FILED
United States Court of Appeals
Tenth Circuit

May 11, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ROBERT BALES,

Petitioner - Appellant,

v.

COMMANDANT, United States Disciplinary Barracks,

Respondent - Appellee.

No. 20-3167
(D.C. No. 5:19-CV-03112-JWL)
(D. Kan.)

ORDER AND JUDGMENT*

Before **HOLMES**, Chief Judge, **EBEL**, and **EID**, Circuit Judges.

Petitioner-Appellant Robert Bales appeals from the district court's denial of his petition for a writ of habeas corpus filed under 28 U.S.C. § 2241. Mr. Bales, who is confined at the United States Disciplinary Barracks at Fort Leavenworth, argues that the district court erred in declining to reach the merits of his habeas claims after concluding that the United States Army Court of Criminal Appeals ("ACCA") had already given those claims full and fair consideration. Instead, Mr. Bales urges that the district court should have continued its analysis and reached the merits of his

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

habeas petition because his claims—which challenge the ACCA's fact-intensive rulings—are actually constitutionally substantial and largely free of factual questions.

Exercising jurisdiction under 28 U.S.C. § 1291, we **affirm**. The district court applied the correct standard of review to Mr. Bales's military habeas claims by first focusing on whether these claims received full and fair consideration in the military courts. And they did. The military courts extensively analyzed, and considered, Mr. Bales's claims. Furthermore, given that Mr. Bales's challenges directly pertain to ACCA rulings that are virtually replete with factual issues, he actually did not present for habeas review claims that are "largely free of factual questions"—which is a necessary (though not sufficient) condition for claims to be eligible for full-merits review. *See* Aplt.'s Opening Br. at 41. Accordingly, we have no basis to disturb the district court's decision to refrain from reaching the merits of those claims.

I

A

This appeal stems from Mr. Bales's guilty plea and subsequent conviction of killing sixteen civilians and wounding six others while serving in the United States Army in Afghanistan in 2012. In his military proceedings, the record revealed that Mr. Bales left his base, VSP Belambay, and entered the village of Alikozai, where he proceeded to kill "four people by shooting them at close range" including "two elderly men, one elderly woman and one child." *United States v. Bales*, ARMY 20130743, 2017 WL 4331013, at *1 (A. Ct. Crim. App. Sept. 27, 2017)

(unpublished). Mr. Bales then returned to his base to collect additional weapons and ammunition, and, after doing so, went to the village of Naja Bien, where he pulled a man from his home, "killed [him] in front of his family by shooting him at close range," and then "shot ten people in the head at close range, which included three women and six children." *Id.* at *2. Mr. Bales then "grabbed a kerosene-filled lantern from the floor, emptied the contents onto the bodies of the individuals he had just murdered, lit a match and set the bodies on fire." *Id.* Finally, as he was leaving, Mr. Bales "shot an elderly woman in the chest and head at close range" and proceeded to crush her skull with his boot when the gun wounds did not kill her. *Id.*

After returning to VSP Belambay, Mr. Bales was met by three U.S. Army soldiers, who seized his weapons and took him into custody. Mr. Bales's clothes were "soaked in blood," and when the Army Criminal Investigation Division (CID) arrived, Mr. Bales made several incriminating statements, including "'I thought I was doing the right thing,' 'I'm sorry that I let you guys down,' 'My count is twenty,' 'It's bad, it's really bad,' and 'We should have hit them harder.'" *Id.* CID seized Mr. Bales's weapons and belongings as part of the investigation, which unearthed "anabolic steroids that [Mr. Bales] had hidden under the boardwalk outside of his room." *Id.*

In a general court-martial, Mr. Bales subsequently pleaded guilty to sixteen specifications of premeditated murder, six specifications of attempted murder, five specifications of aggravated assault, one specification of violating a lawful general order, one specification of wrongfully using a Schedule II controlled substance, four

specifications of intentional infliction of grievous bodily harm, one specification of assault with a dangerous weapon, and one specification of wrongfully burning bodies.[1] *See id.* at *1; *see also* Supp. App., Vol. I, at 29–34 (Charge Sheet, dated June 1, 2012). Mr. Bales pleaded guilty pursuant to a pretrial agreement where he stipulated to "the essential facts and circumstances of the offenses and [agreed] to waive all relevant motions." Aplee.'s Resp. Br. at 3; *see* Supp. App., Vol. I, at 25–27 (Offer to Plead Guilty, dated May 3, 2013). The court-martial panel sentenced him to a dishonorable discharge and life confinement without the possibility of parole. *See Bales*, 2017 WL 4331013, at *1.

B

Following his sentencing by the military trial court, Mr. Bales advanced two arguments on direct appeal to the reviewing military courts that are relevant to his present habeas petition.[2]

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[1] Mr. Bales also pleaded guilty to a specification of assault consummated by a battery stemming from a separate 2012 assault on an Afghan truck driver. *See Bales*, 2017 WL 4331013, at *1 & n.2.

[2] As Mr. Bales explains, "the first level of appeal in the military process involves the Court of Criminal Appeals for the servicemember's branch, for example, the [ACCA]," which "consists of uniformed Judge Advocates." Aplt.'s Opening Br. at 4 n.1 (citing 10 U.S.C. § 866). In Mr. Bales's case, review at this level was mandatory. *See* 10 U.S.C. § 866. "The second level of appeal involves the [Court of Appeals for the Armed Forces ("CAAF")], consisting of five civilian judges appointed by the President. Review at the second level is largely discretionary." Aplt.'s Opening Br. at 4 n.1 (citing 10 U.S.C. § 867). Finally, "[i]f the CAAF denies review, the military appellate process is concluded and access to the United States Supreme Court is not available." *Id.* But "[i]f the CAAF grants review, appeal of its decision can be pursued before the United States Supreme Court." 28 U.S.C. § 1259.

1

Mr. Bales's first argument centered on the government's failure to disclose the potential terrorist backgrounds of government witnesses who testified at his sentencing. Specifically, he asserted that the government had violated his Fifth Amendment due-process rights by failing to disclose evidence such as biometric data—i.e., fingerprints—that tied several witnesses to improvised explosive device ("IED") explosions. Mr. Bales contended that the government had known about these links before his sentencing but had failed to disclose them to the defense in contravention of its obligations under *Brady v. Maryland*, 373 U. S. 83, 87 (1963), and the Rules of Courts-Martial. Relatedly, he posited that "[t]he government committed a fraud on the defense and on the court-martial panel by arguing that the witnesses [at his sentencing] and victims were all innocents, when, in fact, they were not." Supp. App., Vol. I, at 247. As relief, Mr. Bales sought a new sentencing hearing.

The ACCA rejected Mr. Bales's arguments. It noted that Mr. Bales had based his argument that certain government witnesses were involved in terrorist activities on a post-trial declaration from a defense consultant which was of "uncertain origin, authenticity, reliability, and classification"; furthermore, the "assertion that the information in the declaration was known to the government prior to trial was made without supporting evidence." *Bales*, 2017 WL 4331013, at *2. Accordingly, the ACCA declined to admit that post-trial declaration into the record and concluded that "any claim of relief based on this 'undisclosed evidence' is unfounded." *Id.*

The ACCA further held that the government had met its obligations to produce evidence in its possession under *Brady* and the Rules of Courts-Martial. It reasoned that the government had provided more than 36,000 Bates-stamped and indexed pages to the defense in response to Mr. Bales's pre-trial requests, that Mr. Bales's counsel represented in a hearing that most of the requests had been satisfied, and that Mr. Bales had not raised any discovery issues related to "biometric data or derogatory information for any of the government's witnesses." *Id.* at *4. Although the government had filed a motion in limine "to exclude from evidence the unverified claim that [one of the witnesses'] biometric data appeared to match the biometric data of a former Coalition Forces detainee," the ACCA found that the government had only done so after performing due diligence—including inquiries with the State Department—that led it to conclude that it could not substantiate the claim. *Id.* at *4–5.

Therefore, the ACCA determined that Mr. Bales "failed to show on appeal that the government's efforts to discover information [about its witnesses] . . . were either insufficient or disingenuous" under *Brady* or the Rules of Courts-Martial. *Id*. at *5. Moreover, the ACCA held that even if the government had evidence of the terrorist activities of witnesses that it failed to produce, the evidence would not have been material because Mr. Bales had stipulated that he had no lawful justification for any use of force. Accordingly, it concluded that Mr. Bales could not have used such evidence to either argue that his victims were enemy combatants or to impeach the witnesses' testimony during his sentencing. *See id.* at *6.

Finally, the ACCA also rejected Mr. Bales's claim that the government committed fraud on the court when it referred to the witnesses and victims as "'innocent' or 'farmers'" during his sentencing hearing. *See id.* at *6–7. It first held that Mr. Bales waived this issue when his counsel failed to contemporaneously object before the military judge. Even if it were to exercise its discretionary authority to consider the waived objection, however, the ACCA would find that there was neither "error in nor prejudice from" the argument. *Id.* at *7. Because "the innocent people referred to were in their homes asleep when they were attacked by [Mr. Bales]," the ACCA held that "[i]n its full context, trial counsel's references to 'innocent people' or 'farmers' did not manipulate or misstate the evidence." *Id.* Accordingly, the ACCA denied Mr. Bales's request for a new sentencing hearing based on the purported evidence of terrorist activity by the government witnesses.

2

Mr. Bales's second argument, advanced in his *Grostefon* brief,[3] contended the military trial court erred in declining to hold a post-sentencing evidentiary hearing to determine whether Mr. Bales had consumed mefloquine when he committed his crimes. Mr. Bales contended that mefloquine, contained in an anti-malarial medication known as Lariam, is "known to cause psychotic episodes." Supp. App., Vol. I, at 283 (Bales *Grostefon* Br. to ACCA, July 29, 2016). Although the

[3] A *Grostefon* brief "permits a service member to raise legal claims in the military courts that his appellate counsel declined to present." *Brimeyer v. Nelson*, 712 F. App'x 732, 736 (10th Cir. 2017) (unpublished) (citing *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982)).

government had denied that Mr. Bales had been taking Lariam and there were no medical records to indicate that he had done so, Mr. Bales argued that other evidence indicated that he had been on Lariam at the time of the killings and that "this could have caused or contributed to [his] actions."[4] *Id.*

The ACCA rejected this contention as well. At the outset, it noted that, "[a]t his guilty plea, [Mr. Bales] waived the defense of voluntary intoxication." *Bales*, 2017 WL 4331013, at *7. Nevertheless, the ACCA proceeded to extensively analyze his claim. The ACCA noted that Mr. Bales's argument on this score had relied on an affidavit from "a noncommissioned officer who believed [Mr. Bales] was prescribed Lariam," as well as an affidavit from a medical expert who believed Mr. Bales took the drug from 2003–2004. *Bales*, 2017 WL 4331013, at *7. But it reasoned that Mr. Bales "concede[d] [that] his medical records are void of any information about him being prescribed Lariam," and he did not submit an affidavit stating that he actually ingested Lariam or an affidavit from anyone who saw him ingest it. *Id.* at *8. Crucially, the ACCA found that Mr. Bales's medical records showed that he was prescribed a *different* malaria drug—without the same alleged effects—called doxycycline hyclate. *See id.* *7–8. It also noted that Mr. Bales's trial attorney had

[4] In a 28(j) letter, Mr. Bales cites to a 2022 article discussing the side effects of mefloquine and its possible impact on his crimes, noting that the "FDA issued an urgent label change for mefloquine due to the risk of serious psychiatric and nerve side effects" and warned that "psychiatric side effects could include anxiety, confusion, paranoia, mistrustful [sic], depression, or hallucinations." Michael Arieli et al., *Psychoactive Agents and Mental Disorders in Lone-Actor Terrorism*, *in* LONE ACTOR TERRORISM: AN INTEGRATED FRAMEWORK 57, 67 (Jacob C. Holzer et al. eds., 2022).

represented in a pre-trial hearing that the defense did not intend to offer any evidence of Lariam consumption.

Relying on the factors laid out in *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997),[5] the ACCA then held that a post-trial evidentiary hearing was unnecessary to determine whether Mr. Bales had ingested Lariam at the time of the killings. It reasoned that the "factual allegations [that Mr. Bales had been prescribed Lariam]—even if true—would not result in relief." *Bales*, 2017 WL 4331013, at *8. Further, it held that the affidavits on which Mr. Bales relied "[do] not set forth specific facts but consist instead of speculative [and] conclusory observations" and that Mr. Bales's "filings and the record as a whole 'compellingly demonstrate' the improbability of [Mr. Bales's claims]." *Id.* (alterations in original) (quoting *Ginn*, 47 M.J. at 248). It thus concluded that a fact-finding hearing would not be proper under *Ginn*, because "[e]ven assuming [Mr. Bales] was prescribed Lariam, there would still

[5] In *Ginn*, offering guidance to military appellate tribunals, like the ACCA, the CAAF extensively discussed the circumstances where "a post-trial evidentiary hearing was not required," noting that it was "not required in any case simply because an affidavit is submitted by an appellant." 47 M.J. at 248. More specifically, it held that the ACCA was "required to order a factfinding hearing only when the above-stated [five] circumstances are *not* met," which included the situation where "the affidavit is factually adequate on its face but the appellate filings and the record as a whole 'compellingly demonstrate' the improbability of those facts." *Id.* (emphasis added). Thus, in that situation for example, if there was a compelling demonstration—based on the appellate filings and the whole record—of the improbability of the facts in the submitted affidavit, an evidentiary hearing would not be required.

be no evidence he actually took it and was under its influence during the commission of his crimes." *Id.*

* * *

Following the ACCA's decision affirming his sentence, Mr. Bales next sought review from the United States Court of Appeals for the Armed Forces, which granted Mr. Bales's petition for review and summarily affirmed the decision of the ACCA. On June 25, 2018, the U.S. Supreme Court denied Mr. Bales's petition for a writ of certiorari.

C

His direct appeal having proven unsuccessful, Mr. Bales filed a petition for a writ of habeas corpus relief pursuant to 28 U.S.C. § 2241 in the U.S. District Court for the District of Kansas. In his habeas petition, Mr. Bales argued that the district court was authorized to reach the merits of his constitutional claims because the military courts "departed from prevailing legal precedent and ignored the most critical constitutional issues [Mr.] Bales raised." Aplt.'s App. at 7 (Pet. for Writ of Habeas Corpus, filed June 24, 2019) (capitalization omitted). He contended that the ACCA failed to hold the government to its burden of disclosing evidence favorable to the defense under *Brady* and the Rules of Courts-Martial.

Specifically, Mr. Bales renewed his argument that the ACCA should have ordered a new sentencing hearing due to the government's inadequate search for evidence linking several government witnesses to terrorist activity; as he reasoned, the evidence "might have informed [his] defense strategy and advanced his efforts to

undermine witness' credibility." *Id.* at 47. He further contended that the ACCA ignored his evidence that "mefloquine psychosis compromised [his] *mens rea* to commit multiple premeditated murders and whether his guilty plea was truly knowing, voluntary, and intelligent." *Id.* at 41 (capitalization omitted).

The district court denied the petition, holding that the ACCA had given full and fair consideration to all of Mr. Bales's asserted constitutional issues. *See Bales v. Commandant*, No. 19-3112-JWL, 2020 WL 3057859, at *6 (D. Kan. June 9, 2020). Addressing his arguments that the ACCA should have conducted an evidentiary hearing to determine whether he had ingested Lariam, the district court summarized the ACCA's analysis, noting that even though Mr. Bales waived the defense of voluntary intoxication, the ACCA went on to determine that an evidentiary hearing would not have been appropriate based on the *Ginn* factors. *See id.* at *4. The court thus concluded that "the military courts gave this claim the consideration contemplated by precedent and [Mr. Bales] is not entitled to relief on this claim." *Id.* at *5.

Moving on to his claim that the government had obscured evidence that government witnesses were linked to terrorist activity, the district court again evaluated the ACCA's consideration of these claims. It recognized that the ACCA had rested its decision on multiple grounds: that Mr. Bales had relied on unfounded allegations of "undisclosed evidence," that Mr. Bales had either deemed satisfied or abandoned his discovery requests, that the government had exercised an appropriate level of due diligence, and that "the allegedly 'undisclosed evidence' lacked

materiality." *Id.* at *5–6. Further, the court noted that the ACCA had found that Mr. Bales waived his argument as to the government's description of the Afghan witnesses as "farmers" or "innocent," and additionally held that these statements at Mr. Bales's sentencing did not "manipulate or misstate the evidence." *Id.* at *6 (quoting *Bales*, 2017 WL 4331013, at *7). The district court thus concluded that the ACCA had "given constitutionally adequate consideration" on this second issue as well. *Id.*

II

Mr. Bales then filed this appeal. We first summarize the framework under which we review military habeas petitions. We then consider Mr. Bales's appellate arguments and conclude that they are unavailing.

A

We review de novo a district court's denial of habeas relief, but the scope of "our review of military convictions 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 omitted) (quoting *Monk v. Zelez*, 901 F.2d 885, 888 (10th Cir. 1990)). Therefore, "when a military decision has dealt fully and fairly with an allegation raised in th[e] [habeas] application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence." *Burns v. Wilson*, 346 U.S. 137, 142 (1953) (plurality op.). "Only when the military has not given a petitioner's

claims full and fair consideration does the scope of review by the federal civil court expand." *Lips v. Commandant*, 997 F.2d 808, 811 (10th Cir. 1993).

We have held that in determining whether military courts have failed to afford a claim full and fair consideration—such that full-merits review of the claim is "appropriate"—a federal habeas court must decide whether the following four factors, often called the *Dodson* factors, "are met":

> (1) the asserted 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) (citing the seminal case, *Dodson v. Zelez,* 917 F.2d 1250, 1252–53 (10th Cir. 1990)). More specifically, in *Santucci v. Commandant*, --- F.4th ----, 2023 WL 3070683 (10th Cir. 2023), we recently clarified and underscored "that—as a necessary condition for full merits review—a petitioner must demonstrate that the resolution of *each* of the *Dodson* factors weighs in the petitioner's favor." *Id.* *11 (emphasis added). In other words, a "favorable showing regarding" only some of the *Dodson* factors (but not all of them), "though necessary," "is *not* sufficient to set the table for full merits review." *Id.* (emphasis added).

In view of this standard, we reject Mr. Bales's threshold contention that Article III courts may review the claims of military habeas petitions on their merits so long as they include substantial constitutional issues "largely free of factual"

disputes (i.e., the first and second *Dodson* factors). Aplt.'s Opening Br. at 38; *see also id.* at 30 (arguing that the "district court erroneously adopted an overly narrow view of its review authority . . . , despite Supreme Court and Tenth Circuit precedent demonstrating that it should have reached and decided the merits of the substantial constitutional claims presented" (capitalization omitted)). Indeed, we rebuffed this very argument in *Santucci*, where we clarified that our precedent, properly understood, requires satisfaction of all four *Dodson* factors. *See Santucci*, 2023 WL 3070683, at *11. That is, though *necessary* to warrant full-merits review, a mere showing of a substantial constitutional issue largely free of factual dispute is *not sufficient* to allow for such review. Accordingly, contrary to his contention, Mr. Bales must demonstrate that all four *Dodson* factors weigh in his favor to be eligible for full-merits review.

B

With this deferential framework in mind, we turn to Mr. Bales's habeas petition. Mr. Bales asserts that his petition—which challenges the ACCA's rulings on the potential terrorist ties of government witnesses and his consumption of mefloquine—presents substantial constitutional questions that are largely free of factual issues, and that the ACCA "failed to give adequate consideration to the issues involved." Aplt.'s Opening Br. at 36. We hold that Mr. Bales's efforts to seek a searching, full-merits review of his petition must fail. Not only did the ACCA fully and fairly consider each of the issues he properly raised, but his challenges directly pertain to rulings of the ACCA that are virtually replete with factual issues that we

may not review. In other words, Mr. Bales has failed to satisfy, at the very least, the fourth and second *Dodson* factors, respectively. Accordingly, we hold that the district court did not err in declining to review his habeas petition on the merits.

1

For starters, consistent with the district court's analysis, we conclude that the ACCA applied proper legal standards and fully and fairly considered each of Mr. Bales's challenges. We have recognized that a military tribunal may fully and fairly consider an issue when it "is briefed and argued before a military board of review . . . even though [the board's] opinion summarily disposed of the issue with the mere statement that it did not consider the issue meritorious or requiring discussion." *Watson v. McCotter*, 782 F.2d 143, 145 (10th Cir. 1986); *see also Thomas*, 625 F.3d at 671 ("[L]ack of explicit detail is not fatal. Our holding in *Watson* does not demand it. Nor do other circuits."); *Lips*, 997 F.2d at 812 n.2 ("[T]he fact that the [military] court did not specifically address the question . . . in its opinion is not controlling. That court did specifically state that it had 'examined the remaining assignments of error and resolved them against the appellant.'"). Here, the ACCA met—and, indeed, exceeded—this standard in addressing Mr. Bales's claims.

First, as to Mr. Bales's claim involving government witnesses' potential terrorist connections, the ACCA discussed Mr. Bales's fully briefed arguments at length, devoting fifteen paragraphs to analyzing whether the government and military trial court violated Mr. Bales's right to due process. *See Bales*, 2017 WL 4331013, at *2–7. It reasoned that the military trial court either resolved the discovery concerns

that Mr. Bales had raised, or he waived them by abandoning them before the court. *See id.* at *4 (reasoning that Mr. Bales's "initial request for information about the character of the victims and government witnesses appears to have been satisfied or abandoned"); *id.* at *5 (noting that "any concerns defense counsel had at the time of trial [pertaining to a government witness] were resolved or abandoned as no further action was taken on the record"); *id.* at *7 (finding Mr. Bales "failed to object to a single reference of 'innocent people' or 'farmers' during [the government's closing] argument" and thus holding that Mr. Bales waived this issue).

But the ACCA went even further, elaborating on the multiple bases on which it was rejecting Mr. Bales's arguments on the merits. *See id.* at *2 (holding that the information contained in Mr. Bales's post-trial affidavit was "of uncertain origin, authenticity, reliability, and classification" and that Mr. Bales failed to provide supporting evidence for the "assertion that the information in the declaration was known to the government prior to trial"); *id.* at *3–5 (holding the government had met its discovery obligations under *Brady* and the Rules of Courts-Martial because it had produced over 36,000 pages in response to Mr. Bales's generalized requests and had conducted an adequate search in response to "unsubstantiated rumors" linking a government witness to terrorist activity); *id.* at *5–6 (holding any potential evidence of terrorist connections would be immaterial to Mr. Bales's sentencing because he "disclaimed any lawful justification for his use of deadly force"); *id.* at *7 (holding that "trial counsel's reference to 'innocent people' or 'farmers', 'did not manipulate or misstate the evidence'" because "the innocent people referred to were in their

homes asleep when they were attacked by appellant" (quoting *Darden v. Wainwright*, 477 U.S. 168, 182 (1986)).

The ACCA also devoted substantial discussion to Mr. Bales's claims that he may have ingested mefloquine. It again noted that Mr. Bales "waived the defense of voluntary intoxication" in his guilty plea. *Id.* at *7. But it nevertheless proceeded to address the merits of his claims, applying the *Ginn* factors to conclude that an evidentiary hearing was unwarranted because Mr. Bales's "factual allegations—even if true—would not result in relief," and he had offered only "speculative [and] conclusory" affidavits in contrast to the "appellate filings and the record as a whole[,] [which] 'compellingly demonstrate[d]' the improbability of" his claims. *Id.* at *8 (first alteration in original) (quoting *Ginn*, 47 M.J. at 248). Accordingly, the ACCA "reject[ed] [Mr. Bales's] claim that he was likely exposed to Lariam," and held that even if he had been, "there would still be no evidence he actually took it and was under its influence during the commission of his crimes." *Id.*

The district court thus did not err in holding that the ACCA gave Mr. Bales's issues the "consideration contemplated by precedent"—that is, full and fair consideration. *Bales*, 2020 WL 3057859, at *5. Although Mr. Bales cursorily contends that the ACCA "fail[ed] to apply proper legal standards," he does not substantively challenge its reliance on *Brady*, *Ginn*, or the Rules of Courts-Martial. Aplt.'s Opening Br. at 36. Instead, he relies on a circular argument that "adequate consideration must mean 'correct' or at a minimum, at least plausibly justified and defensible in the application of prevailing standards." *Id.* We disagree. We have

repeatedly emphasized that "where an issue is adequately briefed and argued before the military courts the issue has been given fair consideration, even if the military court disposes of the issue summarily." *Roberts v. Callahan*, 321 F.3d 994, 997 (10th Cir. 2003). Because the ACCA met—indeed, exceeded—this standard, the district court properly determined that it gave full and fair consideration to Mr. Bales's claims.

2

Even if Mr. Bales's habeas petition presents constitutional issues, his challenges each involve threshold factual issues that render our review improper. In keeping with the Supreme Court plurality's instruction that "when a military decision has dealt fully and fairly with an allegation raised in [a habeas petition], it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence," *Burns*, 346 U.S. at 142 (plurality op.), we have declined to consider factual questions presented in a habeas petition, *see Dodson*, 917 F.2d at 1254 (holding a habeas claim concerning "whether the reasons given by the government were sufficient to justify the delay in [the] defendant's trial" was "not open to our review" because it presented a "factual question"); *id.* (holding a habeas claim concerning "whether . . . expert testimony would be based on findings generally accepted in the scientific community was a factual question to be determined by weighing the evidence presented at trial" and was also unreviewable because "it was a factual issue fully considered by the military courts"). Although Mr. Bales asserts that "[t]here are no credibility determinations to review, or factual findings that must be set aside," Aplt.'s Opening

Br. at 35, the ACCA's decision is virtually replete with factual issues that belie this assertion.

First, Mr. Bales's argument that "[t]he Army did not disclose that three [government witnesses] had left their fingerprints on bombs that were designed to kill American troops and a fourth had a Taliban tattoo on his hand" relies on multiple disputed facts that were already addressed by the ACCA. *Id.* at 48. In particular, the government disputed the underlying premise of Mr. Bales's post-trial declaration, "which purportedly 'linked' several government witnesses to [IED] events both before and after the charged offenses"; the ACCA's legal analysis turned on its assessment of the factual record, as the court concluded that "the information contained in the declaration and accompanying enclosure was of uncertain origin, authenticity, reliability, and classification." *Bales*, 2017 WL 4331013, at *2.

Not only was the existence of such evidence disputed, but the ACCA also addressed a factual issue about whether the government *knew* about any such evidence, concluding that the "government's prior knowledge of the claimed 'undisclosed evidence' was limited to unsubstantiated rumors" and Mr. Bales failed to show "that the government's efforts to discover information related to [the alleged terrorist bomb-maker] or any other witness were either insufficient or disingenuous." *Id.* at *5. Finally, the ACCA's legal analysis clearly was reliant on its assessment of the factual record, when it concluded that the government's references to "innocent people" or "farmers" in its sentencing argument "did not manipulate or misstate the

evidence" because the referenced people were "in their homes asleep when they were attacked by [Mr. Bales]." *Id.* at *7 (quoting *Darden*, 477 U.S. at 182).

Mr. Bales's challenge to the ACCA's rulings on his alleged mefloquine consumption fares no better. His argument hinges on his assertion that he "was administered mefloquine by the Army, though it was not recorded in his medical records[,] and he had an adverse reaction similar to that described by the manufacturer and the FDA, but nobody determined if he was in his right mind." Aplt.'s Opening Br. at 43; *see also id.* at 44 (asserting that "the revelation that [Mr.] Bales likely had been administered mefloquine" justified a fact-finding hearing). But the ACCA's legal analysis relied on its assessment of the factual record, as it "reject[ed] [Mr. Bales's] claim that he was likely exposed to Lariam," concluding that Mr. Bales's affidavits did "not set forth specific facts but consist[ed] instead of speculative [and] conclusory observations." *Bales*, 2017 WL 4331013, at *8 (fourth alteration in original) (quoting *Ginn*, 47 M.J. at 248). It further found that the record as a whole—which contained neither medical records supportive of Mr. Bales's claim nor an affidavit from Mr. Bales stating that he consumed Lariam or an affidavit from anyone who saw him take Lariam—"'compellingly demonstrate[d]' the improbability of" his claims. *Id.* (quoting *Ginn*, 47 M.J. at 248).

In short, the rulings of the ACCA that Mr. Bales challenges are virtually replete with factual issues, which are not proper subjects of federal habeas review. Because his challenge would impermissibly require us to "grant the writ simply to re-

evaluate the evidence," the district court correctly declined to conduct a full merits review of his habeas claims. *Burns*, 346 U.S. at 142.

III

For the foregoing reasons, we **AFFIRM** the district court's denial of Mr. Bales's petition for habeas corpus.

Entered for the Court

Jerome A. Holmes
Chief Judge