "did not have an honest and reasonable mistake of fact" as to the age of any of the victims and that "at no time" had he "ma[d]e any effort" to determine the age of any of the victims. 2018 WL 5619958, at *2.

Petitioner appealed his conviction, challenging the military judge's acceptance of his plea. 2018 WL 5619958, at *1-*2. The Army CCA concluded that the convening authority failed to reduce petitioner's sentence to six months of confinement as required by the plea agreement and corrected his sentence to that extent, *id.* at *1 n.2, but otherwise affirmed, *id.* at *3. The CAAF denied review. 78 M.J. 346.

Petitioner thereafter sought a writ of error coram nobis from the Army CCA. Pet. App. 24; C.A. ROA 361-377. Among other claims, petitioner challenged the effectiveness of his counsel. C.A. ROA 371-373. The Army CCA denied relief in an order stating that "[o]n consideration of the Petition for Extraordinary Relief in the Nature of a Writ of Error Coram Nobis, the petition is DISMISSED." *Id.* at 356. Petitioner then sought a writ of error coram nobis from the CAAF, raising, *inter alia*, the same claims of ineffectiveness. *Id.* at 388-390.

Construing his petition as a writ-appeal, the CAAF denied it. *Id.* at 314.

2. Petitioner, who had by that point completed his period of confinement, subsequently filed a non-custodial collateral attack in the United States District Court for the Western District of Texas, challenging his court-martial convictions under the Fifth and Sixth Amendments. See Pet. App. 25; *id.* at 35-38 & n.3. The district court dismissed the complaint for failure to state a claim. *Id.* at 28-30, 39-42. Petitioner then appealed the dismissal of his Sixth Amendment claim, and the court of appeals affirmed in an unpublished per curiam opinion. *Id.* at 20-22 & n.*.

The court of appeals explained that under this Court's decision in *Burns* v. *Wilson*, 346 U.S. 137 (1953), "[w]hen a petition collaterally attacks a decision by the military court, 'it is the limited function of the civil courts to determine whether the military has given fair consideration' to the claims raised in that collateral attack." Pet. App. 22 (quoting *Burns*, 346 U.S. at 144 (plurality opinion)). Applying that standard to petitioner's collateral attack, the court of appeals determined that the Army CCA's denial of petitioner's coram nobis petition reflected "full and fair consideration" of his ineffective-assistance claim. *Ibid.* (quoting *Fletcher* v. *Outlaw*, 578 F.3d 274, 278 (5th Cir. 2009)). The court found that petitioner had "'fully briefed and argued the claims before'" the Army CCA and that the Army CCA's summary disposition indicated that it had "considered the petition, but denied it." *Ibid.* (citation omitted)

ARGUMENT

Petitioner contends (Pet. 16-18) that the court of appeals erred in affirming the denial of collateral relief

under *Burns* v. *Wilson*, 346 U.S. 137 (1953), based on its determination that the military courts had given "full and fair consideration" to petitioner's ineffective-assistance claims. The court of appeals correctly determined that petitioner is not entitled to relief under the standard articulated in *Burns*, and petitioner identifies no circuit in which he would have succeeded on his non-custodial collateral challenge to the military courts' resolution of his claims. Further review is therefore unwarranted.

1. In *Burns*, this Court affirmed the dismissal of habeas claims filed by two soldiers convicted by courts-martial of rape and murder. In a plurality opinion, four Members of the Court concluded that, on habeas review of military judgments, the appropriate inquiry was "whether the military have given fair consideration to each of [petitioners'] claims." *Burns*, 346 U.S. at 144. The plurality explained that if the military has done so, civil courts should not "repeat that process * * * [by] reexamin[ing] and reweigh[ing] each item of evidence." *Ibid.* And because the military courts in *Burns* had "heard petitioners out on every significant allegation which they now urge," the plurality concluded that no further review of those allegations was available in civilian courts. *Ibid.*

The plurality would, however, allow a district court to review claims de novo where the underlying allegations were "sufficient to depict fundamental unfairness" and "the military courts [had] manifestly refused to consider those claims." *Burns*, 346 U.S. at 142. Justice Minton, concurring in the judgment, took the even more restrictive view that the sole function of a habeas court was to determine "that the military court ha[d] jurisdiction, not whether it ha[d] committed error in the exercise

of that jurisdiction." *Id.* at 147; see *id.* at 146 (noting that Justice Jackson concurred in the result without opinion).

Two decades later, in *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975), this Court acknowledged that non-custodial plaintiffs, like petitioner, may in appropriate circumstances mount collateral challenges to military court proceedings. See *id.* at 748-753. The Court emphasized, however, that collateral relief would be warranted only if the judgment of the military court is "void," *id.* at 748, and that "grounds of impeachment cognizable in habeas proceedings may not be sufficient to warrant other forms of collateral relief," *id.* at 753. Accordingly, lower courts have recognized that the standards applicable to a non-custodial plaintiff are at least as restrictive as in *Burns*, and that such a plaintiff is not entitled to relief if he cannot satisfy even the *Burns* standard. See *Allen* v. *United States Air Force*, 603 F.3d 423, 430-431 (8th Cir.), cert. denied, 562 U.S. 1113 (2010); *United States ex rel. New* v. *Rumsfeld*, 448 F.3d 403, 408 (D.C. Cir. 2006), cert. denied, 550 U.S. 903 (2007).

2. The court of appeals in this case correctly determined (Pet. App. 22) that petitioner cannot satisfy the *Burns* standard, and that determination does not warrant further review. Although the precise scope of *Burns* has been subject to some uncertainty in the courts of appeals, see *Armann* v. *McKean*, 549 F.3d 279, 289 n.10 (3d Cir. 2008), cert. denied, 558 U.S. 835 (2009), this case is not a proper vehicle to clarify the complete contours of *Burns*'s "full and fair consideration" test, because petitioner would lose under any plausible application of that test.

In the absence of any specific evidence that the military courts "manifestly refused to consider" a soldier's claims, *Burns*, 346 U.S. at 142 (plurality opinion), the courts of appeals have consistently found that military courts gave "full and fair consideration" to a soldier's claim on appeal even when the military courts did not explicitly address the claim in their opinions.[2] And

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[2] See *Thomas* v. *United States Disciplinary Barracks*, 625 F.3d 667, 671-672 (10th Cir. 2010) (Army CCA had summarily denied coram nobis petition raising ineffective-assistance claims), cert. denied, 562 U.S. 1300 (2011); *Fletcher* v. *Outlaw*, 578 F.3d 274, 275 (5th Cir. 2009) (Army CCA had summarily stated that it had considered the record, briefs, and oral argument and "f[ound] no merit in either the errors asserted by counsel for appellant or those raised personally by the appellant"); *Armann*, 549 F.3d at 292-294 (CAAF had summarily affirmed conviction after receiving plaintiff's briefing on competency challenge); *Lips* v. *Commandant*, 997 F.2d 808, 812 n.2 (10th Cir. 1993) (military court had summarily stated that it had examined and resolved the defendant's claim), cert. denied, 510 U.S. 1091 (1994); *United States ex rel. Thompson* v. *Parker*, 399 F.2d 774, 776 (3d Cir. 1968) (Army CCA had stated that it found "no merit in any of the 16 assignments of error urged upon us by appellate * * * counsel"), cert. denied, 393 U.S. 1059 (1969); *Matias* v. *United States*, 19 Cl. Ct. 635, 646 (1990) ("When an issue has been briefed and argued before a military court, it has received full and fair consideration, even if that court disposes of the claim summarily with a statement that it did not consider the issue meritorious or requiring discussion"), aff'd, 923 F.2d 821 (Fed. Cir. 1990); see also *Watson* v. *McCotter*, 782 F.2d 143, 145 (10th Cir.) (explaining that "[w]hen an issue is briefed and argued before a military board of review, we have held that the military tribunal has given the claim fair consideration, even though its opinion summarily disposed of the issue with the mere statement that it did not consider the issue meritorious or requiring discussion"), cert. denied, 476 U.S. 1184 (1986); cf. *Allen*, 603 F.3d at 432 (noting that "even a summary disposal of the issues is sufficient to demonstrate that the issue was fully and fairly considered when it was adequately briefed and argued before the military courts," and finding military trial court would have fully

petitioner has cited no contrary authority. The courts of appeals' consistent practice reflects that it is both ordinary and appropriate for a court, including a military court, to summarily dispose of any or all claims raised in an appeal. Military courts, no less than other appellate courts, have wide discretion to write an opinion or to summarily affirm the judgment of a lower court. See *Harrington* v. *Richter*, 562 U.S. 86, 99 (2011) ("The issuance of summary dispositions in many collateral attack cases can enable a state judiciary to concentrate its resources on the cases where opinions are most needed."); *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n.4 (1972) (per curiam) ("We * * * agree that the courts of appeals should have wide latitude in their decisions of whether or how to write opinions. That is especially true with respect to summary affirmances.").

Applying that principle here, the decision below correctly recognized that petitioner had failed to identify any reason to believe that either the Army CCA or the CAAF had denied "full and fair consideration" to his ineffective-assistance claim when they summarily disposed of it. Petitioner fully briefed his claim to both the Army CCA, C.A. ROA 371-373, and the CAAF, *id.* at 388-390. The Army CCA, "[o]n consideration of the Petition for Extraordinary Relief in the Nature of a Writ of Error Coram Nobis," dismissed the claim, *id.* at 356, and the CAAF, construing petitioner's claim as a writ-appeal, denied it, *id.* at 314. Petitioner has not identified any court of appeals that would find that a plaintiff

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and fairly considered issue even if it had not explained why it reached the conclusion it did); *Sanford* v. *United States*, 586 F.3d 28, 33-34 (D.C. Cir. 2009) (finding military court gave "full and fair consideration" to claim foreclosed by precedent by "simply citing" precedent in a footnote).

has satisfied the *Burns* test in those circumstances and proceed to the merits of the underlying claim.

3. In any event, the Army CCA and CAAF correctly rejected petitioner's ineffective-assistance claims because those claims are legally and factually insubstantial. Before the military courts, petitioner primarily challenged his counsel's professional estimation of uncertain probabilities, C.A. ROA 371, 388, but those claims did not merit discussion from the Army CCA or CAAF and do not warrant this Court's review.

To establish ineffective assistance of counsel, petitioner would have to prove both deficient performance and prejudice from it. See *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984). To show deficient performance, petitioner would need to establish that defense counsel's conduct fell below an "objective standard of reasonableness" and overcome the "strong presumption" that counsel's strategy and tactics fell "within the wide range of reasonable professional assistance." *Id.* at 688-689. And to show prejudice, petitioner would need to establish a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Lee* v. *United States*, 137 S. Ct. 1958, 1965 (2017) (quoting *Hill* v. *Lockhart*, 474 U.S. 52, 59 (1985)). Petitioner did not make a substantial showing of either here. See, *e.g.*, *Chandler* v. *United States*, 218 F.3d 1305, 1314 n.15 (11th Cir. 2000) ("[W]here the record is incomplete or unclear about counsel's actions, we will presume that he did what he should have done, and that he exercised reasonable professional judgment.") (brackets and citation omitted), cert. denied, 531 U.S. 1204 (2001).

As to deficient performance, petitioner primarily criticized his counsel's estimation of the likelihood that

he would have been acquitted had he gone to trial and testified to a belief that his victims—who were 12, 13, and 14—were in fact 16. C.A. ROA 371, 388; see 10 U.S.C. 920b(d)(2) (reasonable mistake of fact as to age can be an affirmative defense). Those claims did not necessitate discussion from the Army CCA or CAAF and do not warrant this Court's review. Petitioner's guilty plea included a stipulation that he had no "honest and reasonable mistake of fact" as to the age of any of his victims, C.A. ROA 237-240, and he identifies no reason to conclude that his counsel's estimation that he could not have proved such a mistake at trial was deficient.

Petitioner's submissions to the Army CCA and CAAF also included a pre-plea e-mail from petitioner to trial defense counsel asserting that he lacked the specific intent to gratify any sexual desire or embarrass, humiliate, or degrade anyone, and suggesting that that might preclude a finding that he engaged in a "lewd act" within the meaning of the statute. 10 U.S.C. 920b(h)(5)(B); see C.A. ROA 375-376, 393-394. But counsel would not have erred in advising petitioner that a jury could infer his intent from his repeated exposure of his penis to school-age girls. Cf. C.A. ROA 107 ("One time, I was stretching and my penis accidentally came out of the bottom of my shorts. I noticed the girls were giggling and * * * it excited me. After that, when I saw teenage girls walk by me while I was stretching, I would intentionally make it so my penis would be exposed outside of my shorts. * * * I did this to gratify my own sexual desire in that it was thrilling to have them notice me.").

As to prejudice, petitioner has failed to meet his burden to show that he would have insisted on trial but for trial defense counsel's purportedly deficient advice.

The "strong societal interest in finality has special force with respect to convictions based on guilty pleas." *Lee*, 137 S. Ct. at 1967 (citation and internal quotation marks omitted). For that reason, "[c]ourts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Ibid.* And here, the contemporaneous evidence shows that, although petitioner expressed some concerns with the draft stipulation to his counsel, C.A. ROA 375-376, 393-394, he nonetheless chose to sign the stipulation, *id.* at 237-244, and pleaded guilty following a lengthy colloquy with a military judge wherein he expressed satisfaction with his defense counsel, *id.* at 107, 125-126, 129-130.

Before accepting petitioner's plea, the judge gave petitioner additional time to consult with his counsel. C.A. ROA 128. At no point did petitioner disavow the stipulation or express other concerns to the military judge. Instead, after pleading guilty, petitioner told the military judge, "I take full responsibility for my actions and accept any and all of the consequences. I am truly sorry for the pain and suffering that I caused to those young women and their families." *Id.* at 151. And petitioner benefitted from his plea agreement, as it ultimately led to a sentence shorter than the military judge would otherwise have imposed: the Army CCA shortened his sentence on direct review precisely because he had erroneously received a sentence that exceeded the maximum allowed under that agreement. 2018 WL 5619958, at *1 n.2. No further review of his unsubstantiated claim that he would have rejected it is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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