IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CLARENCE ANDERSON III, Petitioner, v. MATT DONOVAN, *et al.*, Respondents.	)	Civil Action No. 1:19-cv-1139 (AJT/IDD)

ORDER

In 2015, Petitioner Clarence Anderson, III, formerly a major in the United States Air Force, was convicted of multiple offenses in a military court martial, sentenced to 42 months' confinement and discharged from the military. He appealed his conviction to the Air Force Court of Criminal Appeals (AFCCA) and the United States Court of Appeals for the Armed Forces (CAAF), both of which affirmed his conviction.

In January 2019, Petitioner filed in this Court a Petition for a Writ of Mandamus, *see Anderson v. Wilson, et al.*, Civil Action No. 1:18-cv-1590 (AJT/MSN), [Doc. No. 1] (the "Mandamus Action"), in which he sought an order directing that certain actions be taken in his military proceedings by the Secretary of the Air Force, the Judge Advocate General of the Air Force, and the Convening Authority. By Order dated May 2, 2019, this Court granted the Respondents' Motion to Dismiss the Petition and dismissed the action. *Anderson*, 1:18-cv-1590 [Doc. No. 14]. In its May 2, 2019 Order, the Court found that although it had jurisdiction under 28 U.S.C. § 1331 to review the claim, which was a collateral attack on a court martial conviction by a non-custodial individual, Petitioner had failed to establish his entitlement to mandamus relief because other remedies were available to him. *Id.* at 11. The Court further found that "the facts alleged in the Petition, even when construed in the light most favorable to Petitioner, fail to make plausible that his right to mandamus relief is "clear and indisputable" because the "military appellate courts fully and fairly considered Petitioner's claims for relief according to the facts alleged." *Id.* at 12, 14.

On September 3, 2019, Petitioner filed this action based on the same operative facts as the Mandamus Action, but seeking declaratory and injunctive, rather than mandamus, relief substantially the same in substance and scope as the relief requested in the Mandamus Action: a dismissal of all his charges with prejudice, an order for a new trial, or an order directing the Secretary of the Air Force, the Judge Advocate General of the Air Force, and the Convening Authority to order a post-trial hearing pursuant to Article 39(a) of the Uniform Code of Military Justice in order to allow him to present what he believes is exculpatory evidence and to seek appropriate relief based on that evidence.

In response to the Petition, Respondents have filed a Motion to Dismiss [Doc. No. 13] on the grounds that (1) Petitioner's request for relief is barred based on either res judicata or collateral estoppel; (2) Petitioner otherwise fails to state a claim upon which relief can be granted; and (3) venue is not proper in this district. *See* [Doc. No. 14]. For the following reasons, Respondents' Motion to Dismiss [Doc. No. 13] is GRANTED, and this action is DISMISSED.

I. BACKGROUND

Petitioner Clarence Anderson, III was a major in the United States Air Force. In 2015, he was convicted of various offenses in a military court martial. [Doc. No. 1], Pet. ¶ 19. The offenses of which he was convicted were based on allegations by his wife, K.A., including sexual offenses that allegedly took place on September 1, 2013, which K.A. reported in mid-September 2013. *Id.* Charges were preferred on Petitioner on August 15, 2014.

At a pre-trial hearing in February 2015, the military judge assigned to the case considered the admissibility of evidence that Petitioner sought to introduce, pursuant to Military Rule of Evidence (M.R.E.) 412, concerning K.A.'s prior sexual conduct. *Id.* ¶ 20. This included evidence concerning a relationship K.A. had with J.M., a coworker. *Id.* At that hearing, the crux of Petitioner's argument was that at the time K.A. reported the alleged conduct to the police, she was motivated to lie about a sexual assault to gain leverage in her and Petitioner's contentious divorce and deflect attention away from her adulterous conduct with J.M. *Id.* ¶ 20. But at the pre-trial hearing, the only evidence concerning the relationship of K.A. and J.M., presented through the testimony of J.M. and K.A., was that their relationship began in the spring of 2014, 6 to 8 months after the alleged sexual assault. *Id.* ¶ 21. Based on that evidence, the military judge held that this evidence was not relevant and excluded it from the upcoming trial. *Id.*

Petitioner's court-martial before a military judge was held in April 2015. *Id.* ¶ 1. On April 22, 2015, after a three-day trial, during which J.M. testified, the judge found Petitioner guilty of the charged offenses, in violation of Articles 120, 128, and 134 of the Uniform Code of Military Justice (UCMJ). [Doc. No. 14]. Thereafter, the military judge sentenced him to 42 months' confinement and dismissal from the Air Force. *Id.*

One month after trial, on May 24, 2015, Petitioner's mother recorded two phone calls with J.M., in which J.M. stated his relationship with K.A. started much earlier than they had both testified during the pre-trial hearing, perhaps even as early as a month before the September 2013 event, and that J.M. had received a payment shortly before trial from K.A.'s mother. Pet. ¶ 22.

Based on this evidence, Petitioner filed on September 15, 2015 with the appropriate convening authority—General Nowland, the Commander of the 12th Air Force—a Motion for Post-Trial Article 39(a) Session. Pet. ¶ 23; *see also* [Doc. No. 14-3] at 1. In that Motion, Petitioner referenced the two phone calls on May 24, 2015 between J.M and Petitioner's mother, specifically J.M.'s statement concerning the exchange of money from K.A.'s mother to J.M. Pet. ¶¶ 22–23; *see also* [Doc. No. 14-3] at 1. However, Petitioner's Motion did not reference J.M.'s statement to Petitioner's mother that J.M.'s relationship with K.A. started perhaps even as early as a month before the September 2013 incident. *See* [Doc. No. 14-3] at 1. General Nowland granted the request for a post-trial hearing. *Id.* ¶ 23.

In that post-trial hearing on December 14, 2015, J.M., K.A., and K.A.'s mother testified. Briefly summarized, that testimony indicated that J.M. was living with K.A. at the time of the payments, that J.M. had explained to K.A.'s mother that he wished to marry K.A. and move K.A. and her children into his house but that he did not have the space for all of them and could not afford to renovate his home given his salary as a teacher, and that K.A.'s mother had accordingly agreed to pay for the renovation and had made several payments to J.M. for that purpose. *Id.* ¶¶ 24, 25; [Doc. No. 1-3] at 25–39.[2] After hearing this testimony, the presiding military judge (the same judge who had presided over the court martial) found that K.A.'s mother had made the payment to J.M. "for the purpose of ensuring that her daughter and grandchildren were going to live in a suitable house with sufficient living space." He did not find that the payment was made to influence J.M.'s testimony in Petitioner's trial. *United States v. Anderson (Anderson I)*, Misc. Dkt. No. 2016-17, 2017 WL 2422847, at *2 (A.F. Ct. Crim. App. May 31, 2017). The judge

[2] The testimony from the post-trial hearing also indicates that the payments began in July 2014. [Doc. No. 1-2] at 25–39.

therefore concluded that this evidence "would not probably produce a substantially more favorable result" if Petitioner's case were re-tried and this evidence allowed. *Id.*

During that post-trial Article 39(a) hearing, K.A. and J.M. both testified that their relationship began around the time of the 2013 Thanksgiving and holiday season. *Id.* ¶ 21; *Anderson v. United States (Anderson II)*, No. ACM 39023, 2017 WL 2422844, at *2 (A.F. Ct. Crim. App. May 31, 2017). This testimony conflicted with K.A.'s earlier testimony during the February 2015 pre-trial hearing (during which she testified it started in spring 2014); and Petitioner, through his defense counsel, sought to question J.M. further about the timing of their relationship. Pet. ¶ 30. However, the military judge refused to allow him to do so on the grounds that the Convening Authority had authorized the Article 39(a) hearing only for the purpose of exploring the payments from K.A.'s mother to J.M., not to explore when the relationship had begun, an issue he deemed outside the scope of the Article 39(a) hearing's purpose. Pet. ¶¶ 11, 30. He also denied Petitioner's request for a new trial, holding that he lacked authority to order a new trial at that point because the Convening Authority had already authenticated the record of the trial. *Id.* ¶¶ 11, 52. Nevertheless, the military judge suggested that Petitioner file a request for another Article 39(a) hearing to address any issue pertaining to when the relationship between K.A. and J.M. began. Pet. ¶ 30.

Petitioner subsequently filed a Motion for another Article 39(a) hearing to explore the evidence pertaining to this issue. [Doc. No. 14-4] at 1.[3] The only grounds offered in support of that Motion was that K.A. and J.M. "were engaged in a sexual relationship beginning in approximately November of 2013, contrary to these individuals' respective testimony during a

[3] After the first post-trial hearing, J.M. stated in an unsworn memorandum that he was dating K.A. by "roughly November of 2013." [Doc. No. 14-4] at 4. Petitioner included this memorandum as an attachment to his second Motion for an Article 39(a) hearing. *Id.*

motions hearing in February of 2015." [Doc. No. 14-4] at 1. The Motion did not reference any evidence or contention that the relationship began as early as a month before September 2013. The Convening Authority denied the request. *Id.* ¶¶ 12, 31; [Doc. No. 14-4] at 1.

Petitioner then appealed to the AFCCA his conviction and sentence based on six assignments of error, including, *inter alia*, that the military judge abused his discretion in refusing to hear evidence regarding the timing of K.A. and J.M.'s relationship or refusing to grant a new trial during the first post-trial hearing, and that the Convening Authority abused its discretion in denying Petitioner's request for a second post-trial hearing. *See Anderson II*, 2017 WL 2422844.

During the pendency of this direct appeal, Petitioner also requested a new trial from the Air Force Judge Advocate General, who forwarded the request to the AFCCA for review. *Anderson I*, 2017 WL 2422847, at *1. Petitioner argued he was entitled to a new trial on the grounds that "newly discovered evidence" concerning when K.A. began her relationship with J.M. revealed that her testimony at the pre-trial hearing about the timing of her relationship with J.M. constituted perjury and fraud on the tribunal. *Id.* That "newly discovered evidence," as presented by the Petitioner, was that the relationship had begun in November 2013, as K.A. had testified at the Article 39 post-trial hearing, not the spring of 2014, as she had testified at the pre-trial hearing. *See Anderson I*, 2017 WL 2422847. Petitioner did not claim at that time that there was evidence that the relationship had already begun when K.A. reported the alleged assault in mid-September 2013.

On May 31, 2017, the AFCCA affirmed the conviction and sentence in all respects. *Anderson II*, 2017 WL 2422844, at *1. Relevant to this action, the AFCCA held that the trial judge did not err in excluding the evidence of the relationship between K.A. and J.M., that the military judge did not err in denying the request for a new trial after the Article 39(a) hearing because it did not have authority to do so under the governing rules, and that the Convening Authority did not abuse his discretion in denying the request for a second Article 39(a) hearing. *Id.* at *3–6.

On May 31, 2017, the AFCCA also denied Petitioner's request for a new trial. It concluded that Petitioner failed to demonstrate that K.A. committed a fraud on the tribunal. *Anderson I*, 2017 WL 2422847, at *3. Rather, the AFCCA concluded that K.A.'s testimony had "remained reasonably consistent," and that the inconsistencies in her testimony did not rise to the level of deliberate fraud or deception. *Id.* The AFCCA further held that in any event, a new trial was not warranted on the basis of these inconsistent statements because even if the relationship did begin November 2013 instead of spring 2014, it "would not have a substantial contributing effect on a finding of guilty or the sentence adjudged" because it still began after K.A. reported the sexual assault to the police. *Id.* at *4. The AFCCA also held that the trial judge's factual finding pertaining to the reasons for the payments by K.A.'s mother to J.M. was reasonable. *Id.* at *4. Finally, the AFCCA observed that additional evidence beyond K.A.'s testimony supported Petitioner's conviction. *Id.* at *5. The AFCCA accordingly denied the motion for a new trial. *Id.* at *6.

Petitioner then filed a petition for review of his direct appeal with the CAAF, which, on August 18, 2017, denied the petition. *United States v. Anderson*, No. 17-0429/AF, 76 M.J. 461, 2017 CAAF LEXIS 829 (C.A.A.F. Aug. 18, 2017). Petitioner similarly filed a petition for review of the denial of his petition for a new trial, which was also denied. *United States v. Anderson*, No. 17-0429/AF, 77 M.J. 61, 2017 CAAF LEXIS 981 (C.A.A.F. Oct. 11, 2017).

In January 2019, Petitioner filed in this Court a Petition for a Writ of Mandamus, *see Anderson v. Wilson, et al.*, Civil Action No. 1:18-cv-1590 (AJT/MSN), [Doc. No. 1], in which he sought an order directing the Secretary of the Air Force, the Judge Advocate General of the Air Force, and the Convening Authority in Petitioner's case to order a new trial or a post-trial hearing pursuant to Article 39(a) of the Uniform Code of Military Justice in order to allow him to present what he believes is exculpatory evidence and to seek appropriate relief based on that evidence. By Order dated May 2, 2019, this Court granted the Respondents' Motion to Dismiss the Petition and dismissed the action. *Anderson*, 1:18-cv-1590 [Doc. No. 14]. In the Order dated May 2, 2019, the Court found that it had jurisdiction under 28 U.S.C. § 1331 to review the claim, which was a collateral attack to a court martial conviction by a non-custodial individual. *Id.* at 10.

The Court then analyzed the plausibility of Petitioner's claim for relief through the remedy of mandamus in light of the requirement that in order to obtain a mandamus, a petitioner must have no other adequate means to attain the relief he desires; he must demonstrate that the right to the issuance of the writ is clear and indisputable; and the Court must be satisfied that the writ is appropriate under the circumstances. *Id.* In analyzing Petitioner's request for mandamus, the Court found that he failed to establish that he had no other adequate means to attain relief, noting that, *inter alia*, declaratory and injunctive relief under 28 U.S.C. § 1331 was a remedy that was available to Petitioner. *Id.* at 11. The Court further found that "the facts alleged in the Petition, even when construed in the light most favorable to Petitioner, fail to make plausible that his right to mandamus relief is clear and indisputable" because the "military appellate courts fully and fairly considered Petitioner's claims for relief according to the facts alleged." *Id.* at 12, 14. The Petitioner did not notice an appeal from the dismissal order.

On September 3, 2019, the Petitioner filed this action, now requesting declaratory and injunctive relief under 28 U.S.C. § 1331 based on the same factual allegations as the Mandamus Action. [Doc. No. 1]. On November 21, 2019, Respondents filed a Motion to Dismiss [Doc. No. 13], arguing that Petitioner is barred from relitigating these issues under either res judicata or collateral estoppel, that Petitioner fails to state a claim upon which relief can be granted, and that venue is not proper in this district. [Doc. No. 14].

II. ANALYSIS

A. Applicable Law

Courts considering challenges to the sufficiency of military court proceedings have applied two different standards of review: (1) whether the military proceedings suffered from "a fundamental defect" rendering the proceedings "void," typically applicable to collateral attacks by persons not in custody; and (2) whether a defendant had a "full and fair opportunity" to present evidence and defend himself, typically applicable to collateral attacks by persons in custody. *See, e.g.*, *Sanford v. United States*, 586 F.3d 28, 31 (D.C. Cir. 2009). The Fourth Circuit, in an unpublished opinion, has applied, under habeas review, the less deferential "full and fair consideration" standard to a collateral attack by a person in custody, *United States v. Willenbring*, 178 F. App'x 223, 224 (4th Cir. 2006), but has not yet addressed the standard of review applicable in non-custodial collateral attacks on court-martial proceedings.[4] Given the absence of binding precedent as to the appropriate standard of review pertaining to a collateral attacks by a person not in custody, such as Petitioner, the Court will assess the adequacy of Petitioner's pleadings, as it did in the Mandamus Action and for the reasons stated in the

[4] By citing to *Sanford*, Petitioner appears to recognize that the more deferential "void for fundamental defect" standard of review would likely apply to the sufficiency of his claim for declaratory and injunctive relief, *see* Pet. ¶ 37, but also agrees that the "full and fair consideration" standard is a less deferential, more demanding standard of review than the "void" standard. *See Anderson*, 1:18-cv-1590 [Doc. No. 14] at *13 n.2.

Mandamus Action, based on the less deferential and more demanding "full and fair consideration" standard. *See Anderson*, 1:18-cv-1590 [Doc. No. 14] at *13 n.2.

Under the "full and fair consideration" standard, an issue has been "fully and fairly considered" when it was briefed and argued before the military court, even if it was summarily disposed of. *Watson v. McCotter*, 782 F.2d 143, 145 (10th Cir. 1986); *see also Howard-Pinson v. Army Clemency & Parole Bd.*, 2006 WL 5616330, at *2 (E.D. Va. July 10, 2006) (Hilton, J.); *Romey v. Vanyur*, 9 F. Supp. 2d 565, 568 (E.D.N.C. 1998). "It is the petitioner's burden to show that a military review was legally inadequate to resolve his claims." *Id.* (quotation omitted); *Yongo v. United States*, 2013 WL 2285341, at *6 (E.D.N.C. May 23, 2013), *aff'd sub nom. Yongo v. McHugh*, 540 F. App'x 237 (4th Cir. 2013).

B. Venue is Proper in the Eastern District of Virginia

As an initial matter, Respondents argue that venue in this district is improper under 28 U.S.C. § 1391(e) because it is predicated solely on the location of Respondents' offices at the Pentagon. [Doc. No. 14] at 30. However, venue has been found to be proper in the Eastern District of Virginia in claims against the Air Force under § 1391(e). *See Dehaemers v. Wynne*, 522 F. Supp. 2d 240, 247–48 (D.D.C. 2007) (noting that venue was proper in E.D. Va. but could also be proper in D.D.C. if "an officer or agency head performs a 'significant amount' of his or her official duties in the District of Columbia"). The Court, consistent with other decisions in this District, will deny Respondents' Motion to Dismiss to the extent it is based on a claim of improper venue.

C. Res Judicata

Respondents argue that Petitioner is barred from relitigating his previous claims under res judicata. The doctrine of res judicata, or claim preclusion, applies when three elements are satisfied. "[T]here must be: (1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in both the earlier and the later suit; and (3) an identity of parties or their privies in the two suits." *SAS Inst., Inc. v. World Programming Ltd.*, 874 F.3d 370, 378 (4th Cir. 2017) (quoting *Pueschel v. United States*, 369 F.3d 345, 354–55 (4th Cir. 2004)). "[C]laim preclusion provide[s] that if the later litigation arises from the same cause of action as the first, then the judgment bars litigation not only of every matter actually adjudicated in the earlier case, but also of every claim that might have been presented." *In re Varat Enters., Inc.*, 81 F.3d 1310, 1315 (4th Cir. 1996).

The parties in this suit and the one previously brought by Petitioner are identical. *See Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985) (holding that a suit against a government official in his official capacity is nothing more than a suit against the sovereign). Therefore, the two questions at issue are (1) whether the causes of actions are identical between the two suits and (2) whether the Court's previous dismissal constitutes a final judgment on the merits.

In the Fourth Circuit, causes of action are identical where "the claim presented in the new litigation 'arises out of the same transaction or series of transactions as the claim resolved by the prior judgment' and whether 'the claims could have been brought in the earlier action.'" *SAS Inst., Inc.*, 874 F.3d at 378–79 (quoting *Laurel Sand & Gravel, Inc. v. Wilson*, 519 F.3d 156, 162 (4th Cir. 2008)); *Kutzik v. Young*, 730 F.2d 149, 152 (4th Cir. 1984) (noting that "two suits constitute the same cause of action if they rely on the same facts, even though the legal theories on which recovery is based or the remedies sought are different").

Petitioner argues that the "standard for whether Petitioner has demonstrated his right to mandamus relief is 'clear and indisputable' is not the same analysis as to whether he is entitled to relief under 28 U.S.C. § 1331, and is therefore not based upon the same cause of action." [Doc.

No. 17] at 6. However, the Court's analysis of whether there was "full and fair consideration" would be the same in an action for writ of mandamus versus one for declaratory and injunctive relief. But more importantly, Petitioner seeks review of the same military court judgments and appeals of which he previously sought review in his other Petition, predicated on the same facts and allegations of error; the only difference is the claim for relief—declaratory and injunctive relief, rather than mandamus. At bottom, Petitioner is still requesting that the Court order the military tribunals to act.

Moreover, Petitioner could have brought these claims in his previous action. He also could have requested leave from the Court to amend his Petition or appealed the Court's decision. However, he chose to allow his earlier action to proceed to a final judgment and then file a new Petition, requesting slightly different new relief based on the same facts and legal theories as his previous Petition. Therefore, the Court finds that these causes of action are identical since they both arise out of the same transaction or series of transactions and the same claims could have been brought in the earlier Mandamus Action.

The next issue is whether the dismissal of the Mandamus Action under Federal Rule of Civil Procedure 12(b)(6) is a "judgment on the merits" for res judicata purposes. Dismissals under Rule 12(b)(6) are, unless otherwise noted, with prejudice, and with prejudice dismissals are typically considered to be "on the merits." But the denial of a writ of mandamus does not always operate as a final judgment on the merits, because some writs may be summarily denied, or denied for jurisdictional reasons. *See, e.g.*, *United States v. Dean*, 752 F.2d 535, 541–42 (11th Cir. 1985). Here, the Court dismissed the Petitioner's previous mandamus petition, not on the merits of the underlying claim on which Petitioner based his request for relief, but on the procedural grounds that he had not sought available remedies other than mandamus. For this reason, the Court concludes that its dismissal on that basis does not constitute a judgment on the merits for the purposes of res judicata. Nor does the Court's alternative ruling that Petitioner had not established that his right to a mandamus was "clear and indisputable" because the "military appellate courts fully and fairly considered Petitioner's claims for relief according to the facts alleged." As discussed below with respect to the claim of collateral estoppel, this alternative ruling was not necessary to the dismissal of Petitioner's mandamus claim, and therefore did not constitute a final judgment on the merits.

D. Collateral Estoppel

As to Respondents' Motion to Dismiss based on the doctrine of collateral estoppel, the Court similarly concludes that Petitioner is not collaterally estopped from relitigating whether he received full and fair consideration by the military courts. Collateral estoppel "forecloses the relitigation of issues of fact or law that are identical to issues which have been actually determined and necessarily decided in prior litigation in which the party against whom [collateral estoppel] is asserted had a full and fair opportunity to litigate." *Certusview Techs., LLC v. S&N Locating Servs., LLC*, 198 F. Supp. 3d 568, 579 (E.D. Va. 2016) (quoting *Sedlack v. Braswell Servs. Grp., Inc.*, 134 F.3d 219, 224 (4th Cir. 1998)).

Application of the collateral estoppel doctrine requires demonstration of the following: (1) the issue or fact is identical to the one previously litigated; (2) the issue or fact was actually resolved in the prior proceeding; (3) the issue or fact was critical and necessary to the judgment in the prior proceeding; (4) the judgment in the prior proceeding is final and valid; and (5) the party to be foreclosed by the prior resolution of the issue or fact had a full and fair opportunity to litigate the issue or fact in the prior proceeding. *Id.* As a general proposition, in assessing whether an issue or fact decided in a prior proceeding was "critical and necessary to the judgment," "if a judgment of a court 'is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone.'" *Intellectual Ventures I LLC v. Capital One Financial Corp.*, 937 F.3d 1359, 1371–72 (Fed. Cir.) (relying on Fourth Circuit law), *reh'g denied*, 943 F.3d 1383 (Fed. Cir. 2019) (citing Restatement (Second) of Judgments § 27 cmt. i);[6] *see also In re Microsoft Corp. Antitrust Litig.*, 355 F.3d 322, 328 (4th Cir. 2004).

In its May 2, 2019 Order, the Court dismissed Petitioner's Mandamus Action on two independent and alternative grounds, one procedural, one substantive, either of which was sufficient to support its dismissal: (1) Petitioner had other remedies available to him besides mandamus relief, and the remedy of mandamus was therefore not available, *Anderson*, 1:18-cv-1590 [Doc. No. 14] at 11–12; and (2) based on the facts alleged by Petitioner, Petitioner did not plausibly allege that the military courts did not fully and fairly consider the arguments that were the basis for his challenge. *Id.* at 12–14 & n.2. Respondents rely on this second conclusion in support of the collateral estoppel claim.

Unlike in *Intellectual Ventures*, the alternative grounds stated in this case were not integral to a single dispositive issue, but rather were separate, independent grounds for dismissal; the Court's ruling on either issue alone would have been dispositive. Collateral estoppel, therefore, does not apply to either issue, *see In re Microsoft Corp. Antitrust Litig.*, 355 F.3d at 328, and the Court's dismissal of the Mandamus Action did not preclude Petitioner from

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[6] This Court had dismissed, in a separate action, *Intellectual Ventures I LLC v. Capital One Fin. Corp.*, No. 1:13-CV-00740 AJT, 2013 WL 6682981, at *5–7 (E.D. Va. Dec. 18, 2013), Capital One's antitrust claims on what appeared to be alternative holdings: (1) Capital One had not plausibly alleged a relevant market; and (2) Capital One had not plausibly alleged monopoly power within a relevant market. *Intellectual Ventures*, 937 F.3d at 1363–65. Nevertheless, the Federal Circuit in *Intellectual Ventures* concluded that collateral estoppel did apply because each holding was part and parcel of a single controlling issue: whether Intellectual Ventures exercised monopoly power within a relevant market. *Intellectual Ventures*, 937 F.3d at 1371. The alternative rulings in the Mandamus Action, however, were not part and parcel of the same issue, but rather completely independent grounds for dismissal.

relitigating whether he received full and fair consideration from the military tribunals. For these reasons, the Court denies the Respondents' Motion to Dismiss to the extent it is based on collateral estoppel.

E. Federal Rule of Civil Procedure 12(b)(6)

Respondents finally argue that Petitioner has failed to state a claim upon which relief can be granted, an argument which, for the reasons explained above, the Court considers *de novo.* Based on the Court's review of the Petition, there is nothing materially different in the allegations in this action than in the previous Mandamus Action. Here, as there, Petitioner focuses on the failure to specifically consider his claim that his ex-wife perjured herself as to the timing of when her relationship with another man began, in particular, that it began prior to her reporting of sexual assault in mid-September 2013, but Petitioner does not allege where he sought relief based on that contention. In fact, neither of his requests for post-trial Article 39(a) hearings proffered any evidence that K.A. and J.M.'s relationship pre-dated the report of sexual assault. Rather, his requests for relief based on the timing of K.A.'s relationship with J.M. were based only on the inconsistencies between K.A.'s original testimony at the February 2015 pre-trial hearing—that her relationship with J.M. began approximately 6 to 8 months after she reported Petitioner to the authorities in September 2013—and her and J.M's subsequent testimony that the relationship began by November 2013, even though he now claims he received the information of an earlier relationship in the same May 2015 phone calls in which he received information that he did present in support of his requests for an Article 39(a) hearing. *See* [Doc. No. 14-3] at 1; [Doc. No. 14-4] at 1. Not until Petitioner's Mandamus Action, [Doc. No. 1] ¶ 19(a)—and subsequently, this action—did he specifically allege as the basis for relief that he had not been given the opportunity to present evidence that the relationship began before the reported sexual assault, evidence which was never considered by any military tribunal because Petitioner never presented it.

Petitioner has failed to allege facts that make plausible that he was denied a full and fair opportunity to defend himself within the military justice system based on the claims and evidence he presented during those proceedings because the military courts reviewed this evidence, as presented by Petitioner, and found that it would not have changed the outcome of the proceedings, because the relationship still post-dated the sexual assault K.A. reported. *Anderson I*, 2017 WL 2422847, at *3–4; *Anderson II*, 2017 WL 2422844, at *6. His claim that the military courts should consider K.A.'s relationship with J.M. was repeatedly "briefed and argued." *See Watson v. McCotter*, 782 F.2d 143, 145 (10th Cir. 1986). Petitioner never presented within the military proceedings his specific claim advanced here as the basis for relief—that K.A.'s relationship with J.M. pre-dated K.A.'s accusations against him. Petitioner was not prevented from presenting that claim for consideration and cannot now claim that he was denied "full and fair consideration" with respect to K.A.'s relationship with J.M. based on evidence and contentions he never presented to the military courts.

Based on its review of the Petition, the Court concludes that the Petitioner has failed to allege facts, which when viewed most favorably to the Petitioner, make plausible his claim that he did not have a full and fair opportunity to present his issues and defenses, or that the military courts did not give "full and fair consideration" to the evidence and defenses he presented during those proceedings.

III. CONCLUSION

For the above reasons, it is hereby

ORDERED that Respondents' Motion to Dismiss [Doc. No. 13] be, and the same hereby is, GRANTED; and it is further

ORDERED that this action be, and the same hereby is, DISMISSED with prejudice.

The Clerk is directed to forward a copy of this Order to all counsel of record and to enter judgment in Respondents' favor pursuant to Fed. R. Civ. P. 58.

/s/
Anthony J. Trenga
United States District Judge

Alexandria, Virginia
February 27, 2020