IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee* v. Staff Sergeant (E-5) KALAB D. WILLMAN, USAF, *Appellant*	) BRIEF ON BEHALF OF) THE UNITED STATES))) Crim. App. No. 39642))) USCA Dkt. No. 20-0030/AF

BRIEF ON BEHALF OF THE UNITED STATES

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TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

ISSUE PRESENTED:

WHETHER THE CCA ERRED WHEN IT CONCLUDED IT COULD NOT CONSIDER EVIDENCE OUTSIDE THE RECORD UNDER UNIFORM CODE OF MILITARY JUSTICE (UCMJ) ARTICLE 66(C).

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(c), UCMJ, 10 U.S.C § 866(c) (2016)[1]. This Court has jurisdiction over this matter under Article 67(a)(3) UCMJ, 10 U.S.C. § 867(a)(3).

[1] References to Article 66(c), UCMJ, 10 U.S.C. § 866(c), have since become Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) with the implementation of the MJA.

STATEMENT OF THE CASE

The United States generally accepts Appellant's statement of the case. (App. Br. at 1.) Because the case was referred prior to 1 January 2019, post-trial processing was performed in accordance with the 2016 edition of the Manual for Courts-Martial. All references to the Uniform Code of Military Justice (UCMJ), Rules for Courts-Martial (R.C.M.), and Military Rules of Evidence (M.R.E.) are to the 2016 edition of the Manual, unless otherwise noted.

STATEMENT OF FACTS

Appellant unlawfully recorded the private area of a sixteen-year-old girl during online video chat sessions without her knowledge or consent. (JA 002).

As a result of Appellant's conviction, Appellant was sentenced to confinement for one year, reduction to E-4, and a mandatory dishonorable discharge. (JA 002.) Appellant began serving his confinement at the Naval Consolidated Brig in Charleston, South Carolina on 28 November 2018. (JA 09.) While confined and towards the end of December 2018, Appellant claimed he injured his large toe while playing flag football. (JA 057.) Over the following two to three weeks, Appellant asserted his toenail swelled and became painful. (Id.) Eventually, his toe discharged pus and became detached from the nail bed. (Id.) On 14 January 2019, Appellant described that when he reported to sick call for a medical evaluation, a medical staff member concluded no action was needed. (Id.) Appellant requested the toenail to be removed and specifically asked to speak to

the supervisor. (Id.) When Appellant asked the supervisor to remove his nail, the supervisor determined that "the best course of action was to let the nail remain intact until it fell off spontaneously because removing the nail would have left his toenail matrix exposed which could increase the chances of an injury or infection to the nail matrix." (JA 062.) Instead, the supervisor gave Appellant a Betadine soak with instructions to return to Sick Call should the issue worsen. (JA 057.) Appellant was advised he should "cover the area with a band aid to help prevent the nail catching onto his socks." (JA 062.) However, despite this advice, Appellant unintentionally removed his toenail when he took off his boots and socks later that night. (JA 057.)

Three weeks later, Appellant stated he returned to sick call to have his toe condition reevaluated because a new toenail was growing in an unusual manner and with significant discoloration. (Id.) Appellant claims medical personnel instructed Appellant that no action was needed and he could return to sick call if more symptoms or issues developed. (Id.) Appellant did not ask to speak further with a supervisor or other staff members. Additionally, Appellant's prisoner record contains no requests for medical treatment, redress, or grievances. (JA 062.) Though sick call was offered every morning from Monday to Friday at 0800, Appellant does not assert he sought further medical care. (JA 057, 062.)

Appellant had an opportunity to raise his medical treatment issue as a matter of clemency to the convening authority -- Appellant's toe injury occurred in

December 2018 and his subsequent visits to the medical clinic occurred in January 2019. Yet, on 27 February 2019, Appellant chose to waive his right to submit matters in clemency to the convening authority. (JA 066.) On 28 February 2019, the convening authority approved the sentence as adjudged, and ordered it executed except for the dishonorable discharge. (JA 069.) Appellant made no formal complaint to the clinic, the prison administration, or his commander during his confinement for the medical treatment of his toe and did not raise the issue until his appeal. (JA 010-12.)

On appeal before AFCCA, Appellant raised two issues pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982), including an allegation that the post-trial confinement conditions imposed by the medical treatment received by Appellant violated the Eighth Amendment and Article 55, UCMJ, or alternatively, it warranted sentencing relief under Article 66(c), UCMJ. Appellant submitted an accompanying declaration via a motion to attach that supported his contention.[2] (JA 055-58.) AFCCA ultimately granted Appellant's motion. (JA 055.)

On 2 September 2020, AFCCA issued an opinion that resolved Appellant's Grostefon issues—finding Appellant's claim that his confinement conditions violated Article 55, UCMJ, and the Eighth Amendment, unpersuasive. (JA 012.)

[2] Initially, Appellant attached his declaration to his Assignment of Errors; however, the Government filed a motion to strike as Appellant failed to comply with AFCCA's rules of procedures. (JA 055.)

The lower court declined to resolve Appellant's alternate claim that his conditions warranted sentencing relief under Article 66(c), UCMJ, citing the rule established in United States v. Jessie, 79 M.J. 437 (C.A.A.F. 2020).

SUMMARY OF ARGUMENT

AFCCA correctly held in this case that it could not consider additional matters proffered by Appellant not included or referenced in the "entire record." Based upon this Court's precedent in Jessie as well as the plain language of Article 66(c), CCAs are not permitted to consider matters outside the entire record or matters not raised within the record beyond the context of Article 55, UCMJ, and the Eighth Amendment.

Appellant did not raise or include any post-trial confinement matter within the record. Instead, he submitted a motion to attach a declaration to AFCCA at the same time he submitted his assignments of error brief. Appellant now claims that when AFCCA granted his motion to attach his declaration, AFCCA attached his declaration to the record, and it could then be used for any purpose. However, despite his claims, this Court has provided clear delineation of what constitutes an "entire record." Nothing in this Court's delineation allows for Appellant's declaration to become part of the entire record.

Finally, as an Article I court, whose limited jurisdiction is prescribed by the plain language of Article 66(c), AFCCA is not equipped to fashion the most appropriate remedy for Appellant's post-trial confinement claim. Rather,

Appellant should have sought relief from his confinement facility, his commander, or the convening authority. Instead, Appellant sought no relief and forewent any opportunity to attach his matter at issue to the record of trial. Therefore, following the plain language of Article 66(c) and Jessie, this Court should deny Appellant's request to reverse AFCCA's decision and to remand for sentence review under Article 66(c).

ARGUMENT

THE CCA WAS CORRECT WHEN IT CONCLUDED IT COULD NOT CONSIDER EVIDENCE OUTSIDE THE RECORD UNDER ARTICLE 66(C).

Standard of Review

"The scope and meaning of Article 66(c) is a matter of statutory interpretation, which, as a question of law, is reviewed de novo." United States v. Gay, 75 M.J. 264, 267 (C.A.A.F. 2016) (citation omitted).

Law and Argument

I. CCAs are not permitted to consider matters outside the entire record for post-trial confinement claims beyond the context of Article 55, UCMJ, and the Eighth Amendment.

A. The plain language of Article 66(c) and this Court's ruling in Jessie limits the CCAs' ability to consider matters outside the entire record or matters beyond the context of Article 55, UCMJ, and the Eighth Amendment.

"[T]he Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority." Article 66(c), UCMJ, 10

U.S.C. § 866(c) (2016 ed.). When reviewing sentences, a service court "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Id. Thus, based on the plain language of the statute, it is evident Congress never intended to bestow unlimited review authority upon service courts when it drafted Article 66(c), UCMJ. Instead, it fettered service courts' ability to review sentences with the language "as the Court finds correct in law and fact and determines, *on the basis of the entire record*, . . . should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c) (emphasis added).

The language of Article 66(c) highlights that a CCA "may" approve only that part of a sentence that it finds 'should be approved' and 'on the basis of the entire record.' While the legislative history of Article 66 reflects Congress intended to bestow broad powers upon service courts, the legislative history also reflects a "congressional distinction between review of the lawfulness of a sentence and its appropriateness." United States v. Tardif, 57 M.J. 219, 223 (C.A.A.F. 2001) (citing S. Rep. No. 98-486, at 28 (1949)) ("The Board may set aside, on the basis of the record, any part of a sentence, either because it is illegal or because it is inappropriate."). The statute establishes a discretionary standard for sentence appropriateness relief for the Courts of Criminal Appeals. Gay, 75 M.J at 268 (citing United States v. Lacy, 50 M.J. 286, 288 (C.A.A.F. 1999)) (recognizing that

"the sentence review function of the Courts of Criminal Appeals is highly discretionary.").

As this Court recognized in Gay, when the Supreme Court reviewed the legislative history of Article 66, it "concluded that Congress intended the Boards of Review to affirm only so much of the sentence as they found to be 'justified by the whole record,' and to set aside all or part of a sentence, 'either because it is illegal or because it is inappropriate.'" Id. (citing Jackson v. Taylor, 353 U.S. 569 (1957)).

Similarly, this Court recently affirmed that service courts "may not consider anything outside of the 'entire record' when reviewing a sentence under Article 66(c), UCMJ." Jessie, 79 M.J. at 441 (citing United States v. Fagnan, 12 M.J. 192 (C.M.A. 1961)) ("If a CCA's review authority is limitless, then much of the restrictive wording in Article 66(c), UCMJ, would be superfluous."); *see also* Mackey v. Lanier Collection Agency & Serv., 486 U.S. 825, 837 (1988) (explaining that courts should be "Hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law."). As a part of its analysis in Jessie, this Court reviewed the plain language of Article 66(c), noting the following:

> First are the words specifying that a CCA can affirm only so much of a sentence that if finds "correct in law." These words prevent a CCA from affirming an unlawful sentence, such as one that violates the prohibition against

> cruel and unusual punishment in the Eighth Amendment and Unif. Code Mil. Justice art. 55, 10 U.S.C.S. § 855.
>
> Second are the words specifying that a CCA may affirm only so much of a sentence as it "determines . . . should be approved." Pursuant to these words, a CCA may not affirm any portion of a sentence that it finds excessive. Accordingly, the CCAs have broad discretionary power to review sentence appropriateness.
>
> Third are the words specifying that a CCA must review the sentence on the basis of the entire record.

Id. at 440. Consequently, this Court acknowledged the distinction between a sentence review based upon its "correctness in law" and a sentence review based on its appropriateness. This Court noted that a sentence review of a cruel and unusual punishment claim under the Eighth Amendment and Article 55, UCMJ, falls under service courts' mandate to review a sentence for "correctness in law," whereas a claim of an inappropriate sentence falls under service courts' discretionary review to "affirm only so much of a sentence as it determines . . . should be approved." Id. at 440. However, even so, this Court concluded that, "[t]he entire record restriction, under the grammar and punctuation of the second sentence, applies equally whether the CCA is reviewing a sentence's correctness in law, reviewing a sentence's correctness in fact, or determining whether a sentence should be approved." Id. at 444.

Although this Court held that the entire record restriction applies to both forms of sentencing review, this Court recognized that Eighth Amendment and

Article 55, UCMJ, claims are among the few classes of issues this Court's "precedents have allowed the CCAs to consider materials outside the record . . . even though those issues are not raised by anything in the record." Jessie, 79 M.J. at 445 ("Consistent with the Government's proposal for accommodating the discordant precedents, all we must decide today is that the practice of considering material outside the record should not be expanded beyond the context of Article 55, UCMJ, and the Eighth Amendment."); United States v. Erby, 54 M.J. 476, 478 (C.A.A.F. 2001). While the plain language of Article 66 does not allow for any exceptions to sentencing review for matters outside the record, this Court allowed a narrowly tailored exception for claims under the Eighth Amendment and Article 55, UCMJ. Jessie, 79 M.J. at 445. This Court made it clear that this exception was not to bleed into other types of sentencing reviews -- "CCA[s] [are] prohibited from allowing the parties to supplement the record except in those tightly circumscribed instances where the appellant raises Eighth Amendment and Article 55, UCMJ, claims." Id. at 445 (Judge Ohlson referencing the majority opinion in his dissent.). Consequently, this Court has never expanded this exception beyond Eighth Amendment or Article 55, UCMJ, claims, nor are there any reasons for this Court to further expand that exception to any other post-trial confinement claims, especially claims requesting discretionary review of a sentence.

Although this Court has acknowledged that CCAs do maintain broad, discretionary power to review sentence appropriateness claims, this Court has

never specifically permitted CCAs to review sentence appropriateness matters not included in the record. United States v. Kelly, 77 M.J. 404, 405 (C.A.A.F. 2018). While CCAs are permitted to review sentences under Article 66, UCMJ, within its discretion, CCAs do not have "unlimited authority to grant sentence appropriateness relief for any conditions of post-trial confinement of which they disapprove." Gay, 75 M.J. at 269 (discretion much be founded on a "legal deficiency in the post-trial process.").

In Gay, this Court held that the CCA "did not abuse its discretion when it exercised its Article 66(c) sentence reassessment authority for post-trial confinement conditions despite its conclusion that the conditions did not rise to a violation of the Eighth Amendment or Article 55[, UCMJ]." Id. at 268. However, the post-trial confinement matters to be considered were part of the record of trial because the appellant submitted them in his request for clemency to the convening authority. Id. at 265–66. Thus, as this Court affirmed in Towns, Fagnan, and Jessie, CCAs' sentence appropriateness review is limited to the entire record, thereby limiting review to "claims based on post-trial treatment that occurs prior to the action of the convening authority and which is documented in the record of trial." United States v. Towns, 52 M.J. 830, 833 (A.F. Ct. Crim. App. 2000) (citing Article 66(c), UCMJ), aff'd, 55 M.J. 361 (C.A.A.F. 2001) (mem.); Jessie, 79 M.J at 440; Fagnan, 30 C.M.R. at 192.

This Court has always precluded CCAs from "considering extra record matters when making [a] determination[] of . . . sentence appropriateness" and also has a long history of precluding evidence not introduced at trial from being considered by CCAs during appellate review. United States v. Holt, 58 M.J. 227, 232 (C.A.A.F. 2003) (holding that CCA could not consider excluded evidence during its appellate review under Article 66(c)); *see* United States v Starr, 1 M.J. 186, 189-90 (C.M.A. 1975) (CCAs are precluded from considering evidence excluded at trial in performing their appellate review function under Article 66(c)); United States v. Reed, 54 M.J. 37, 43 (C.A.A.F. 2000) (CCAs are precluded from considering evidence not introduced at trial); *see also* United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993) (noting "It is well established that a Court of Military Review's assessment of appellant's guilt or innocence for legal and factual sufficiency is limited to the evidence presented at trial."); United States v. Bethea, 22 U.S.C.M.A. 223, 224-25, 46 C.M.R. 223, 224-25 (1973) (The courts of military review were precluded from considering "extrajudicial hearsay matters that were neither brought up in the trial nor considered by the convening authority in his action.") Thus, this Court should continue its long-standing history of limiting CCAs' appellate review to the "entire record."

Therefore, based on the plain language of Article 66(c) and this Court's consistent precedent, CCAs do not maintain authority to review matters outside the record for post-trial confinement claims pursued under Article 66(c).

B. The Military Justice Act of 2016 neither changed the essential language of Article 66(c), UCMJ, nor the congressional intent behind its text.

Appellant argues that in light of the unique nature of post-trial confinement claims and the new court-martial rules of procedure, CCAs should not be limited to review only material contained or referenced in the record. (App. Br. at 20-21.) However, that is not the granted issue before this Court. The granted issue refers only to Article 66(c), as it existed prior to any post-trial procedural changes from the Military Justice Act of 2016.

Despite this, Appellant argues that under the new rules, there is now a greater chance that certain sentencing issues will not arise until after the convening authority has acted. He specifically points to several changes in the R.C.M. – e.g. the convening authority is no longer permitted to modify a punitive discharge or a sentence to confinement in some cases, and a convening authority need not even take action on the findings or sentence for courts-martial – as reasons to no longer follow the rule this Court affirmed in Jessie. Appellant cites to Judge Meginley's concerns:

> [T]he time to include post-trial matters in the record is nearly irrelevant; gone are the days when an appellant could be in confinement for months before action. Now, depending on how quickly a legal office can process a record, entry of judgment can take place in a matter of days.

(App. Br. at 20.) Although Appellant makes policy arguments centered on the procedural changes from the MJA, his post-trial confinement claim remains unaffected by Judge Meginley's concerns or any of these changes.

However, assuming, *arguendo*, Appellant's post-trial confinement claim was affected by these changes, this Court has emphasized that "policy arguments should not guide [its'] decision in [Jessie] because the text of Article 66(c), UCMJ, does not permit the CCAs to consider matters that are outside the entire record." Jessie, 79 M.J. at 445 (citing Universal Health Servs. v. United States, 136 S. Ct. 1989 (2016)) (explaining that "policy arguments cannot supersede the clear statutory text"). This Court further instructed that policy arguments may guide Congress and the President in the future if they choose to revise Article 66(c), UCMJ, but this Court would not supersede the statutory text with policy arguments. Id.

Further, despite any of the new procedural changes with the passage of the MJA, the text of Article 66(c) remains essentially the same. Appellant argues that the amended R.C.M.1106's shortened timeline for an accused to submit clemency matters to the convening authority and the convening authority's limited ability to take action, make including post-trial confinement matters in the record impracticable and inconvenient. (App. Br. at 20-21.) Although Congress made some significant changes to post-trial procedure, it made particularly insignificant changes to the language of Article 66(c). Article 66(c)'s language has changed

from "with respect to the findings and sentence as approved by the convening authority" to Article 66(d) stating, "with respect to the findings and sentence as entered into the record under section 860(c) of this title." This language is substantially similar and seemingly indicates that CCAs' review is still limited to findings and sentences as adjudged – the only change being that review is now based on what has been entered into the entry of judgment, rather than on what has been approved by the convening authority. This slight alteration suggests that Congress contemplated its new rules of post-trial procedures, but still chose to limit CCAs' power to review findings and sentences as "entered into the record." Article 60(c)(a) MCM (2019 ed.). Thus, Congress demonstrated that it had no intention to remove the requirement that post-trial confinement claims need to be included in the record in order to be considered by the CCAs during their Article 66 review.

Therefore, this Court should not allow CCAs to conduct sentencing review under Article 66(c) for post-trial confinement matters not included in the record.

II. Appellant's declaration never became a part of the record to be considered by AFCCA during its review of Appellant's sentence under Article 66(c).

Appellant claims that when AFCCA granted Appellant's motion to attach his declaration to the record of trial, it made his confinement conditions a part of the entire record. (App. Br. at 11.) Appellant acknowledges that Jessie precludes service courts from considering materials from outside the record of trial, except

for matters relating to Eighth Amendment and Article 55, UCMJ, claims. (App. Br. at 11.) Yet he claims that Jessie does not prohibit sentence appropriateness reviews under Article 66(c) emanating from cruel and unusual punishment allegations. (Id.) This, however, is in direct conflict with Jessie, which held that "if military justice proceedings are to be 'truly judicial in nature,' then the appellate courts cannot 'consider information relating to the appropriateness of sentences when it has theretofore formed no part of the record.'" Jessie, 79 M.J. at 441. (quoting Fagnan, 30 C.M.R. at 195).

Appellant's argues that his declaration is now part of the record that AFCCA can consider for a sentence appropriateness review because AFCCA granted his motion to attach in order to review his claim of an Eighth Amendment and Article 55, UCMJ, violation. But this claim is misguided. The 'record of trial' contains all of the items listed in R.C.M. 1103(b)(2), and the "'allied papers' are identified as 'matters attached to the record' in accordance with R.C.M. 1103(b)(3)." Jessie, 79 M.J. at 440-441. This Court added that "the 'entire record' also includes briefs and arguments that government and defense counsel might present *regarding* matters in the record of trial and allied papers." Id.

Appellant's declaration about his post-trial confinement conditions is not an item listed in R.C.M. 1103(b)(2) or R.C.M. 1103(b)(3), nor does it constitute a brief or argument regarding matters in the record of trial and 'allied papers.' Jessie, 79 M.J. at 440-441. While this Court has affirmed that claims asserted under the

Eighth Amendment and Article 55, UCMJ, fall within a "limited class of issues," which do not need to be referenced in the record, it has not expanded that limited class to include post-trial confinement claims considered under Article 66(c). Jessie, 79 M.J. at 440. Appellant cannot make a claim that falls within a "limited class of issues" as a way to get around the requirement that his matter be included in the record for a sentence review under Article 66(c). If that were possible, it would make this Court's ruling in Jessie obsolete.

Further, Appellant's argument as to what constitutes the 'entire record' is not aligned with congressional intent. Close in time to when Congress drafted Article 66(c), this Court noted that Congress intended CCAs to review as part of the entire record, statement of matters considered by the convening authority in his action on sentence. United States v. Lanford, 6 C.M.R. 87 (C.M.A. 1955). In determining Congress' intent of what constitutes the 'record,' this Court noted the following:

> Although the Code provides a means after trial for an accused to get clemency-oriented information into the "record" prior to action by the convening authority and thereby can bring this information to the attention of the Court of Military Review, the Code does not provide an opportunity for the accused and his counsel to supplement the 'record' after the convening authority has acted. We infer from this omission that Congress never intended that a Court of Military Review would be under any duty to receive additional information on sentencing after the convening authority had acted.

United States v. Healy, 26 M.J. 394, 396 (C.M.A. 1988). Thus, Congress never intended to expand the 'record' to include additional information on sentencing matters after action by the convening authority. This is also consistent with the plain language of Article 66(c), which states that a "Court of Criminal Appeals may act only with respect to the findings and sentence *as approved by the convening authority.*" (emphasis added). This plain language supports that a court of criminal appeals has no authority to act with respect to sentencing matters that arise after the convening authority has taken action on the sentence.

Acknowledging that Congress has since removed any reference to the convening authority taking action in Article 66(c), this Court can infer that by replacing that language with "as entered into the record under section 860c," Congress now intends to limit the record instead to everything included up until the entry of judgment. Thus, it is evident that Congress intended the 'record' to be limited, because it did not bestow unlimited review of clemency matters upon service courts, and it used limiting language in Article 66(c) to prevent CCAs from evolving into courts of equity or clemency. *See* Towns, 52 M.J. at 833 (quoting Healy, 26 M.J. at 395-396) (The "exercise of our judicial powers is limited to ensuring justice is done, which does not extend to the exercise of clemency.").

Appellant's declaration never became part of the record despite the fact that he had an opportunity to include it in the record. A month after Appellant's two medical visits for his toe, on 27 February 2019, Appellant waived his right to

submit matters for clemency to the convening authority. (JA 066.) Despite his ripe claim for clemency, he chose to waive his opportunity to submit matters for clemency, and consequently, lose his opportunity to include that matter in the record. This Court recognized that while CCAs maintain broad authority to review the appropriateness of adjudged and approved sentences under Article 66(c), UCMJ, that authority is based on the review of the "entire record," which includes matters submitted to the convening authority for clemency purposes. Gay, 74 M.J. at 742 (citing Towns, 52 M.J. at 833). Thus, while Appellant was not precluded from bringing his post-trial confinement issue to AFCCA, AFCCA was precluded from conducting its' sentencing review under Article 66(c) on the issue as it was not included in the "entire record."

Had Appellant's medical treatment truly rendered his sentence inappropriately severe, it would have been readily apparent or recognizable to Appellant at the time of his treatment. Yet, it is readily apparent that Appellant made no attempt to include this claim in his request for clemency to the convening authority, and Appellant failed to raise any complaint of any kind during his period of confinement. Instead, Appellant waited until he appealed, which happened to be a month after he was released from confinement. (JA 009 & JA 058.)

Therefore, based on the reasons above, Appellant's declaration never became a part of the record to be considered by AFCCA for sentencing review under Article 66(c).

III. From both a plain language and policy perspective, military appellate courts are the wrong forum for Appellant's complaint.

As described above, the plain language of Article 66(c) supports that the courts of criminal appeals are not the appropriate forum to litigate the propriety of sentencing conditions that arise after the convening authority acts on the sentence. Although in Jessie, this Court declined to consider policy arguments because the text of Article 66 was clear, policy considerations in this case do support the plain language reading of Article 66.

Service courts are not well equipped to appropriately respond to each and every manner of prisoner complaint. *See* Bell v. Wolfish, 441 U.S. 520, 531, 544 (1979) ("courts are ill equipped to deal with the increasingly urgent problems of prison administration" and "it would 'not [be] wise for [it] to second-guess the expert administrators on matters on which they are better informed.'") (citations omitted) (alterations in original); Overton v. Bazzetta, 539 U.S. 126, 132 (2003) (Courts "accord substantial deference to the professional judgment of prison administrators."); Beard v. Banks, 548 U.S. 521, 536 (2006) ("Judicial scrutiny of prison regulations is an endeavor fraught with peril.") (Thomas, J., concurring); United States v. Jessie, 2018 CCA LEXIS 609, at *13–15 (A. Ct. Crim. App. 2018) ("Our Article 66(c) sentence appropriateness power is a poor tool for such an endeavor . . . were we to act on Appellant's claim, we would be at the outer edge of our authorizing statute.").

"As an Article I Court, and thus a creature of Congress," there is no certainty that military courts were intended to "oversee the conduct of prison affairs at any institution wherein a post-trial conviction military prisoner is housed." United States v. Haymaker, 46 M.J. 757 (A.F. Ct. Crim. App. 1997) (declining to consider a request for sentence reassessment for a post-trial confinement complaint beyond a claim amounting to a cruel and unusual punishment, explaining "to achieve a remedy tailored to the specific inadequacy alleged, the complaint should be brought to the forum or tribunal best positioned to do so.")

Allowing appellants to raise post-trial confinement conditions entirely outside the record creates a significant burden upon CCAs. For example, since January 2019, AFCCA has dealt with 25 post-trial confinement claims of Eighth Amendment and Article 55, UCMJ, and 20 post-trial confinement claims under Article 66(c)[3] The need for AFCCA to explore and resolve these claims extends the time period necessary for appellate review and slows down AFCCA's efforts to move expeditiously through its docket. *See* United States v. Ferrando, 77 M.J. 506, 517 (A.F. Ct. Crim. App. 2017) (reminding appellants that relief will only be granted in rare circumstances based on legal deficiencies and that "we are not a clearing house for post-trial confinement complaints or grievances").

[3] See Appendix A.

Article III Courts, however, are more reasonably situated to fashion appropriate remedies for confinement claims such as Appellant's since they actually have the ability to provide equitable relief. Haymaker, 46 M.J at 9 (citing Farmer v. Brennan, 511 U.S. 825 (1994) (damages and injunction sought under authority of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971); Bounds v. Smith, 430 U.S. 817 (1977) (request for injunction ordering prison officials to devise constitutionally sound program to assure inmates access to courts.)).

While military prisoners are not necessarily afforded a civil remedy under 42 U.S.C. §§ 1983 and 1985, or the Federal Tort Claims Act, 28 U.S.C. §§ 1346 and 2671, *see* United States v. Miller, 46 M.J. 248, 250 (C.A.A.F. 1997), military prisoners are still free to access Article III courts to seek injunctive or declaratory relief for oppressive prison conditions. *See also* Walden v. Bartlett, 840 F.2d 771, 774–75 (10th Cir. 1988) (military prisoners are free to access Article III courts to seek injunctive or declaratory relief for oppressive prison conditions); Chappell v. Wallace, 462 U.S. 296, 304 (1983) ("This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service.") (citations omitted).

Furthermore, unlike military courts, Article III courts are statutorily empowered to "grant the sort of declarative, equitable, systemic relief appropriate

to remedy meritorious prisoner complaints." Haymaker, 46 M.J. at 9. However, even so, the Supreme Court has cautioned Article III courts from getting too involved into the management of correctional institutions. *See* Lewis v. Casey, 518 U.S. 343 (1996) (citing Bell v. Wolfish, 441 U.S. at 520 ("our opinions have lamented as a court's "in the name of the Constitution, becoming . . . enmeshed in the minutiae of prison operations.""); Turner v. Safley, 482 U.S. 78, 89 (1987) (prison administrators, not the courts, are to make difficult judgments concerning institutional operations). This admonition provides even more reason why the CCAs should follow the plain language of Article 66, and limit their involvement in post-trial confinement condition solely to those matters raised by the record of trial itself.

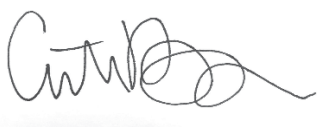
To the extent Appellant's allegedly inadequate medical treatment may have caused him some amount of harm, the appropriate relief was never a decrease in his adjudged and approved sentence, but rather the adequate medical treatment he desired. However, specific to this case, Appellant made no attempt to seek relief from the confinement facility for his medical treatment – the entity that could have best addressed his concerns in a timely manner. Inmates should not be incentivized to delay addressing their concerns at the lowest level, in the hope that a CCA will later grant them time off their confinement sentence.

In conclusion, the Court should reaffirm its ruling in Jessie, which precludes CCA from reviewing post-trial confinement claims pursuant to its discretion to

review sentences under Article 66(c) when there is no reference to the matter in the record. Additionally, the Government asks this Court to deny Appellant's request to provide a prospective ruling to this case, should this Court deny his request to allow CCAs to consider matters outside the record for sentencing review under Article 66(c). There is no precedent where this Court has held that CCAs could look to matters outside the entire record for post-trial confinement claims reviewed under Article 66(c) outside the context of the Eighth Amendment and Article 55, UCMJ. In fact, in Fagan this Court held otherwise, stating, "a board of review is limited in its consideration of information relating to the appropriateness of sentence to matters included in the entire record." 12 U.S.C.M.A. at 195. Further, even prior to this Court's ruling in Jessie, the plain language of Article 66(c) was clear – CCAs cannot consider matters outside the record for their sentence review under Article 66(c).

CONCLUSION

WHEREFORE the United States respectfully requests this Honorable Court deny Appellant's requested relief and affirm the decision of Air Force Court of Criminal Appeals



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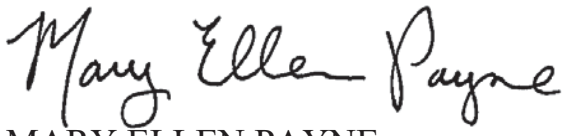

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 24 February 2021.

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/s/

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Attorney for USAF, Government Trial and Appellate Counsel Division

Date: 24 February 2021

Appendix A

AFCCA opinions dealing with Eighth Amendment and Article 55, UCMJ, claims:

2019-Present:

1. United States v. Kane, 2020 CCA LEXIS 275 (A.F. Ct. Crim. App. 20 August 2020)
2. United States v. Lawler, 2020 CCA LEXIS 186 (A.F. Ct. Crim. App. 28 May 2020)
3. United States v. Lopez, 2020 CCA LEXIS 439 (A. F. Ct. Crim. App. 8 December 2020)
4. United States v. Damm, 2019 CCA LEXIS 283 (A.F. Ct. Crim. App. 21 Jun. 19)
5. United States v. Grigger, 2019 CCA LEXIS 243 (A.F. Ct. Crim. App. 3 Jun. 19)
6. United States v. Defalco, 2020 CCA LEXIS 164 (A.F. Ct. Crim. App. 21 May 20)
7. United States v. Frantz, 2020 CCA LEXIS 404 (A.F. Ct. Crim. App. 10 Nov. 20)
8. United States v. O'Bryan III, 2020 CCA LEXIS 211 (A.F. Ct. Crim. App. 24 June 2020)
9. United States v. Burrell, 2019 CCA LEXIS 371 (A.F. Ct. Crim. App. 12 September 2019)
10. United States v. Cink, 2020 CCA LEXIS 208 (A.F. Ct. Crim. App. 12 June 2020)
11. United States v. Aumont, 2020 CCA LEXIS 416 (A.F. Ct. Crim. App. 20 Nov. 2020)
12. United States v. McPhatter, 2019 CCA LEXIS 262 (A.F. Ct. Crim. App. 18 June 2019)
13. United States v. Massillon, 2020 CCA LEXIS 345 (A.F. Ct. Crim. App. 28 September 2020)
14. United States v. Matthews, 2020 CCA LEXIS 193 (A.F. Ct. Crim. App. 2 June 2020)
15. United States v. Meier, 2020 CCA LEXIS 464 (A.F. Ct. Crim. App. 15 December 2020)
16. United States v. Monroe, 2020 CCA LEXIS 108 (A.F. Ct. Crim. App. 10 April 2020)
17. United States v. Woods, 2019 CCA LEXIS 309 (A.F. Ct. Crim. App. 26 July 2019)
18. United States v. Zegarrundo, 2019 CCA LEXIS 250 (A.F. Ct. Crim. App. 13 June 2019)
19. United States v. Turner, 2020 CCA LEXIS 428 (A.F. Ct. Crim. App. 25 November 2020)

20. United States v. Warren, 2020 CCA LEXIS 59 (A.F. Ct. Crim. App. 28 February 2020)
21. United States v. Willman, 2020 CCA LEXIS 300 (A.F. Ct. Crim. App. 2 September 2020)
22. United States v. Hernandez, 2020 CCA LEXIS 362 (A.F. Ct. Crim. App. 8 Oct. 2020)
23. United States v. Haggart, 2020 CCA LEXIS 212 (A.F. Ct. Crim. App. 24 June 2020)
24. United States v. Walker, 2021 CCA LEXIS 14 (A.F. Ct. Crim. App. 19 January 2021)
25. United States v. Merritt, 2021 CCA LEXIS 61 (A.F. Ct. Crim. App. 11 June 2021)

AFCCA opinions dealing with Article 66, UCMJ, post-trial confinement claims:

2019-Present:

1. United States v. Buford, 2020 CCA Lexis 78 (A.F. Ct. Crim. App. 9 March 2020)
2. United States v. Cook, 2019 CCA LEXIS 91 (A.F. Ct. Crim. App. 4 March 2019)
3. United States v. Leidigh, 2019 CCA LEXIS 189 (A.F. Ct. Crim. App. 30 April 2019)
4. United States v. Lawler, 2020 CCA LEXIS 186 (A.F. Ct. Crim. App. 28 May 2020)
5. United States v. Damm, 2019 CCA LEXIS 283 (A.F. Ct. Crim. App. 21 Jun. 19)
6. United States v. Defalco, 2020 CCA LEXIS 164 (A.F. Ct. Crim. App. 21 May 20)
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10. United States v. Cink, 2020 CCA LEXIS 208 (A.F. Ct. Crim. App. 12 June 2020)
11. United States v. Citsay, 2020 CCA LEXIS 453 (A.F. Ct. Crim. App. 18 December 2020)
12. United States v. Macaluso, 2020 CCA LEXIS 171 (A.F. Ct. Crim. App. 27 May 2020)
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