UNITED STATES DISTRICT COURT

District of Kansas

(Topeka Docket)

NIDAL MALIK HASAN,

Petitioner,

v. CASE NO. 5:26-cv-03460-AWM

ANDREW SERGENT,
Colonel, United States Army,
Commandant, United States
Disciplinary Barracks,
Ft. Leavenworth, Kansas,

Respondent.

RESPONSE TO PETITIONER'S MOTION FOR AN ORDER STAYING HIS EXECUTION TO PURSUE HABEAS RELIEF (Doc. 1)

APPEARS NOW the Respondent, by and through Ryan A. Kriegshauser, the United States Attorney for the District of Kansas, and Jared S. Maag, Assistant United States Attorney, and in response to Petitioner's (hereafter Hasan's) motion to stay his execution (Doc. 1) submits the following for the Court's consideration:

INTRODUCTION

Nidal Hasan, an Army major, admittedly killed 13 people and wounded 31 others

at Fort Hood, Texas, in 2009. A court-martial sentenced him to death, the military courts affirmed his convictions and sentences, and the Supreme Court denied review in March 2025. On November 24, 2026, only nine days before his scheduled execution, Hasan has sought a stay of execution with this Court based on his purported intent to file a habeas petition under 28 U.S.C. § 2241 at some unspecified point in the future. Hasan offers no justification for his delay in filing a habeas petition, nor can he establish any likelihood of success on the merits of his yet-unfiled petition. One of his anticipated claims was definitively and correctly resolved against him by the military courts. And the other anticipated claim is neither cognizable on habeas review nor meritorious.

A stay of execution is an extraordinary equitable remedy that will be granted only in rare circumstances. A capital prisoner must establish (among other things) a strong likelihood of success on the merits of his claims and that the public interest favors a stay. Hasan has made neither showing here: he has not yet filed a habeas petition; the claims he says he intends to raise are untimely and meritless; and the government and the victims of Hasan's crimes—many of whom are imminently traveling to Texas to witness his execution—"have an important interest in the timely enforcement of [his death] sentence." *Bucklew v. Precythe*, 587 U.S. 119, 149 (2019). As the Supreme Court has emphasized, courts "should police carefully" attempts to use last-minute challenges "to interpose unjustified delay" in carrying out scheduled executions. *Id.* at 149-50. Hasan's last-minute stay motion should be denied.

ISSUE PRESENTED

Whether Nidal Hasan, a capital defendant in a military case, is entitled to a stay of his execution based on his intention to file a habeas petition raising claims for which he cannot show a likelihood of success on the merits and cannot justify his inequitable delay.

RELEVANT PROCEDURAL HISTORY

Following a trial before a general court-martial, Hasan was convicted on 13 specifications of premeditated murder, in violation of Article 118 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918(1); and 32 specifications of attempted pre-meditated murder, in violation of Article 80 of the UCMJ, 10 U.S.C. 880. *United States v. Hasan*, 84 M.J. 181, 194 (C.A.A.F. 2024). The court-martial sentenced Hasan to death. *Id.* The convening authority approved the adjudged sentence. *Id.* The Army Court of Criminal Appeals (Army CCA) affirmed, *United States v. Hasan*, 80 M.J. 682 (Army Crim. App. 2020), and the Court of Appeals for the Armed Forces (CAAF) likewise affirmed. *United States v. Hasan*, 84 M.J. 181 (C.A.A.F. 2024). The Supreme Court of the United States denied Hasan's petition for a writ of certiorari on March 31, 2025. *Hasan v. United States*, 145 S. Ct. 1470 (2025). Hasan made no effort to file a habeas petition or any other form of post-conviction relief since the denial of certiorari, until the current motion was filed on November 24, 2026. Doc. 1.

On October 2, 2026, Donald J. Trump, President of the United States, under his role as Commander-in-Chief of the Armed Forces of the United States, and pursuant to 10 U.S.C. § 857(a)(3), issued an Order approving Hasan's sentence of death, and in turn

ordered Hasan's execution as directed by the Secretary of the Army. Doc. 1-1.

On October 6, 2026, Adam R. Telle, the Acting Secretary of the Army, issued a memorandum and order directing the Commandant of the United States Disciplinary Barracks (Respondent) to execute Petitioner at 1:00 p.m. (CST) on Thursday, December 3, 2026, at Fort Hood, Texas, by firing squad, all in accordance with Army Regulation 190-55. Doc. 1-3.

On November 24, 2026, seven weeks later and just nine days before his scheduled execution, Hasan filed the instant motion seeking to stay the execution order issued by the Acting Secretary of the Army, claiming that he intends to file, on an unspecified date, a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. Document 1, Exhibit 4 to Hasan's stay motion identifies two claims that he may raise in a forthcoming habeas petition: one related to his alleged "defense of others" defense, and another related to supposed "unlawful command influence" in setting his execution.

RELEVANT FACTUAL STATEMENT

On November 5, 2009, Nidal Hasan, an Army major, having carefully planned and prepared his attack, murdered 13 people and wounded 31 others at a crowded Soldier Readiness Processing (SRP) center at Fort Hood, Texas. *United States v. Hasan*, 84 M.J. 181, 192 n.2 (C.A.A.F. 2024).

In July 2009, Hasan purchased an advanced FN Five-seven semiautomatic handgun, laser sights, and magazine-extension kits that increased the firing capacity to 30 rounds per magazine. *Hasan*, 84 M.J. at 193. In October 2009, Hasan began target practice at a firing

range, where he obtained instruction on "speed loading" the weapon and became proficient at kill shots at 100 yards. *Id.* After being informed that he would be deployed to Afghanistan and would need to process through the SRP center, Hasan told a coworker: "They've got another thing coming if they think they are going to deploy me." *Id.* (citation omitted). Hasan then made seven to nine unscheduled visits to the SRP center for no legitimate purpose in the two weeks before his attack. *Id.*

On the day of the attack, Hasan entered the SRP center with his weapon and nearly 400 rounds of ammunition. *Hasan*, 84 M.J. at 193. He pulled out his weapon, yelled "Allahu Akbar!", and began shooting at his fellow soldiers using speed-reloading techniques. *Id.* Hasan fired at soldiers as they ran toward the center's front and back doors; walked across the facility and shot several soldiers in the back; and then exited the SRP center to pursue other fleeing soldiers. *Id.* Once outside, Hasan engaged law-enforcement officers in a firefight, was shot in the chest, and was apprehended. *Id.*

Hasan was charged with 13 specifications of premeditated murder and 32 specifications of attempted premeditated murder. *Hasan*, 84 M.J. at 194. The convening authority referred the case to a general court-martial as a capital case. *Id.* As trial approached, Hasan and his three military defense attorneys disagreed about trial strategy. *Id.* at 195. Defense counsel wanted to argue that the murders were not premeditated because Hasan had been overwhelmed by "religious passion," but Hasan wanted to argue that his attack was justified to protect Taliban members from imminent harm. *Id.*

After counsel advised Hasan that his "theory did not constitute a legally viable defense under the facts of the case," Hasan requested to represent himself. *Hasan*, 84 M.J. at 195. The military judge granted his request after ensuring that Hasan's waiver of his right to counsel was knowing, intelligent, and voluntary. *Id.* at 195-97. The judge, however, appointed Hasan's three original attorneys to serve as standby counsel. *Id.* at 196.

Before trial, Hasan "submitted memoranda in support of his proposed 'defense of others' defense." *Hasan*, 84 M.J. at 242. His "essential claim" was that "because the American presence in Afghanistan was illegal under international law, personnel of the United States military were 'fair game' for the Taliban." *Id.* And, according to Hasan, it was permissible for those sympathizing with the Taliban to act in the Taliban's defense. *Id.* Hasan requested that the military judge accept this defense-of-others theory and instruct the panel accordingly. *Id.*

The military judge ruled that the proposed defense theory did not apply as a matter of law. *Hasan*, 84 M.J. at 242. As the judge explained, "the victims in Fort Hood, Texas, posed no imminent or immediate threat of death or grievous bodily harm to anyone in Afghanistan." *Id.* (quotation omitted).

At trial, Hasan admitted that he was the shooter and did not put on a case in chief. *Hasan*, 84 M.J. at 194. The court-martial convicted Hasan of 13 specifications of premeditated murder and 32 specifications of attempted premeditated murder. *Id.* During a four-day sentencing phase of the trial, Hasan did not put on any evidence or make any

sentencing arguments. *Id.* The court-martial sentenced Hasan to death, and the convening authority approved the adjudged sentence. *Id.*

After the Army Court of Criminal Appeals affirmed Hasan's conviction and sentence, *United States v. Hasan*, 80 M.J. 682 (Army Crim. App. 2020), the Court of Appeals for the Armed Forces (CAAF) also affirmed. *Hasan*, 84 M.J. at 245. As relevant here, the court rejected Hasan's defense-of-others claim. *Id.* at 243-44. The court explained that, under governing law, "the right to self-defense arises where an individual believes that a *wrongful* use of force is *imminent*." *Id.* at 243. And the court agreed with the military judge that "any alleged threat" to the Taliban "was simply too remote for the 'defense of others' defense to apply" to Hasan's actions. *Id.* The court found "no support in the record for [Hasan] to claim that he reasonably believed members of the Taliban were in immediate danger of unlawful bodily harm from his victims at the SRP center." *Id.* at 244.

The Supreme Court denied Hasan's petition for certiorari on March 31, 2025. 145 S. Ct. 1470 (2025). On October 2, 2026, the President approved Hasan's sentence of death. Doc. 1-1. On October 6, 2026, the Acting Secretary of the Army scheduled Hasan's execution to take place by firing squad on December 3, 2026. Doc. 1-3.

On November 24, 2026, Hasan filed the current motion in the United States District Court for the District of Kansas—where he is in custody at the United States Disciplinary Barracks at Ft. Leavenworth—seeking a stay of his execution on the basis that he "intends to file a petition for writ of habeas corpus" on some unspecified date in the future. Doc. 1 at 1. He requests that he be "permitted to proceed *pro se* in habeas proceedings" with

standby counsel. *Id.* at 8. He maintains that a stay is necessary "to provide him and standby counsel with sufficient opportunity to investigate, prepare, and present his habeas petition." *Id.* at 9. He states that, "[e]ven without the assistance of qualified habeas counsel," he has "already identified at least two constitutional issues that he will present in his habeas petition." *Id.* at 10.

Hasan's first anticipated claim, which he raised before the military courts, is that he acted in defense of others because his victims posed an imminent threat to Taliban members. Doc.1-4 at 2. He argues that military personnel "pending deployment" constituted "an imminent threat to the Taliban." Doc.1-4 at 4. And he argues that the threat was "unlawful" because the United States did not obtain approval from the U.N. Security Council for its attacks on Afghanistan. Doc.1-4 at 4-6.

Hasan's second anticipated claim is that the President and the Secretary of War engaged in "unlawful command influence" that violated his Fifth and Sixth Amendment rights. Doc.1-4 at 10. Specifically, he contends that the authority to designate the method, date, and place of execution are reserved to the Secretary of the Army under Army regulations. Doc.1-4 at 10-11. Hasan claims that the President violated those regulations by announcing that Hasan would be executed by firing squad "before the Acting SECARMY issued his execution order." Doc.1-4 at 11. And he claims that the Secretary of War "made public statements calling for his execution for more than a year before the approval and execution orders were issued." Doc.1-4 at 14. Hasan also asserts that statements by the President and Secretary of War raised "an obvious concern that approval

of the execution . . . was driven by a bigoted animus of Constitutional dimension." Doc.1-4 at 16-21.

APPLICABLE LEGAL STANDARDS

"[A] stay of execution is … not available as a matter of right." *Pavitts v. Jones*, 627 F.3d 1336, 1338 (10th Cir. 2010) (internal quotation marks omitted). It is instead "an equitable remedy," *id.* in which the standards for a preliminary injunction generally apply, *Hamilton v. Jones*, 472 F.3d 814, 815 (10th Cir. 2007); *see also Williams v. Chrans*, 50 F.3d 1358, 1360 (7th Cir. 1995) (per curiam). Accordingly, Hasan bears the burden of demonstrating that (1) he has a "strong" likelihood of success on the merits of his claims; (2) he "will be irreparably injured absent a stay"; (3) a stay will not "substantially injure the other parties interested in the proceeding"; and (4) "the public interest" favors a stay. *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quotations omitted).

The mere possibility of relief is not enough; Hasan must show that he has a strong likelihood of succeeding on the merits. *Nken*, 556 U.S. at 434; *see also Hamilton*, 472 F.3d at 815. Understandably, in the capital context, irreparable injury is taken as a given when, as here, Hasan is challenging his conviction or the ability to carry out his sentence. *See, e.g.*, *Jones v. Hobbs*, 604 F.3d 580, 581-82 (8th Cir. 2010) (per curiam); *Chrans*, 50 F.3d at 1360. But Hasan must satisfy all the other "requirements for a stay, including a showing of a significant possibility of success on the merits." *Hill v. McDonough*, 547 U.S. 573, 584 (2006).

This Court "must also apply 'a strong equitable presumption against the grant of a

stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.'" *Hill*, 547 U.S. at 584 (quoting *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)); *see also Hamilton*, 472 F.3d at 815. In short, the relevant Supreme Court decisions "emphasize two critical factors in evaluating whether a stay of execution should issue: (1) whether the inmate has delayed unnecessarily in bringing the claim; and (2) whether the inmate shows a significant probability of success on the merits." *Lambert v. Buss*, 498 F.3d 446, 451 (7th Cir. 2007) (per curiam); *see also Hamilton*, 472 F.3d at 815-16; *cf. Dunn v. Price*, 587 U.S. 929, 929 (2019) (vacating stay due to delay); *Dunn v. McNabb*, 583 U.S. 941, 941 (2017) (vacating stay where there was no "finding that [the inmate] ha[d] a significant possibility of success on the merits").

ARGUMENT

I. Hasan Is Not Entitled to an Automatic Stay in Order to File a Habeas Petition.

Again, as a threshold matter, Hasan is not entitled to a stay as a matter of right. *Nken*, 556 U.S. at 427; *Hill*, 547 U.S. at 584 ("a stay of execution is an equitable remedy [and] . . . not available as a matter of right, and equity must be sensitive to [the government's] strong interest in enforcing its criminal judgments without undue interference from the federal courts"). To be sure, the Supreme Court has previously recognized that a court "has jurisdiction to enter a stay of execution where necessary" to allow capital inmates "to challenge their conviction and sentence in habeas corpus proceedings." *McFarland v. Scott*, 512 U.S. 849, 859 (1994); *see also Barefoot v. Estelle*,

463 U.S. 880, 889-90 (1983). But since then, the Supreme Court has made clear that an inmate seeking a stay of his execution must show "a significant probability of success on the merits." *Hill*, 547 U.S. at 584 ; *see also Nken*, 556 U.S. at 434; *Hamilton*, 472 U.S. at 817 (denying stay of execution where capital inmate failed to show a "substantial likelihood of prevailing on the merits of his constitutional challenge" to his execution); *cf. Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20-22 (2008) (explaining that a preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that" the movant is likely to succeed on the merits). As explained in greater detail below, Hasan cannot satisfy that standard here.

Moreover, even accepting that a court could stay a capital inmate's execution simply to allow that inmate an opportunity to litigate an initial habeas petition, a stay on that basis is unwarranted here for three independent reasons.

First, this is a military execution. Hasan was convicted of numerous violations of the Uniform Code of Military Justice involving the premeditated murder of 13 individuals, including fellow soldiers and civilians, and the attempted murder of others who were simply preparing for deployment. As a result of these crimes, a military judge sentenced him to death, and his execution is now being carried out by the United States military.

The Supreme Court has long recognized that the Constitution imposes fewer restrictions on military prosecutions than it does on civilian ones. Article I of the Constitution empowers Congress to "make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. Art. I, § 8, Cl. 14, and the Fifth Amendment

exempts "cases arising in the land or naval forces" from the grand-jury requirement, U.S. Const. Amend. V. The Supreme Court has thus held that the military may try service members by court-martial without a grand jury. *See, e.g.*, *Kahn v. Anderson*, 255 U.S. 1, 8 (1921); *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 78-79 (1858); *see also Wilson v. Curtis*, 150 F.4th 1359, 1369 (10th Cir. 2025) (noting that "the Constitution permits disciplinary differences between civilians and members of the armed forces"). And despite the absence of a similarly express textual exemption, the Supreme Court has likewise held that the jury-trial requirement does not apply to courts-martial. *See Anderson*, 255 U.S. at 8-9. The Court has also explained that it will enforce procedures adopted by Congress for military prosecutions unless the "factors militating in favor" of broader due-process protections "are so extraordinarily weighty as to overcome the balance struck by Congress." *Middendorf v. Henry*, 425 U.S. 25, 44 (1976) (concluding that right to counsel does not apply to summary courts-martial); *see Weiss v. United States*, 510 U.S. 163, 177-178 (1994) (holding that military judges need not have fixed terms of office).[1]

[1] It bears repeating that through its power "[t]o make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. art. I, § 8, cl. 14, Congress has provided for courts-martial to adjudicate prosecutions of active-duty servicemembers and others, as well as a comprehensive scheme of appellate review of court-martial judgments that "replicates the judicial apparatus found in most States." *Ortiz v. United States*, 585 U.S. 427, 438 (2018). Under the Uniform Code of Military Justice (UCMJ), court-martial judgments are reviewed by intermediate courts of appeals for each military service, the judges of which may be servicemembers or civilians. *See* 10 U.S.C. § 866. The judgments of the courts of appeals are subject to review by the Court of Appeals for the Armed Forces (CAAF), which is staffed by five civilian judges appointed by the President and confirmed by the Senate. *See id.* §§ 867, 941-942.

"The court-martial is older than the Constitution, was recognized and sanctioned by the Framers, and has been authorized here since the first Congress." *Ortiz*, 585 U.S. at 428. For much of that history, however, direct review of court-martial judgments concluded with the highest court

Similarly, the Supreme Court has repeatedly recognized the "need for special regulations in relation to military discipline" that make distinctive "demands on [military] personnel 'without counterpart in civilian life.'" *Chappell v. Wallace*, 462 U.S. 296, 300 (1983) (citation omitted); *Wilson*, 150 F.4th at 1369. And the Court has resolved constitutional challenges to such regulations with a focus on the "very significant differences between military law and civilian law and between the military community and the civilian community." *Parker v. Levy*, 417 U.S. 733, 752 (1974); *see, e.g.*, *Chappell*, 462 U.S. at 300-305; *Brown v. Glines*, 444 U.S. 348, 360 (1980); *Greer v. Spock*, 424 U.S. 828, 840 (1976); *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion). Given the general deference that Article III courts must give the executive on "military judgments," *Winter*, 555 U.S. at 24, this Court should decline to issue a stay of Hasan's military execution absent, at minimum, a showing of a substantial likelihood that Hasan will prevail on the merits of his claims.

Second, and relatedly, Hasan has not yet filed a habeas petition and has only identified two claims that he might raise in some future petition on some unspecified date.

---

in the military justice system; no provision allowed for direct review of court-martial judgments by the Supreme Court or any other Article III court. *See Schlesinger v. Councilman*, 420 U.S. 738, 746 (1975). In 1983, however, Congress for the first time granted the Supreme Court certiorari jurisdiction over certain judgments of the military courts. Military Justice Act of 1983, Pub. L. No. 98-209, § 10, 97 Stat. 1393, 1405-06.

The final judgments of the military courts "are final and conclusive" and are "binding upon all departments, courts, agencies, and officers of the United States," subject to limited exceptions not relevant here. 10 U.S.C. § 876. Thus, "[t]he valid, final judgments of military courts, like those of any court of competent jurisdiction not subject to direct review for errors of fact or law, have res judicata effect and preclude further litigation of the merits." *Councilman*, 420 U.S. at 746.

Given that the government and the victims of Hasan's crimes "have an important interest in the timely enforcement of [his death] sentence," *Bucklew v. Precythe*, 587 U.S. 119, 149 (2019), this Court should deem Hasan's mere suggestion that he intends to file a habeas petition in the future insufficient to warrant a stay of his execution.

Third, for the reasons explained below, the claims Hasan says he intends to raise in his not-yet-filed habeas petition are meritless or are not proper subjects for a habeas petition. His claim relating to his defense-of-others is frivolous on its face and his claim relating to the approval and scheduling of his execution is not cognizable on habeas review. Indeed, if Hasan had timely filed a habeas petition raising these claims, it would and should have been summarily denied. He cannot avoid that result by refusing to file a habeas petition and merely saying he intends to do so at some unspecified future date.

None of these three factors, let alone all of them, were present in the Supreme Court's pre-*Nken* cases approving of automatic stays while a first habeas petition is pending in a capital case. Those three factors together strongly militate against extending those pre-*Nken* cases, especially given that *Nken* and similar cases emphasize that a strong likelihood of success is an essential element of a stay.

II. Hasan Cannot Show a Likelihood of Succes on His Anticipated Claim Relating to His "Defense-of-Others" Defense.

Hasan's first anticipated habeas claim is that he acted in defense of others because his victims posed a threat to members of the Taliban in Afghanistan. Doc.1-4 at 2. That claim would be barred by traditional abuse-of-the-writ principles, would completely fail

the standard of review applied when reviewing a court-martial conviction in an Article III setting, and is frivolous in any event. His stated intention to raise that claim in a future habeas petition does not warrant a stay.

A. Raising this claim at this late juncture would be an abuse of the writ.

If Hasan were to renew his defense-of-others claim in a habeas petition, that claim would be barred by equitable principles. By raising this claim approximately 20 months after his conviction became final, Hasan exceeded the one-year statute of limitations period that would apply to any other post-conviction motion by a federal prisoner to vacate his conviction and sentence. *See* 28 U.S.C. § 2255(f). Although § 2255(f)'s statute of limitations does not directly apply to habeas petitions under § 2241, "the writ of habeas corpus has always been limited by equitable principles" including the abuse-of-the-writ doctrine. *Mandacina v. Entzel*, 991 F.3d 758, 762 (7th Cir. 2021). Particularly given the Executive's heightened interest in the swift execution of military punishments, no equitable reason exists to allow Hasan to dally far longer in seeking post-conviction relief than any other federal prisoner would be allowed. And given the "important interest in the timely enforcement of a [death] sentence," courts "should police carefully" attempts to use last-minute challenges "to interpose unjustified delay." *Bucklew*, 587 U.S. at 149-50 (quotation omitted) (discussing method-of-execution challenges).

Here, Hasan has provided no reason, much less a justifiable one, for failing to raise his anticipated defense-of-others claim in an Article III court in a timely fashion. Rather than raise that challenge in the 20 months following the denial of his petition for certiorari,

he waited until nine days before his scheduled execution to file the current motion. And, even then, he has not actually presented that claim in a habeas petition; instead, he has only requested additional time to prepare a petition presenting that claim at an unknown date in the future. Allowing him to do so would be an abuse of the writ.

B. This claim is barred because it was fully considered and rejected by the military courts, and it is otherwise frivolous.

Hasan's defense-of-others claim would also fail for the separate reason that the claim was already raised and rejected on direct review by the CAAF. Under the prevailing standard of review, Hasan's claim will unquestionably fail on federal habeas review.

In deciding whether to review a military habeas petition, courts employ a four-factor test. *See Dodson v. Zelez*, 917 F.2d 1250, 1252-53 n.1 (10th Cir. 1990). Review of non-jurisdictional issues is appropriate only if the following four conditions are met: "(1) the asserted error is of substantial constitutional dimension; (2) the issue is one of law rather than of disputed fact already determined by the military tribunal; (3) there are no military considerations that warrant different treatment of constitutional claims; and (4) the military courts failed to give adequate consideration to the issues involved or failed to apply proper legal standards." *Lips*, 997 F.2d at 811; *Thomas v. U.S. Disciplinary Barracks*, 625 F.3d 667, 670-71 (10th Cir. 2010) (noting that the fourth factor is treated as the most important consideration). Importantly, Tenth Circuit precedent now conclusively holds that a military petitioner must establish that *all four Dodson* factors weigh in his favor for a district court to employ a full merits review of a non-jurisdictional question. *Santucci v. Commandant*,

66 F.4th 844, 869 (10th Cir. 2023). Accordingly, Hasan's "failure to show that even one [*Dodson*] factor weighs in [his] favor is fatal to [his] efforts to secure full merits review." *Id*. at 858; *see also Drinkert v. Payne*, 90 F.4th 1043, 1047 (10th Cir. 2024) (reaffirming that review cannot be granted "even if just one of the *Dodson* factors is unfavorable to the petitioner"); *Gray v. Payne*, No. 23-3079, 2023 WL 8433977, at *2 (10th Cir. 2023) (reaffirming that deference owed to military courts is greater than that owed to state courts).

For claims like Hasan's that were already decided by the military courts on direct review, this Court's review under the critical fourth factor of habeas review is limited. *Burns,* 346 U.S. at 144 ("It is the limited function of the civil courts to determine whether the military have given fair consideration to ["Petitioners'] claims."); *Lips,* 997 F.2d at 811 ("Under *Burns*, if the military gave full and fair consideration to claims asserted in a federal habeas corpus petition, the petition should be denied. Only when the military has not given a petitioner's claims full and fair consideration does the scope of review by the federal civil court expand."); *Khan v. Hart*, 943 F.2d 1261, 1262 (10th Cir. 1991) ("Our jurisdiction to review a military conviction for constitutional error is limited because habeas jurisdiction of a federal civil court does not extend to a reassessment of the facts and issues fully and fairly considered by a military court.").

Review of the first habeas factor is similarly limited. Article III courts "only review habeas corpus petitions from the military courts that raise substantial constitutional issues."

Roberts v. Callahan, 321 F.3d 994, 997 (10th Cir. 2003).[2] As the Tenth Circuit has explained, a "substantial constitutional issue" is "largely free of factual disputes." *Santucci*, 66 F.4th at 871. Similarly, in the habeas context under 28 U.S.C. § 2254, "substantial constitutional questions" are generally considered questions "upon which reasonable jurists could disagree." *See, e.g., Tennard v. Dretke*, 542 U.S. 274, 288-89 (2004); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)) *Allen v. Lee*, 366 F.3d 319, 324 (4th Cir. 2004); *accord Madsen v. United States*, 48 Fed. Cl. 464, 468 (Fed. Cl. 2000) ("[A] pure issue of constitutional law must pertain to a matter of fundamental fairness, such as one 'where the barriers and safeguards are so relaxed or forgotten, . . . that the proceeding is more a spectacle, . . . or trial by ordeal . . ., than a disciplined contest.'" (citing *United States v. Augenblick*, 393 U.S. 348, 356 (1969)).

Because Hasan's defense-of-others claim received full and fair consideration in the military courts, he is clearly barred from relitigating it now. Hasan raised that claim before the military judge, who rejected it. *Hasan*, 84 M.J. at 242. He renewed the claim in the CAAF, which likewise rejected it on *de novo* review. *Id.* at 244. Hasan could have

[2] This assumes, of course, that the claims were properly raised and decided in the military courts in the first place. Article III courts must decline review on any ground that was not properly exhausted before the military courts. *Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975) ("[F]ederal courts normally will not entertain habeas petitions by military prisoners unless all available military remedies have been exhausted."); *Watson v. McCotter*, 782 F.2d 143, 145 (10th Cir. 1986) ("We will not review petitioners' claims on the merits if they were not raised at all in the military courts . . ."); *see also Davis v. Lansing*, 202 F. Supp. 2d 1245, 1249 (D. Kan. 2002), *aff'd*, 65 F. App'x 197 (10th Cir. 2003) (noting that a plurality of the Supreme Court has stated that a district court may not review challenges to military courts-martial *de novo* unless the military courts have manifestly refused to consider the claims).

presented the claim to the Supreme Court in his petition for certiorari, but he did not. In short, Hasan had a full opportunity to litigate this claim, the military courts fully considered and rejected it on the merits, and he provides no reason why an Article III court would entertain this claim in a future habeas petition.

Additionally, Hasan cannot show likelihood of success on the merits of this claim because it is frivolous. As the military judge concluded, Hasan's "victims in Fort Hood, Texas, posed no imminent or immediate threat of death or grievous bodily harm to anyone in Afghanistan." *Hasan*, 84 M.J. at 242 (quotation omitted). The CAAF similarly found "no support in the record for [Hasan] to claim that he reasonably believed members of the Taliban were in immediate danger of unlawful bodily harm from his victims at the SRP center." *Id.* at 244. Indeed, the vast majority of the soldiers in the center were receiving medical evaluations, not posing an imminent or immediate threat. *Id.* at 193. Some of the soldiers in the center were returning from deployments, not just preparing to deploy. *Id.* at 193. Hasan shot several soldiers in the back as they attempted to flee the building, then proceeded outside continuing to shoot victims in the back. *Id.* And his victims were not just soldiers, he was convicted of murdering a retired soldier who worked at the center. *Id*. Thus, there was no factual basis for presenting the defense Hasan demanded at trial.

Moreover, the defense-of-others defense applies only to "a *wrongful* use of force." *Hasan*, 84 M.J. at 243. But Hasan's victims would not have engaged in "wrongful" use of force had they been deployed to Afghanistan and engaged in warfare against the Taliban as members of the United States military. *See* Authorization for the Use of Military Force,

Pub. L. 107-40, 115 Stat. 224 (2001) (authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks [of September 11, 2001]" or who "harbored such organizations or persons."). Obeying orders to engage enemy combatants in wartime is not unlawful, however much Hasan might have disagreed with the United States's participation in that war. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) ("There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF.")

By Hasan's own twisted logic, any person could unilaterally decide that a war was unlawful and engage in murderous mass shootings against U.S. military personnel with impunity, even before such personnel reached the battlefield. That is not how the law of self-defense works.

III. Hasan Cannot Show a Likelihood of Success on His Proposed Claim Challenging the Approval and Scheduling of His Execution.

Hasan similarly cannot show a likelihood of success on his proposed claim relating the approval and scheduling of his execution by the President and Secretary of War.

To begin, this claim is not properly cognizable in a habeas petition at all. In *Nance v. Ward*, 597 U.S. 159 (2022), the Supreme Court made clear that, although habeas is available where a defendant challenges the validity of a death sentence issued by the

sentencing court, it does not apply where the defendant instead challenges the lawfulness of how the death sentence will be carried out. *See id.* at 167-68 (explaining that habeas is intended to address "challenges [to] the validity of a conviction or sentence," and that "method-of-execution claims" are not cognizable in habeas). The latter type of claim must be brought in a suit seeking injunctive relief. *Id.* at 169 (addressing injunctive relief under 28 U.S.C. § 1983 for state capital prisoners); *cf. Trump v. Cook*, 609 U.S. 528, 549 n.2 (2026) (explaining "that plaintiffs may sue 'in equity' without a congressionally-provided cause of action 'to prevent an injurious act by a public officer'") (quoting *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 327 (2015) (internal quotation marks omitted).

Hasan brings that latter type of claim. He is not raising any defect with the death sentence imposed and affirmed by the military courts on direct review. Rather, he is objecting to how the President and Secretary of War have acted in deciding to carry out the sentence. That claim would not be cognizable in any future habeas petition.

Moreover, under equitable principles, the claim is dilatory and barred by laches. Equitable relief of the sort Hasan apparently intends to seek must be sought swiftly; even absent a statutory limitations period, the doctrine of laches "bars a claim when there is: (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Biodiversity Conserv. Alliance v. Jiron*, 762 F.3d 1036, 1091 (10th Cir. 2014) (internal quotation marks omitted); *see Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 678 (2014). Where, as here, the government and victims have

strong interests in the timely execution of a capital sentence, *see Bucklew*, 587 U.S. at 149, and courts view with skepticism last-minute attempts to delay the orderly execution of such sentences, *id.* at 149-50, there is no justification for Hasan's decision not to raise his command-influence concern at any point in the seven weeks since the facts underlying that claim became known. Laches does not permit him to suddenly raise that claim a little over a week before his execution and expect to obtain extraordinary equitable relief as a result.

To the extent that Hasan suggests that his execution is the result of unlawful command influence, Doc. 1-4 at 11, that argument also fails. The prohibition against unlawful command influence (UCI) is unique to the military justice system and ensures "public confidence in the actual and apparent fairness of [the military's] system of justice." *See United States v. Harvey*, 64 M.J. 13, 17 (C.A.A.F. 2006). To raise the issue of UCI on appeal, Hasan would first have to demonstrate exhaustion of that claim, in turn showing: (1) facts which, if true, constitute unlawful command influence; (2) that the proceedings were unfair to the prejudice of the accused; and (3) that unlawful command influence caused the unfairness. *United States v. Barry*, 78 M.J. 70, 77 (C.A.A.F. 2018). While the threshold for raising the issue is low, Hasan would be required to present "more than mere allegation or speculation." *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013). Such UCI claims have been rejected in this district. *See Allen v. Payne*, No. 23-3061-JWL, 2023 WL 4361209, at *2 (D. Kan. June 30, 2023) (holding that a UCI claim fails to satisfy all four *Dodson* factors given that such a claim does not involve a pure question of law and is "peculiar to the military courts and thus uniquely military considerations could affect any

constitutional analysis").[3]

Simply put, Hasan's claim that the method of execution runs afoul of his rights is not cognizable in habeas review, is meritless, and would ultimately fail the standard of review that this Court must apply.

IV. The Remaining Equities Further Weigh Against a Stay.

In addition, Hasan's delay in raising these claims, and the public interest, also strongly militate against a stay.

The government has a compelling interest in the timely enforcement of criminal sentences that have been upheld through extensive appellate and postconviction proceedings in federal courts. *Bucklew*, 587 U.S. at 149 at 1133. Indeed, delay "inflict[s] a profound injury to the 'powerful and legitimate interest in punishing the guilty,' an interest shared by the State and the victims of crime alike." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (quoting *Herrera v. Collins*, 506 U.S. 390, 421 (1993) (O'Connor, J., concurring)). In fact, Hasan's delay in seeking a stay of his execution has further

[3] By his claim, Hasan demands that this Court intervene to overturn the President's sole executive function of approving Hasan's death sentence, and the Secretary of the Army's discretionary function of deciding the time, place, and manner of the execution. To be sure, when the President exercises his powers as the Commander in Chief, those decisions "are not to be set aside by the courts without clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted." *Ex parte Quirin*, 317 U.S. 1, 25 (1942). Hasan's vague constitutional concerns do not come close to meeting the extraordinary demand of establishing that both the President and the Acting Secretary of the Army abdicated their defined roles in such a way that Article III relief is warranted. In other words, Hasan falls well-short of establishing a claim of substantial constitutional dimension—apart from the fact that this very claim involves military considerations—such that he would prevail under the first factor of the *Dodson* test, much less all four factors. *Santucci*, 66 F.4th at 858.

exacerbated the potential for injury to his victims, many of whom will soon be traveling to Texas to observe the execution. The victims' families—and the public as a whole—have an overwhelming interest in implementing the capital sentence in this case. Unduly delaying executions can also frustrate the death penalty by undermining its retributive and deterrent functions. *See Bucklew*, 587 U.S. 149-50; *id.* at 168 (Breyer, J., dissenting).

The government's interest in implementing Hasan's sentence is magnified by the heinous nature of his crimes. Hasan premeditated his attack for weeks, engaging in target practice at a shooting range and scoping out the SRP center between seven and nine times in the weeks before the attack. *Hasan*, 84 M.J. at 193. He brought nearly 400 rounds of ammunition to the attack. *Id.* He shot dozens of soldiers as they attempted to flee, shooting several in the back. *Id.* After being confronted by law enforcement, Hasan refused to drop his weapon, injuring an officer in the shoot-out, who he then attempted to murder at point blank range, but was unsuccessful when his firearm malfunctioned. *Id.* His premeditated attack killed 13 service members and injured 31 more. *Id.* at 192. Far from expressing remorse, Hasan justified his actions based on "America's war on Islam." *Id.* at 194. As a result of these unspeakable crimes, Hasan's sentence was upheld on direct review. The balance of equities therefore tips strongly in the government's favor.

CONCLUSION

The government respectfully moves this Court to reject the defendant's arguments and deny his motion seeking to stay his execution.

Respectfully submitted,

RYAN A. KRIEGSHAUSER
United States Attorney
District of Kansas

By: /s/ Jared S. Maag

JARED S. MAAG, KS Bar No. 17222
Assistant United States Attorney
District of Kansas
290 Carlson Federal Building
444 SE Quincy Street
Topeka, KS 66683
Ph: 785.295.2850 (Office)
Fax: 785.295.2853
jared.maag@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of November 2026, I electronically filed the foregoing Response with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel who have entered their appearance in this matter.

By: /s/ Jared S. Maag

JARED S. MAAG, KS Bar No. 17222
Assistant United States Attorney