IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

RONALD A. GRAY,

Petitioner,

vs. Case No. 08-3289-RDR

ERIC BELCHER, COLONEL, U.S. ARMY,
Commandant, USDB - Fort Leavenworth,

Respondent.[1]

RESPONDENT'S RESPONSE IN OPPOSITION TO PETITIONER'S "MOTION TO STAY PROCEEDINGS"

Respondent Eric Belcher, Colonel, U.S. Army, Commandant, USDB-Fort Leavenworth, by and through Barry R. Grissom, United States Attorney for the District of Kansas, and T.G. Luedke, Assistant United States Attorney for said District, responds as follows to Petitioner's Notice of Military Court Proceedings and Request that the Court Await Action of the Military Courts Before Taking Dispositive Action ["Motion to Stay Proceedings"], Doc 51. Respondent respectfully requests that this Court deny Petitioner's motion to stay the habeas proceedings in this case.

Petitioner requests a delay to exhaust, *inter alia*, seven of the twenty-one claims pending before this Court ["Traverse/Amended Petition"]. (Doc. 41.) On February 11, 2011, Petitioner filed a Request for Extraordinary Relief in the Nature of a Writ of Error Coram Nobis in the Army Court of Criminal Appeals ["ACCA"]. (Doc. 51-1.) Petitioner filed the Writ of Error Coram Nobis on seven claims for which the Respondent asserted in its Answer and Return ["Answer'] (Doc. 20) and Response to Petitioner's Traverse (Doc. 48) that Petitioner had failed to exhaust available remedies

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[1] Col. Eric Belcher is the current Commandant of the U.S. Disciplinary Barracks. Pursuant to Fed. R. Civ. P. 25(d), he should be substituted as the Respondent herein.

within the military court system. Respondent asserts that a stay is unwarranted because Petitioner failed to provide cause for the default and actual prejudice resulting from the error. Accordingly, this Court should deny the request to stay the proceedings and dismiss the seven unexhausted claims and allow the remaining fourteen claims to remain.

I. BACKGROUND[2]

In April 1988, a general court-martial[3] at Fort Bragg, North Carolina, found Petitioner guilty by a unanimous vote[4] of the premeditated murders[5] of U.S. Army Private Laura Lee Vickery-Clay and Ms. Kimberly Ann Ruggles. The court members also found Petitioner guilty of the attempted murder of Private Mary Ann Lang Nameth; the rapes of Private Vickery-Clay, Ms. Ruggles, and Private Nameth; the forcible sodomy of Private Vickery-Clay and Ms. Ruggles; and the robbery of Ms. Ruggles and Private Nameth; and burglary and larceny of property of another person, in violation of Articles 118, 80, 120, 122, 125, and 129, UCMJ.

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[2] Respondent has provided a more detailed Factual Background and Procedural History as Appendix A to the Answer and Return. Doc 20.

[3] Unlike courts of standing jurisdiction, courts-martial are convened by military officers who have been granted that authority under Article 22, UCMJ. *See* Manual for Courts-Martial, United States (2008) [hereinafter "MCM"]. A court-martial is a bifurcated proceeding with separate guilt and sentencing stages, and the members of the court-martial panel must separately decide each question. When capital punishment is an available penalty for a charged crime, the panel members must be unanimous in order to convict a servicemember of that offense. The sentencing stage then commences. After hearing evidence in aggravation and mitigation, the panel votes on an appropriate sentence. In order to impose a capital sentence, the panel must be unanimous.

[4] In Petitioner's case, the military judge instructed the members to announce whether any findings of guilty relating to premeditated murders of Private Vickery-Clay and Ms. Ruggles were by unanimous vote.

[5] Capital punishment is authorized for both premeditated murder and felony murder under UCMJ Articles 118(1) and 118(4). *See* 10 U.S.C. § 918(1) and 918(4).

After a separate sentencing hearing, the court-martial unanimously found, beyond a reasonable doubt, the following aggravating factors[6] based on the evidence presented: that the premeditated murder of Private Vickery-Clay was committed while Petitioner was engaged in raping or sodomizing her[7]; that the premeditated murder of Ms. Ruggles was committed while Petitioner was engaged in raping, sodomizing, or robbing her; that the premeditated murder of Private Vickery-Clay was preceded by Petitioner's intentional infliction of substantial mental and physical pain and suffering upon her;[8] that the premeditated murder of Ms. Ruggles was preceded by Petitioner's intentional infliction of substantial mental and physical pain and suffering upon her; and that Petitioner, having been found guilty of the premeditated murder of Private Vickery-Clay, was also found guilty of the murder of Ms. Ruggles.[9] The court-martial also unanimously concurred that any extenuating and mitigating circumstances were substantially outweighed by the aggravating circumstances.[10]

The court-martial unanimously sentenced Petitioner to death, a dishonorable discharge, total forfeiture of all pay and allowances, and reduction to Private E-1. (T2583.) The Commanding General of the 82d Airborne Division approved the sentence. (AR 0001.) Petitioner was represented

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[6] Death may not be adjudged unless the members unanimously find beyond a reasonable doubt at least one of the aggravating factors listed in the MCM. *See* R.C.M. 1004(c).

[7] One of the aggravating factor in cases of murder is that the accused committed murder while engaged in the commission of a rape. *See* R.C.M. 1004(c)(7)(B).

[8] An aggravating factor in cases of murder is when the murder was preceded by the intentional infliction of substantial mental or physical pain and suffering to the victim. *See* R.C.M. 1004(c)(7)(I).

[9] An aggravating factor in cases of murder is when the accused was found guilty in the same case of another murder. *See* R.C.M. 1004(c)(7)(J).

[10] *See* R.C.M. 1004(b)(4)(C) ("All members concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances admissible under R.C.M. 1001(b)(4), including the factors under subsection (c) of this rule.")

at his court-martial and in the post-trial clemency proceedings of his case by at least two detailed military defense attorneys.

A sanity board, conducted prior to trial in accordance with R.C.M. 706,[11] found Petitioner competent and responsible for his actions. (A.E. XXXIII.) On appeal, the ACMR ordered a second sanity board, which found Petitioner mentally competent to understand his trial and appellate proceedings. In 1991, the ACMR also granted a second request for additional medical and neuropsychological testings which indicated that Petitioner was sane at the time of the offense and during the appellate proceedings.[12]

Petitioner and his military appellate defense counsel filed assignments of error before the ACMR and additional errors or *Grostefon* matters[13] specifically raised by the Petitioner as part of the appeal. The ACMR provided Petitioner with a post-trial mental sanity evaluation that confirmed his competency to participate in the appellate process. The ACMR affirmed the conviction and sentence after careful consideration of Petitioner's legal challenges. Specifically, the ACMR rejected

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[11] A mental examination pursuant to R.C.M. 706 is an inquiry into the mental capacity or mental responsibility of the accused.

[12] *See United States v. Gray*, 51 M.J. 1, 9 (C.A.A.F. 1999).

[13] Pursuant to the holding in *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), a servicemember has an independent right to personally submit all issues to the military appellate courts through appellate defense counsel, even if not supported by law or fact. Thus, a servicemember may himself raise legal claims that his counsel has decided not to present to a military appellate court. In *Grostefon*, the defendant's appointed military appellate counsel did not bring to the attention of the Court of Military Review a claim that the defendant himself believed to be a valid basis for reversal. *Id.* Drawing on the concerns discussed in *Anders v. California*, 386 U.S. 738 (1967), and the Second Circuit's decision in *Barnes v. Jones*, 665 F.2d 427 (1981), *rev'd*, 463 U.S. 745 (1983), the Court of Military Appeals concluded that an appointed military appellate defense lawyer should bring to the attention of military appellate courts any issue that his client wishes the court to consider. *Grostefon*, 12 M.J. 431 (noting that the UCMJ "provides many benefits not shared by civilian defendants"). The purpose of the *Grostefon* rule is to ensure that no servicemember believes that his attorney, who is usually a military officer detailed to the task, has failed to raise a particular claim because of command influence. *See United States v. Healy*, 26 M.J. 394, 397 (C.M.A. 1988). Thus, military appellate counsel are required "to invite the attention of the [ACMR] or the [CMA] to issues specified by an accused." *Id.*

Petitioner's claim that he was unconstitutionally sentenced to death by a court-martial panel of fewer than twelve members. The ACMR also rejected Petitioner's claim that the Fifth, Sixth, and Eighth Amendments do not permit a convening authority to select military subordinates to serve as court-martial members in a capital trial. Finally, the ACMR rejected Petitioner's claim that the military judge violated *Batson v. Kentucky*, 476 U.S. 79 (1986), by failing to require the government immediately to articulate a race-neutral reason for its peremptory challenge.

In 1992, following briefing, argument, and a review of the record, the ACMR determined that the findings and sentence were correct in law and fact and denied Petitioner's appeal and supplemental assignments of error. (A1699-712, A1963-990).[14] The ACMR independently weighed the evidence, agreed with each of the aggravating factors found by the court-martial, and agreed that any extenuating and mitigating circumstances were substantially outweighed by the aggravating factors.[15] Although not constitutionally required, the ACMR also conducted a proportionality review,[16] using a computer search to examine cases reviewed by the Supreme Court since 1972 and concluded "that the sentence [was] generally proportional to those imposed by other jurisdictions in similar situations."[17]

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[14] *See United States v. Gray*, 37 M.J. 730 (A.C.M.R. 1992).

[15] *Id.*, at 748. Article 66, UCMJ, requires the ACMR to review this case because the sentence adjudged and approved included a sentence to death. The ACMR may only affirm such findings of guilty and the sentence as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. It may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

[16] *Id.*, at 749.

[17] *See Gray*, 37 M.J. at 749. "A computer search was used to examine cases reviewed by the Supreme Court since the reinstatement of the death penalty following *Furman v. Georgia*, 408 U.S. 238 (1972). Among the cases examined were *Boyde v. California*, 494 U.S. 370 (1990); *Walton v. Arizona*, 497 S.Ct. 639 (1990); *Clemons v. Mississippi*, 494 U.S. 738 (1990); *Blystone v. Pennsylvania*, 494 U.S. 299 (1990); and *Zant v. Stephens*, 462 U.S. 862 (1983)." *Id.*, at note 13.

In an extraordinary writ to the CAAF, Petitioner again sought mental and medical testing related to his potential defenses. The CAAF reviewed his briefs and issued an order denying, without prejudice, his request for an expert investigator and behavioral neurologist. (A1634-35.) In May 1999, after lengthy briefing, argument, and review of the trial and appellate records, the CAAF affirmed the ACMR decision. (A0603-793.) CAAF also affirmed Petitioner's convictions and sentence, following mandatory review of a death sentence. *See* 10 U.S.C. § 867(a)(1). The CAAF, relying on previous legal decisions, rejected Petitioner's claim that his capital sentence was unconstitutional because the court-martial panel had fewer than twelve members. The CAAF also rejected Petitioner's claim that his constitutional rights were violated because the convening authority personally selected members of the court-martial. Finally, the CAAF found no reversible error in the military judge's handling of the *Batson* challenge.

In May 2001, the Supreme Court, after full briefing by Petitioner's counsel (A0018-31, A0081-346) and the Solicitor General (A0032-56), denied Petitioner's request for reconsideration of its March 2001 denial of Petitioner's petition for writ of certiorari (A0003).[18]

Upon completion of direct review by the military courts and denial of certiorari review, Petitioner's case was legally final. *See* Article 71(c)(1)(C)(iii). Between 2001 and 2008, Petitioner's case was submitted for clemency review as required by the UCMJ through the Secretary of the Army and the Secretary of Defense to the President of the United States. Petitioner submitted no clemency matters but made various requests for expert assistance which were denied. (A0203-30.) Petitioner was apprised annually of the status of the transfer of his case for clemency review to the Department

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[18] *See United States v. Gray*, 532 U.S. 1035, and 532 U.S. 919 (2001).

of Justice and to the White House. (A0218, A0227-30.) On July 28, 2008, the President approved the sentence of death. (AR 231.)

II. PROCEDURAL HISTORY

1. On November 26, 2008, Petitioner obtained a stay of his execution by lethal injection. (Doc. 7.)

2. On April 1, 2009, Petitioner submitted his Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 alleging eighteen grounds of Constitutional error in his court-martial trial and appellate proceedings. (Doc. 17.)

3. On May 1, 2009, Respondent filed an Answer and Return asserting that the petition should be denied because Petitioner either received full and fair consideration of his claims or failed to exhaust his available remedies with the military courts. (Doc. 20.)

4. Petitioner then filed a Traverse/Amended Petition on December 18, 2009, in which he requested to amend his original petition and add an additional three claims to the original eighteen claims.

5. On September 30, 2010, the Court granted Petitioner's request to amend his original petition and granted the Respondent thirty days to file a response to the Traverse/Amended Petition. (Doc. 42.)

6. On November 1, 2010, Respondent filed a Response to Petitioner's Traverse replying only to Petitioner's additional three claims and incorporating the Answer and Return (Doc. 20) which responded to the original eighteen claims. (Doc. 48.)

7. On November 20, 2010, Petitioner filed a Motion for Extension of Time to File a Reply requesting a ninety day extension to file a Reply. (Doc. 49.) Respondent opposed Petitioner's request for such a lengthy delay. (Doc. 50.) The Court has not yet ruled on that request.

8. On February 14, 2011, Petitioner provided notice to this Court that he filed a petition for a Writ of Error Coram Nobis with ACCA (Doc. 51-1) and moved this Court to stay the habeas proceedings pending action on the writ for coram nobis. (Doc. 51, ¶ 10, 11.) Petitioner asserts that he filed the writ with ACCA based upon Respondent's assertion that he failed to exhaust remedies with respect to several claims cited in his petition for habeas relief. (Doc 51, ¶4.) In his petition for Error Coram Nobis with the ACCA, Petitioner requests relief on the following claims:

Claim 1: Petitioner was denied his rights under the Sixth and Eighth Amendments when he was tried while incompetent to proceed and when he was incompetent during portions of the appellate proceedings; the trial court and the appellate courts erred in not conducting competency proceedings and prior counsel were ineffective for failing to litigate Petitioner's obvious incompetence.

Claim 2: Petitioner was denied his rights to due process, to a fair sentencing proceeding, to a public trial, and against cruel and unusual punishment, as guaranteed by the Fifth, Sixth, and Eighth Amendments, where the President, acting in a judicial role, approved Petitioner's death sentence upon confidential reports that were not disclosed to Petitioner.

Claim 3: The proportionality review in this case was insufficient as a matter of law in violation of the fifth, sixth, and eighth Amendments; Petitioner's death sentence must be reversed because the death sentencing system as applied is unconstitutional and his sentence was the result of racial discrimination, in violation of the sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Claim 4: Petitioner was denied his right to effective assistance of counsel where appellate counsel articulated and argued the incorrect standard of law regarding Petitioner's claim under *Witherspoon v. Illinois*.

Claim 5: Petitioner was denied his Sixth Amendment right to effective assistance of counsel at his capital sentencing.

Claim 6: Petitioner's appellate counsel rendered ineffective assistance of counsel in violation of the Fifth, Sixth, and Eighth Amendments.

Claim 7: During peacetime, allowing a member of the armed forces to be sentenced to death by a court-martial panel of less than twelve, when there is no fixed panel size, promotes unreliability, undermines the right to an impartial fact finder and sentencer and creates an arbitrary factor in violation of the Fifth, Sixth, and Eighth Amendments.

(Doc. 51-1.) Petitioner requests that this Court maintain his habeas petition on its active docket without taking action on it until the ACCA takes action on his Writ of Error Coram Nobis. (Doc 51, ¶11.) In the mean time, Petitioner will not file a Reply to Respondent's response to the amended petition unless ordered to do so by the Court. (Doc 51, ¶9.)

III. STANDARD OF REVIEW

The habeas corpus standard of review is that if Petitioner's claims were given full and fair consideration by the military courts, the Petition for a writ of habeas should be denied. *See Burns v. Wilson*, 346 U.S. 137 (1953); *see also Dodson v. Zelez*, 917 F.2d 1250 (10th Cir. 1990). If a petitioner failed to present a claim to the military courts, it is waived. *Watson v. McCotter*, 782 F.2d 143, 145 (10th Cir. 1986), *cert. denied*, 476 U.S. 1184 (1986). The sole exception to such a waiver is that a petitioner may obtain review by showing cause for the default and actual prejudice resulting from the error. *Lips v. Commandant, U.S. Disciplinary Barracks*, 997 F.2d 808, 812 (10th Cir. 1993).

Once a responsive pleading is filed, a party may amend a Petition only by leave of the court or by written consent of the adverse party. *Fed. R. Civ. P. 15(a)*; *Gillette v. Tansy*, 17 F.3d 308, 312 (10th Cir. 1994). The district court "should freely grant leave to amend when justice so requires." *Foman v. Davis*, 371 U.S. 178, 182 (1962) (quotation marks omitted); *Stafford v. Saffle*, 34 F.3d

1557, 1560 (10th Cir. 1994). Although amendment should be liberally permitted, amendment should be denied when it would be futile. *See Foman*, 371 U.S. at 182; *Lind v. Aetna Health, Inc.,* 466 F.3d 1195, 1199 (10th Cir. 2006). The court may deny a motion to amend as futile if the proposed amendment would not withstand a motion to dismiss or if it otherwise fails to state a claim. *Ketchum v. Cruz*, 961 F.2d 916, 920 (10th Cir.1992). The court will dismiss a cause of action for failure to state a claim when "it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief," *Beedle v. Wilson*, 422 F.3d 1059, 1063 (10th Cir. 2005) (citation omitted), or when an issue of law is dispositive, *Neitzke v. Williams*, 490 U.S. 319, 326 (1989).

The standard of review for a mixed state habeas petition is that a federal district court "may not adjudicate mixed petitions for habeas corpus, that is, petitions containing both exhausted and unexhausted claims." *Rose v. Lundy*, 455 U.S. 509, 510 (1982);. "The Supreme Court recently reiterated its holding in *Rose* that "federal district courts must dismiss mixed habeas petitions." *McCormick v. Kline*, 2006 U.S. Dist. LEXIS 30028 * n 4 (D. Kan., May 11, 2006) (*quoting Pliler v. Ford*, 542 U.S. 225, 230 (2004). "*Rose* requires dismissal of mixed petitions, which, as a practical matter, means that the prisoner must follow one of the two paths outlined in *Rose* if he wants to proceed with his federal habeas petition." *Pliler*, at 347. In *Rose*, the Supreme Court held that when a petitioner files a mixed petition, the district court must either (1) dismiss the action allowing petitioner to return to state court to exhaust his unexhausted claims, or (2) allow petitioner to amend the Petition to present only the exhausted claims to the federal district court. *Rose*, 455 U.S. at 510. However, the court may deny the entire petition on the merits, if it plainly fails to state a claim.

Moore v. Schoeman, 288 F.3d 1231, 1235-36 (10th Cir. 2002). However, the court is not authorized to adopt a hybrid approach. *Id.*

IV. ARGUMENT

Petitioner's assertions that a stay or abeyance is needed so that Petitioner may exhaust seven of his twenty-one claims before the military courts does not justify a delay of this case. Petitioner's seven unexhausted claims allege: (1) Petitioner's constitutional rights were violated because he was incompetent both at trial and during the appellate process; (2) the statutory approval process violated Petitioner's constitutional rights; (3) the proportionality review in this case was insufficient as a matter of law and the military death sentence system is unconstitutional as applied because it is a result of racial discrimination; (4) Petitioner's appellate defense counsel provided ineffective assistance; (5) Petitioner's trial defense counsel provided ineffective assistance during his sentencing proceedings; (6) Petitioner's death sentence is unconstitutional because it is a result of racial discrimination; and, (7) Petitioner's death sentence is unreliable and violates his constitutional rights because it was imposed by a military panel of less than twelve members.

This Court may not entertain a mixed petition and Petitioner fails to meet his burden to establish habeas review of his unexhausted claims. Drawing on the standard for mixed state petitions, this Court should allow Petitioner to withdraw his unexhausted claims or simply deny the unexhausted claims on the merits. As shown by the record, the Answer and Return (Doc. 20), and Respondent's Response to the Traverse/Amended Petition (Doc. 48), all of Petitioner's exhausted claims were given full and fair consideration by the military courts and his unexhausted claims are waived for failure to demonstrate cause and prejudice for not raising the claims before the military courts. Even if Petitioner had a colorable argument on the seven claims brought forth to the ACCA

in his Writ for Error Coram Nobis, this Court should nevertheless decline to reach these issues because Petitioner has failed to exhaust his military court remedies, such that any new claims would be subject to dismissal. Hence, a stay is unwarranted.

A. Failure to Exhaust Waives Review.

To the extent that Petitioner bypassed the military justice appellate system and raises the seven claims asserted in the Writ of Error Coram Nobis for the first time in the habeas proceedings before this Court, the claims are waived. Thus, this Court should dismiss the seven claims Petitioner asserted in his writ to ACCA which he concedes are unexhausted claims.

Prior to seeking relief under § 2241, federal prisoners must exhaust available remedies. The Supreme Court in *Gusik v. Schilder*, 340 U.S. 128 (1950), established the general rule that habeas corpus petitions from military prisoners should not be entertained by federal civilian courts until all available remedies within the military court system have been exhausted. Where "[n]othing in the record . . . indicates that there was any 'excuse' for either of these procedural defaults, and hence the 'cause and actual prejudice' standard was not met . . . the [habeas] claim will not be reviewed 'on the merits' in the present federal habeas corpus proceeding." *Lips*, 997 F.2d at 812.

If a ground for relief has not been raised in the military courts, it is waived for the purpose of a collateral attack in the district court. *Lips*, 997 F.2d at 811. The United States district courts are authorized to grant a writ of habeas corpus to a prisoner "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3) (1994). Generally, complete exhaustion of available administrative remedies is required before granting the writ. *Williams v. O'Brien*, 792 F.2d 986, 987 (10th Cir. 1986). Specifically, federal courts are not to entertain habeas petitions by military prisoners until all available military remedies have been

exhausted. *Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975) (courts must respect congressional judgment that military courts can adequately and responsibly address constitutional claims, and respect congressional scheme requiring full exhaustion of all available military remedies prior to federal collateral review of a military judgment); *see also Clinton v. Goldsmith*, 526 U.S. 529, 538 n.1 (1999) (military prisoner entitled to bring a habeas corpus petition after full exhaustion of military remedies); *Kehrli v. Sprinkle*, 524 F.2d 328, 334 (10th Cir. 1975). If a petitioner failed to present a claim to the military courts, it is waived. *Roberts*, 321 F.3d at 995 (citing *Watson*, 782 F.2d at 145).

Petitioner is not entitled to relief of unexhausted claims. Petitioner's filing of a writ on seven of his twenty-one claims demonstrates his own concession that those seven claims have not been exhausted. Petitioner is not entitled to a stay on his pending habeas proceedings to exhaust claims which should have been exhausted prior to his filing a petition with this Court.

B. Dismissal on Procedural Grounds is Appropriate if Petitioner Fails to Voluntarily Dismiss Unexhausted Claims.

While there is an exception to the waiver of unexhausted claims, Petitioner does not satisfy that exception. Thus, this Court has the following options: (1) allow Petitioner to the opportunity to voluntarily dismiss the seven unexhausted claims or the entire petition until such time has he exhausts the seven unexhausted claims; or (2) dismiss the seven unexhausted claims without prejudice.

There is a limited exception to the waiver rule of unexhausted claims, but this sole exception to waiver is only applicable if the petitioner can show *both cause and actual prejudice* excusing their procedural default. *Roberts*, 321 F.3d at 995 (citing *Lips*, 997 F.2d at 812). More specifically, the Tenth Circuit has said that, "[t]o obtain federal habeas review of claims *based on trial errors to which*

no objection was made at trial, or of claims that were not raised on appeal, a state prisoner must show both cause excusing the procedural default and actual prejudice resulting from the error." *Lips*, 997 F.2d at 812 (emphasis added) (citing *Murray v. Carrier*, 477 U.S. 478, 491 (1986)); *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Wolff v. United States*, 737 F.2d 877, 879-80 (10th Cir. 1984).[19]

The causal component of the "cause and actual prejudice" standard requires that an objective and external factor have prevented the claim from being asserted. "To establish the 'cause' required to overcome a procedural bar to federal habeas review, petitioner must demonstrate that some objective factor external to him impeded his efforts to comply with the state's procedural rule." *Cross v. Cody*, 1994 U.S. App. LEXIS 9002 No. 94-6045, (10th Cir. April 28, 1994) (citing *Coleman v. Thompson*, 501 U.S. 722, 753 (1991) (citing *Murray*, 477 U.S. at 488)). In *Murray*, the court generally stated that cause might be found upon the showing of "some external impediment preventing counsel from constructing or raising the claim." Id. at 479. The court considered the possibility that a factual or legal basis for a claim may not be reasonably available to counsel or that situations may exist whereby officials interfere with compliance. Id. at 488, (citing *Reed v. Ross*, 468 U.S. 1, 16 (1984)); *Brown v. Allen*, 344 U.S. 443, 486 (1953).

Even assuming a petitioner can show cause, he must also show actual prejudice resulting from the errors of which he complains. *McCleskey*, 499 U.S. at 494; *United States v. Frady*, 456 U.S. 152, 168 (1982). This requires "a reasonable probability that, absent errors, the fact-finder would have had

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[19] The Supreme Court has created a narrow second exception: "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Murray*, 477 U.S. at 496. However, actual innocence is not at issue here because Petitioner does not allege that he is actually innocent.

a reasonable doubt respecting guilt." *Strickland v. Washington*, 466 U.S. 668, 695 (1984). Thus, actual prejudice is legal prejudice - a claimed error that affected the ultimate verdict.

Petitioner does not allege sufficient facts in his Traverse/Amended Petition to show good cause for his failure to exhaust military court remedies or actual prejudice to warrant a stay because all of his claims are meritless. (See Answer and Return, Doc 20 and Response to Traverse, Doc 48.) Of the seven claims which Petitioner concedes are unexhausted, by asserting them in his petition for coram nobis before the ACCA, he only provides an explanation for his failure to exhaust Claim 2, 5 and 6. Petitioner contends that the constitutional violation in Claim 2 occurred after his military appellate proceedings which is his reason for presenting the issue for the first time in his habeas petition. (Doc 42, ¶19(D) at 188, Doc 51-1, at 39.) Petitioner contends that his failed to exhaust military review as to Claims 5 and 6 because he is alleging ineffective assistance of appellate counsel and the habeas petition was his first opportunity to assert these claims. (Doc 51-1, at 60, 108.) However, Petitioner fails to provide any explanation for his failure to file a coram nobis petition on Claim 2, or any of the unexhausted claims, prior to filing his habeas petition in April 2009. Petitioner may argue that he was unsure whether military courts had jurisdiction to hear a writ for coram nobis because *Denedo* was not decided by the United States Supreme Court until June 2009, two months after he filed his habeas petition. *United States v. Denedo*, 129 S.Ct. 2213 (2009). However, that argument ignores the state of military law at the time Petitioner filed his habeas petition. *See United States v. Denedo*, 66 M.J. 114 (C.A.A.F. 2008) The CAAF decided the *Denedo* case in March 2008 and ruled that military courts have jurisdiction to conduct "collateral review under the All Writs Act", even in cases where a service-member's conviction and sentence are final. *Id.* at 119. Petitioner's death sentence was approved by the President in July 2008, subsequent to CAAF's decision in *Denedo*. (AR 231.) Thus,

Petitioner could have raised his unexhausted claims in a error coram nobis petition in the military courts prior to his filing a habeas petition with this court in April 2009. Petitioner provides no explanation for his failure to do so.

A federal district court has discretion to stay a mixed petition and "hold it in abeyance while the petitioner returns to state court to exhaust his previously unexhausted claims." *Rhines v. Weber*, 544 U.S. 269, 273 (2005). Once exhaustion is completed, the stay may be lifted and the petitioner may proceed in federal court, but the Supreme Court held that this is only appropriate when the district court makes certain findings, including determinations that good cause existed for the petitioner's failure to exhaust and that the unexhausted claims are potentially meritorious. *Id*., at 277. Petitioner has failed to provide good cause for his failure to exhaust seven of his twenty-one claims. Thus, he is not entitled to a stay of his habeas proceedings while he exhausts his claims in military courts.

By filing the writ with the ACCA in order to ensure he exhausts military remedies, Petitioner concedes he failed to exhaust his remedies, as to those claims, but wishes to pursue them now. However, Petitioner is not entitled to review of unexhausted claims, nor is he entitled to a stay of a habeas petition in order to exhaust unexhausted claims. When a court is presented with a mixed petition and it does not appear that stay and abeyance is appropriate, then the court should allow the petitioner an opportunity to amend his petition to delete the unexhausted claims and to proceed in federal court with the exhausted claims. *Rhines*, 544 U.S. at 278, *citing Rose*, 455 U.S. at 520 ("A petitioner can always amend the petition to delete the unexhausted claims, rather than returning to state court to exhaust all of his claims."). Petitioner should be given the option and time to amend his Petition to only those claims which have been totally exhausted. If he does not amend his Petition to

only exhausted claims within the time allotted, this Court could dismiss those seven unexhausted claim.

CONCLUSION

WHEREFORE, based on the foregoing reasons, Respondent respectfully requests this honorable Court deny the Motion to Stay the Motion in Abeyance based upon the following: all issues were given full and fair consideration by the military trial courts; and to the extent these issues were not raised, they are waived. Thus, no delay is warranted to pursue the seven claims before the military courts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2011, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a copy to the following CM/ECF participants:

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