UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
R.Q. WARD, B.L. PAYTON-O'BRIEN, J.P. LISIECKI
Appellate Military Judges

TODD P. DOUGHTY

v.

UNITED STATES OF AMERICA

NMCCA 9900437
Review of Petition for Extraordinary Relief in the Nature of a Writ of Error *Coram Nobis*

Sentence Adjudged: 6 October 1998.
Military Judge: LCDR J.A. Fischer, JAGC, USN.
Convening Authority: Commanding Officer, USS DWIGHT D. EISENHOWER (CVN 69).
For Petitioner: LT Toren Mushovic, JAGC, USN; LT Gabriel Bradley, JAGC, USN.
For Respondent: LT Philip Reutlinger, JAGC, USN.

27 June 2013

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

PAYTON-O'BRIEN, Senior Judge:

A military judge sitting as a special court-martial, convicted the petitioner, pursuant to his pleas, of two specifications of indecent assault, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The petitioner was sentenced to confinement for three months, forfeiture of $600.00 pay per month for three months, reduction to pay grade E-1, and a bad-conduct discharge. Pursuant to a pretrial agreement, the convening authority approved the

sentence as adjudged, but suspended confinement in excess of 89 days.

In our initial consideration of this case, we affirmed the findings and the sentence and found no error materially prejudicial to the substantial rights of the petitioner. *United States v. Doughty*, No. 9900437, 1999 CCA LEXIS 277, unpublished op. (N.M.Ct.Crim.App. 20 Oct 1999).[1]

This case is once again before us, as we are in receipt of a Petition for Extraordinary Relief in the Nature of a Writ of Error *Coram Nobis* offered under the All Writs Act, 28 U.S.C. §1651(a). The petitioner alleges that his plea was improvident. In this regard, he claims that:

1. His plea was involuntary;
2. The military judge failed to obtain a sufficient factual basis for his plea;
3. The misconduct of the DNA examiner in his case constitutes a "matter inconsistent" with the guilty plea that arose after trial;
4. The military judge failed to resolve a potential defense, which may have uncovered the DNA report's untrustworthiness; and
5. Even if the military judge properly accepted the petitioner's plea, he received ineffective assistance of counsel.

This case involves the U.S. Army's Criminal Investigation Laboratory (USACIL) at Fort Gillem, Georgia. The history of USACIL and the misconduct of its DNA examiner, Mr. Phillip Mills, are well-known. *See United States v. Luke*, 69 M.J. 309 (C.A.A.F. 2011). Further facts about USACIL will be developed as necessary herein.

On 16 October 2012, we ordered the Government to show cause why the Petition should not be granted. We also ordered the Government to produce various documents.[2] On 31 October 2012, we

[1] The petitioner's only assigned error during his initial appeal was that the military judge erred in failing to consolidate the two specifications under the charge into a single specification.

[2] We ordered the Government to produce:

1. Any laboratory reports prepared in the course of and relating to the comparison of the DNA results of the semen on the clothing of the victim and the DNA results of the blood sample provided by the petitioner;

ordered the Government to produce an additional document.[3] After the Government produced the ordered documents and filed its response to our show cause order, on 6 December 2012, we returned the record of trial for a *DuBay*[4] hearing.

On 25 March 2013, the *DuBay* hearing was conducted, following which the military judge made findings of fact and submitted those findings to this court. *DuBay* Hearing Record at Appellate Exhibit XII.

Background

On 14 May 1998, the petitioner hosted a party at his residence during which a number of Sailors, including the petitioner, participated in drinking large amounts of alcohol. Over a period of approximately 15 hours, the petitioner consumed many drinks (14-15 beers, 3 Jack Daniels mixed drinks). Several Sailors decided to sleep at the petitioner's house that night, including Aviation Ordnanceman Airman Apprentice EM (the victim), Aviation Storekeeper Airman Apprentice (AKAA) JS, Electrician's Mate Third Class (EM3) CD, and Electrician's Mate Fireman (EMFN) TG. All the Sailors, including the petitioner, slept in the petitioner's bedroom.

The victim fell asleep in the petitioner's bed. The petitioner got into the bed, and he slept in the middle between the victim and EMFN TG. Another Sailor, AKAA JS slept at the foot of the bed. The fifth Sailor slept on a couch in the bedroom. Early in the morning, the victim was awakened while being sexually assaulted. Her attacker, who was behind her on the bed, pulled her pants down, digitally penetrated her anus, masturbated himself, and then touched her buttocks, back, shoulder and hair. The victim was scared and thus never turned around to see who was touching her.

After the assault, the victim reported the incident, and the Naval Criminal Investigative Service (NCIS) commenced an investigation. As part of that investigation, the petitioner was interrogated and initially denied culpability. He acknowledged, however, that he could not remember all events of

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2. The USACIL investigation into the conduct of its former employee, Mr. Phillip Mills, who was involved in the DNA test in this case;

[3] The document ordered produced was the USACIL "Final Report" prepared by the Quality Manager, Mr. Michael Auvdel, into Mr. Phillip Mills, DNA Examiner's, Misconduct.

[4] *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

the evening due to his excessive alcohol consumption. NCIS seized the victim's shirt from the evening, and also obtained blood and pubic hair samples from the petitioner, the victim, and AKAA JS[5] for DNA evaluation. The shirt, blood and hair samples were ultimately tested at USACIL by Mr. Mills. Mr. Mills issued a Serology/DNA report summarizing his findings that the DNA profile from a semen stain on the victim's shirt matched the petitioner's DNA profile, and excluded AKAA JS as a donor of the semen.

After the DNA testing was complete, NCIS questioned the petitioner again and confronted him with the DNA evidence. The petitioner still maintained that he could not remember the events of the evening of 14 May 1998, and did not admit or deny the victim's sexual assault allegations.

The case notes in Mr. Mills' file indicate he received telephone calls from both the trial and defense counsel on 1 October 1998 and 2 October 1998, respectively.[6] Mr. Mills' notes indicate that LT M, the defense counsel, asked Mr. Mills various questions about the testing performed.[7] After asking these questions, the defense counsel informed Mr. Mills he was going to "try to work out a deal" with the prosecution.

The petitioner ultimately pleaded guilty at a special court-martial. The petitioner entered into a stipulation of fact as a term of his pretrial agreement. Prosecution Exhibit 1; Appellate Exhibit I. He stipulated that he drank heavily the day of the incident and became intoxicated, resulting in a loss of memory for his actions that night. Because of his loss of memory, he stipulated to various facts based upon his review of the NCIS investigation. This investigation included statements from individuals present at the party at his house as well as the Serology/DNA report.

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[5] The victim originally believed that AKAA JS may have been the individual who assaulted her.

[6] We note that the names of the trial and defense counsel in Mr. Mills' "Laboratory Activity Summary" are the same individuals who originally tried this case.

[7] The defense counsel's questions, as indicated in the Mr. Mills' notes, were: "How big was the stain on top?" "How was evidence rec'd?" "Were bloods labeled?" "Was ABO done?" "Was evidence or my qual thrown out in any court?" "How were stains ident?" Government's Response to Court Order to Produce Documents and Motion to Attach of 24 Oct 2012, Appendix 7 at 32.

During his providence inquiry, the petitioner acknowledged that he had read "all of the reports" and that while he did not remember the incident, he believed there was enough evidence against him to cause him to believe he was guilty of the charged offenses. Record at 15. The petitioner indicated to the military judge that he had initially believed he was innocent, but after the DNA tests results returned from the lab, he "could not deny . . . saying that I did it." *Id.* at 16. The military judge appropriately inquired of the petitioner what particular items of evidence factored into his belief that he was guilty. The petitioner indicated that the NCIS investigation and, more importantly, the victim's statement factored into his decision to plead guilty.

We ordered the military judge in the *DuBay* hearing to answer the following questions:

> a. What was the source of the DNA found on the victim's shirt (i.e., type of bodily fluid) as reflected in USACIL's laboratory report and supporting documentation at pages 26-27, and 36;
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> b. Whether the sample of the petitioner's DNA or any other evidence in this case was contaminated or compromised by Mr. Phillip Mills, former U.S. Army Criminal Investigation Laboratory DNA examiner;
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> c. Whether any false data entries were made on documents created by or used by Mr. Phillip Mills in relation to the petitioner's case; and
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> d. What were Mr. Mills' qualifications as a DNA examiner at the time he conducted the testing in the petitioner's case?

The petitioner asks this court to set aside his conviction on a number of bases. First, he argues that his guilty plea was involuntary because he relied on a DNA report from an expert who committed misconduct unknown to the petitioner, and which report would have had no authoritative weight had the misconduct been known prior to trial. Second, he argues that the military judge failed to obtain a sufficient factual basis for the plea because he relied on Mr. Mills' DNA report. Third, the petitioner argues that the facts surrounding Mr. Mills' misconduct call into question the DNA report in this case, which he claims is the basis of his plea, and is thus a "matter inconsistent" with the guilty plea that has arisen after trial. Fourth, he argues

that the military judge failed to question him on a potential defense which may have uncovered the DNA report's untrustworthiness, and thus he abused his discretion in accepting his guilty plea. Finally, the petitioner argues he received ineffective assistance of counsel because his attorney relied on the DNA report to his prejudice.

USACIL History

After issues with Mr. Mills' work at USACIL were revealed in 2005, Mr. Mills was suspended from casework.[8] The Standards of Conduct Office (SOCO) for the US Army Criminal Investigation Command conducted an investigation into his alleged misconduct, during which Mr. Mills made an admission that he had made a false entry while conducting testing.[9] The investigation results were released on 20 September 2005 and concluded that "Mr. Mills prepared a fictitious DNA quantitative testing record" and "made a false statement in a USACIL case when he claimed to have examined three slides when he only examined one" and "provided a negative report after testing only one of four samples.[10] "In a subsequent memorandum, issued on October 17, 2005, USACIL . . . listed a number of problems with [Mr. Mills'] work, including incidents in which he 'cross-contaminated and/or switched samples,' 'altered documentary evidence,' 'entered false data regarding a control sample,'[made]'a false data entry and creat[ed] a false document,' and 'misrepresented he examined evidence when he had not." *Luke*, 69 M.J. at 325 (Effron, C.J., dissenting). *Id.* Thereafter, Mr. Mills resigned from his position. Following the SOCO report, USACIL began a remediation project to review/retest the 465 cases on which Mr. Mills had worked between 1995 and 2005.[11] In a report detailing the remediation effort, USACIL noted that Mr. Mills "was not properly screening cases because of his lack of thoroughness and

[8] It was determined that Mr. Mills engaged in misconduct involving representations that he had examined evidence when he had not, made false data entries, and conducted deficient DNA analysis.

[9] USACIL Memorandum for all Staff Judge Advocates, Subject: Deficiencies at the US Army Criminal Investigation Laboratory; Brady Notifications, dated 25 Aug 2005. Petition, Appendix A at 4-5.

[10] SOCO Administrative Inquiry 0083-05, Government's Response to Court Order and Motion to Attach of 24 Oct 2012.

[11] Government Response to Court Order to Produce Documents and Motion to Attach of 9 Nov 2012, Quality Manager's Final Report – Mr. Phillip Mills, USACIL, DNA Examiner's Misconduct, of 30 Sep 2008, at 3.

shorter times spent on examinations."[12] Although the petitioner's case was one of Mr. Mills' cases, the evidence from his case was not retested during the USACIL remediation project because it had been destroyed following the petitioner's trial.

The USACIL remediation report revealed "thoroughness issues" with Mr. Mills' work. Specifically, USACIL discovered a lack of thoroughness in Mr. Mills' serological analysis for 37 Navy cases between 1995 and 1999. *Luke*, 39 M.J. at 316. Mr. Mills "did not examine all the biological swabs and smears submitted for examination. This also resulted in him spending less time on examinations." *Id.* As a result, his screening techniques may have "resulted in some questionable negative results in these cases." *Id.* Despite the thoroughness issues, however, there was no evidence of contamination or false reporting in Mills' serological analysis between 1995 and 1999. *Id.* Additionally, USACIL found that the first instance of Mr. Mills' DNA false documentation was in 2002, four years after the evidence in the petitioner's case was tested at USACIL. *Id.,* n.9. USACIL found no cases with "DNA issues" between 1995 and 1999. *Id.*

On 30 December 2005, the Assistant Judge Advocate General of the Navy, Military Justice, sent a letter to the petitioner informing him that a DNA examiner at USACIL was suspended for misconduct while performing his duties, and that his case may be affected. Petition, Appendix B. The letter advised the petitioner that his case would be administratively reviewed by the Judge Advocate General pursuant to 10 U.S.C. § 869 and RULE FOR COURTS-MARTIAL 1201, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), and that the Judge Advocate General's Appellate Defense Division would be notified of this action. For reasons unclear, the administrative review was not conducted and it was not until 1 June 2012 that the Judge Advocate General formally authorized the detailing of an appellate defense counsel to represent the petitioner. Petition, Appendix B.

Discussion

After an appellant has exhausted his appellate review, his case is final and conclusive. Art. 76, UCMJ. Despite this finality, this court has the authority to consider a petition for writ of error *coram nobis*. *United States v. Frischholz*, 36 C.M.R. 306 (C.M.A. 1966). We derive this authority from the All Writs Acts, 28 U.S.C. § 1651(a). *Clinton v. Goldsmith*, 526 U.S.

[12] *Id*. at 5.

529 (1999); *Dettinger v. United States*, 7 M.J. 216, 219 (C.M.A. 1979). The All Writs Act does not enlarge this jurisdiction. *Goldsmith*, 526 U.S. at 534-35. Rather, it confines our authority to issuing writs necessary or appropriate in aid of our jurisdiction. *Id.* Our jurisdiction to review the findings and sentence of courts-martial is defined in Article 66(c), UCMJ.

A writ of error *coram nobis* is not a substitute for appeal. Rather, the "writ of *coram nobis* is an ancient common-law remedy designed 'to correct errors of fact.'" *United States v. Denedo*, 556 U.S. 904, 910 (2009) (quoting *United States v. Morgan*, 346 U.S. 502, 507 (1954)). We have jurisdiction over *coram nobis* petitions to allow consideration of allegations that an earlier conviction was flawed in a fundamental respect. *Id.* at 917. *See also Denedo v. United States*, 66 M.J. 114, 124 (C.A.A.F. 2008). The Supreme Court, however, has noted that judgment finality "is not to be lightly cast aside; and courts must be cautious so that the extraordinary remedy of *coram nobis* issues only in extreme cases." *Denedo,* 556 U.S at 916. Because the petitioner is asking this court to issue an extraordinary writ, he has the burden to show a "clear and indisputable right" to the extraordinary relief requested. *Denedo*, 66 M.J. at 126 (citing *Cheney v. United States Dist. Court*, 542 U.S. 367, 381, (2004)).

Prior to addressing the merits of a *coram nobis* petition, the petitioner must meet six stringent threshold requirements:

> (1) the alleged error is of the most fundamental character;
> (2) no remedy other than *coram nobis* is available to rectify the consequences of the error;
> (3) valid reasons must exist for not seeking relief earlier;
> (4) the new information presented in the petition could not have been discovered through the exercise of reasonable diligence prior to the original judgment;
> (5) the petition does not seek to reevaluate previously considered evidence or legal issues; and,
> (6) the sentence has been served, but the consequences of the erroneous conviction persist.

Denedo, 66 M.J. at 126-27 (citations omitted).

Assuming, arguendo that the petitioner has met all of the *coram nobis* threshold requirements, he is still not entitled to relief.

A. Providence of Pleas

The petitioner attacks the providence of his pleas in a variety of ways: voluntariness, insufficient factual basis, matters inconsistent with the guilty plea arising post-trial, and the failure of the military judge to resolve a potential defense. Each basis relies on Mr. Mills' misconduct in some way. Based on the pleadings of the parties, and the fact-finding hearing held on 25 March 2013, we reject each of these bases.

We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). A military judge abuses his discretion when he "fails to obtain from the accused an adequate factual basis to support the [guilty] plea." *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). Before accepting a guilty plea, the military judge must conduct an inquiry to determine whether there is factual basis for the plea, the accused understands the plea and is entering it voluntarily, and the accused admits each element of the offense. *United States v. Mitchell*, 66 M.J. 176, 177-78 (C.A.A.F. 2008). We will not reject the plea unless there is a substantial basis in law or fact for questioning the guilty plea. *Inabinette*, 66 M.J. at 322. While the facts as revealed by the accused must objectively support the guilty plea, a guilty plea will only be considered improvident if testimony or other evidence of record reasonably raises the question of a defense, or includes something patently inconsistent with the plea in some respect. *See United States v. Roane*, 43 M.J. 93, 98-99 (C.A.A.F. 1995). The "mere possibility" that a defense exists is not enough of a basis for rejecting a guilty plea. *Id.* If an accused is unable to remember the facts surrounding the offense with which he is charged, a military judge may still accept his guilty plea as provident if the accused is convinced of his guilt based upon the evidence available to him. *United States v. Moglia*, 3 M.J. 216, 218 (C.M.A. 1977); *United States v. Luebs*, 43 C.M.R. 315 (C.M.A. 1971); *United States v. Butler*, 43 C.M.R. 87 (C.M.A. 1971).

The question we must answer is whether Mr. Mills' misconduct at USACIL renders the appellant's pleas improvident. We hold that it does not.

First, we agree with the *DuBay* hearing military judge's findings of fact and adopt them as our own. The record establishes that semen was found on the victim's top, and the

DNA profile of that semen matched the petitioner's DNA profile, and not the DNA profile of AKAA JS. There is no evidence that Mr. Mills contaminated or compromised any evidence in the petitioner's case. Although misconduct was uncovered by USACIL pertaining to Mr. Mills in other cases, there is no evidence that Mr. Mills committed any misconduct in this case. The record supports the conclusion that Mr. Mills did not contaminate or compromise the petitioner's DNA or any other evidence in this case in any way.

Although Mr. Mills did not testify at the *DuBay* hearing, the Government presented the testimony of two current USACIL employees, Mr. Michael Auvdel[13] and Ms. Deborah Glideswell. Both witnesses testified that they had reviewed Mr. Mills' report in this case prior to testifying.[14] Both witnesses were confident after reviewing the report that Mr. Mills properly followed protocols in extracting the evidence, performing the testing, and identifying the petitioner as the source of the semen on the victim's shirt, and that there was no indication of any mistakes or tampering on his part.[15] As noted by Ms. Glideswell, the petitioner's case was "a very small case, it's a very focused case . . . you have one forensic unknown and three standards. . . . [I]t would be hard to mess this up because it is very straightforward." *DuBay* Hearing Record at 94-95.

The appellant was able to plead guilty to indecent assault, despite his lack of memory of the incident, because the evidence presented to him, including the DNA results and the victim and witness statements, convinced him that he engaged in a sexual act with AOAA EM without her consent. A military judge may accept a guilty plea as provident when the accused does not remember the incident, so long as the accused is convinced he committed the charged offense. *See Moglia, Luebs, and Butler, supra.* The appellant admitted that, "after considering all of this evidence and discussing the case with [his] defense counsel," he believed he committed the offense of indecent

[13] We note that Mr. Auvdel was involved in the USACIL remediation project and authored the "Quality Manager's Final Report – Mr. Phillip Mills, USACIL, DNA Examiner's Misconduct, of 30 Sep 2008."

[14] Mr. Auvdel testified that the during the USACIL remediation project, approximately 70 USACIL cases were identified as having "thoroughness issues," but the petitioner's case was not one of the cases identified as having a "thoroughness issue." *DuBay* Record at 48-49.

[15] At the time Mr. Mills performed the analysis in this case, his results were reviewed by three other USACIL individuals: a DNA examiner, a technical reviewer and a final peer reviewer.

assault as it was previously defined and described. Record at 20. The military judge was able to accept the appellant's plea as provident based upon this record. Mr. Mills' subsequent misconduct is not a matter inconsistent with his plea. Furthermore, we find the Mr. Mills' evidence of misconduct does not sufficiently raise a defense or an inconsistency with regard to the petitioner's guilty plea. As such, there was no substantial basis in either law or fact to question his plea in this regard. We hold that Mr. Mills' subsequent misconduct, unrelated to the petitioner's case, is not evidence in "substantial conflict" with the pleas of guilty. *United States v. Stewart*, 29 M.J. 92, 93 (C.M.A. 1989); *United States v. Hebert*, 1 M.J. 84, 86 (C.M.A. 1975).

B. Ineffective assistance of Counsel

We use a two-tiered approach to evaluate claims of ineffective assistance of counsel raised via *coram nobis*. First, the petitioner must meet the aforementioned threshold requirements for a writ of *coram nobis*. If the petitioner meets the *coram nobis* threshold requirements, the claims are then evaluated under the standards applicable to the issue. *Denedo*, 66 M.J. at 126. Assuming the petitioner has met the *coram nobis* threshold requirements, we conduct the second tier analysis of the ineffective assistance of counsel claim applying the principles set out in *Strickland v. Washington*, 466 U.S. 668 (1984).

A military accused is entitled under the Constitution and Article 27(b), UCMJ, to the effective assistance of counsel. *Denedo*, 66 M.J. at 127 (citing *United States v. Scott*, 24 M.J. 186, 187-88 (C.M.A. 1987); *see also* Art. 38, UCMJ. However, the petitioner "must surmount a very high hurdle" when making an ineffective assistance of counsel claim. *Denedo*, 66 M.J. at 127 (quoting *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006)).

To prevail on a claim of ineffective assistance of counsel, "an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *United States v. Green*, 68 M.J. 360, 361-62 (C.A.A.F. 2010) (citing *Strickland*, 466 U.S. at 687) (additional citation omitted). In reviewing for ineffectiveness, the court "looks at the questions of deficient performance and prejudice *de novo*." *United States v. Gutierrez*, 66 M.J. 329, 330-31 (C.A.A.F. 2008) (citations omitted).

When assessing *Strickland's* first prong, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." 466 U.S. at 689 (citation omitted). When challenging the performance of trial defense counsel, the appellant "bears the burden of establishing the truth of the factual allegations that would provide the basis for finding deficient performance." *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007) (citation omitted). "When there is a factual dispute, we determine whether further factfinding is required under *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997). If, however, the facts alleged by the defense would not result in relief under the high standard set by *Strickland*, we may address the claim without the necessity of resolving the factual dispute." *Id.* (citing *Ginn*, 47 M.J. at 248).

To demonstrate prejudice, the appellant must show that "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Gutierrez*, 66 M.J. at 331 (quoting *Strickland*, 466 U.S. at 694). The *Strickland* test also governs ineffective assistance of counsel claims in cases involving guilty pleas. *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000). Because this is a guilty plea case, the petitioner must show not only that his counsel was deficient but also that "'there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Id.* (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

The Supreme Court has made clear that the test is an objective inquiry. *See Roe v. Flores-Ortega*, 528 U.S. 470, 486 (2000) (describing *Hill* 474 U.S. 52 as holding that "the prejudice inquiry depends largely on whether that affirmative defense might have succeeded leading a *rational* defendant to insist on going to trial") (emphasis added)). Thus, the focus is not on the outcome of a potential trial, but rather on "'whether counsel's constitutionally ineffective performance affected the outcome of the plea process.'" *Denedo*, 66 M.J. at 129 (quoting *Hill,* 474 U.S. at 59). Often in a guilty plea context, the prejudice inquiry will involve a determination of whether counsel would have made a different recommendation as to the plea had no error been committed. *Ginn*, 47 M.J. at 247. This assessment, in turn, will depend in large part on a prediction "whether the evidence likely would have changed the outcome of a trial." *Id*. Such predictions should be made objectively without regard for the "idiosyncrasies of the

particular decisionmaker." *Id*. (citation and internal quotation marks omitted).

The petitioner's claim focuses on his counsel's reliance on Mr. Mills' DNA report, his failure to question Mr. Mills "on the record," and his failure to seek a second opinion of the DNA report. He essentially argues that if his counsel had registered a challenge to Mr. Mills or his report, his counsel would have learned the report was flawed and Mr. Mills' misconduct would have surfaced, and thus he would have advised the petitioner to plead not guilty. We reject this rationale.

Prior to advising his client, trial defense counsel interviewed Mr. Mills and asked appropriate questions concerning the DNA testing process. The trial defense counsel reviewed the evidence, including the entire NCIS investigation. As the *DuBay* hearing revealed, despite the petitioner's allegations of a false DNA report, there is no evidence that Mr. Mills' report in this case was in any way false. Nor is there any indication Mr. Mills contaminated the evidence in this case. Thus, a second DNA examiner opinion or additional DNA testing of the petitioner's case would most likely have been fruitless. The petitioner also reviewed the entire criminal investigation in this case, to include the DNA report. The DNA report was not the only piece of evidence which was considered by the petitioner prior to pleading guilty. Given that the petitioner was fully aware of the evidence in the hands of the Government, and Mr. Mills' misconduct occurred in an unrelated matter after the petitioner's trial, the trial defense counsel's decision to not investigate the DNA report further was reasonably made and we find no deficiency in counsel performance. *See* *Scott*, 24 M.J. at 192-93 (concluding counsel failed to investigate adequately). Since the petitioner has failed to meet his heavy burden in overcoming his counsel's presumption of competence, we need not address the second prong of the *Strickland* analysis.

Conclusion

After considering the pleadings of the parties, the record of trial, and the *DuBay* record, we conclude the petitioner has failed to demonstrate a clear and indisputable right to the

extraordinary relief requested. We, therefore, deny his petition.

Senior Judge WARD and Judge LISIECKI concur.

For the Court

R.H. TROIDL
Clerk of Court