IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v. Master Sergeant (E-8) **ANDREW D. STEELE,** United States Army Appellant	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20170303 USCA Dkt. No. _22-0254/AR

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UNITED STATES SUPREME COURT

COURT OF APPEALS FOR THE ARMED FORCES

STATUTES

Issue Granted

WHETHER THE ARMY COURT IMPROPERLY APPLIED A FEDERAL HABEAS STANDARD THAT IS INCONSISTENT WITH ARTICLE 66, UCMJ, IN FINDING APPELLANT FORFEITED REVIEW OF HIS CLAIM.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ.

Statement of the Case

On March 2, April 21, May 16-19, and October 4, 2017, a military judge, sitting as a general court-martial, convicted Master Sergeant (MSG) Andrew D. Steele (Appellant), pursuant to his pleas, of one specification of violating a lawful general order and one specification of fraternization in violation of Articles 92 and 134, UCMJ. (JA 003). Contrary to Appellant's pleas, the military judge also convicted Appellant of one specification of indecent exposure and one specification of disorderly conduct in violation of Articles 120c and 134, UCMJ (2012). (JA 003). The military judge sentenced Appellant to reduction to E-3 and a bad-conduct discharge. The convening authority approved the adjudged findings and sentence. (JA 003).

On March 5, 2019, the Army Court affirmed the findings, but set aside the sentence because the Government could not provide a verbatim transcript. The Army Court authorized a sentence rehearing. (JA 009).

On January 23, April 3, September 8, September 25, and October 21-23, 2020, a panel with enlisted representation sentenced Appellant to a reduction to E-5. (JA 011). On May 6, 2021, the convening authority approved the adjudged sentence.

On June 9, 2022, in a published opinion, the Army Court affirmed the findings of guilty and sentence.

Summary of Argument

By applying a cause and prejudice standard to considering issues raised after a case is returned to the trial court, the Army Court created an unduly burdensome and exclusionary standard that cannot be reconciled with the wide-ranging scope and intent of Article 66, UCMJ. Congress directly addressed exactly what service courts are supposed to do, and how they are supposed to do it – they are mandated to approve only those convictions that are correct in law and fact and should be approved. Federal habeas analysis is inappropriate for an Article 66, UCMJ direct appeal. If Congress wanted to apply a federal habeas corpus review – or any other standard of review – for sentence rehearings, it could have done so. However,

nothing in the UCMJ suggests that habeas standards should apply to direct Article 66 appeals.

Further, the federal habeas "cause and prejudice" standard was never intended to ensure the result of a trial was correct in law and fact. Congress limits habeas relief to only those cases that were decided based on an unreasonable application of clearly established federal law, as determined by the Supreme Court, or was the result of an unreasonable determination based on the evidence in a state court. 28 U.S.C. 2254(d). *See also United States v. Loving*, 64 M.J. 132, 145 (C.A.A.F. 2006). The very narrow limits of a habeas standard for review is the antithesis of the "awesome, plenary, and de novo" review envisioned by Congress in Article 66 to ensure that a conviction is correct in law and fact.

Additionally, the Army Court erred in failing to evaluate Appellant's case pursuant to Article 66, UCMJ, because the Army Court could not have completed its Article 66 review until after remand. In this case, due to the lack of a verbatim transcript, the Army Court was unable to complete its review. Instead of recognizing this fact, and despite the fact that this case was on direct appeal under Article 66, the Army Court imported the "cause and prejudice" standard that federal courts apply for collateral review pursuant to 28 U.S.C. §2255, and refused to consider Appellant's constitutional claim. (JA 015) *citing Murray v. Carrier*, 477 U.S. 478, 488 (1986); *United States v. Kovic*, 830 F.3d 680, 684 (7th Cir.

1987); *United States v. Frady*, 456 U.S. 152, 152, 172 (1982). None of the cases cited by the Army Court is a direct appeal of a federal case.

By remanding the case for a sentence rehearing, the Army Court retained its obligation to review whether the results, in its entirety, were just. *United States v. Davis*, 63 M.J. 171, 177 (C.A.A.F. 2006). The Army Court had continuing jurisdiction. *Id.* Continuing jurisdiction provides that a "rehearing relates back to the initial trial and to the appellate court's responsibility to ensure that the results of a trial are just." *Id.* This review includes the entire record of trial, not only selected portions of a record or allegations of error alone." *Chin*, 75 M.J. at 222 (noting that even waived issues may be reviewed under the Article 66, UCMJ mandate).

Because the Army Court abdicated its responsibility under Article 66 and refused to review Appellant's constitutional and legal sufficiency claims, this case must be remanded for that court's consideration of these claims. As it did in this case, the Army Court cannot conduct a piecemeal Article 66 review. The Article 66 mandate contained in the UCMJ is unique to American judicial systems, and by imposing an extremely narrow "standard of last resort" reserved for federal habeas petitions, the Army Court has unduly restricted its own Article 66 review authority.

Statement of Facts

Appellant initially claimed the record in his case was not substantially verbatim, and that his conviction for indecent exposure was both factually and legally insufficient. (JA 011). The Army Court rejected the sufficiency claims, but finding the record was not verbatim, sent Appellant's case back to the convening authority for either a sentencing rehearing or approval of a sentence that did not result in a punitive discharge. (JA 009).

On appeal and after remand, while the Army Court still had jurisdiction for direct review, Appellant claimed his conviction for indecent exposure must be set aside because Article 120c includes terms that are unconstitutionally vague and overbroad. (JA 011). The Army Court found Appellant forfeited his assigned error by failing to raise it before the Army Court when he raised the issue of an incomplete record. (JA 016).

The Army Court refused to even consider Appellant's constitutional claim because, in its view, Appellant failed to show either "good cause for his failure to raise his new claim in his first appeal, nor that he would suffer actual prejudice or manifest injustice based on his new claim. . . ." (JA 016). The Army Court recognized, "[i]n the normal course of review" it would be mandated, pursuant to Article 66, UCMJ, to approve only the findings and sentence it found correct in law and fact. (JA 012).

The Court noted, "[i]n addition to this plenary appellate review under Article 66, a non-trivial number of appeals" return to the Army Court following remand to the convening authority or following remand by this Court to the Army Court. (JA 012). The Army Court recognized that in some cases appellants advance new claims on appeal, and the Court likewise recognized that, in some circumstances, it had entertained those new appeals, and in other cases it had not. (JA 012).

Granted Issue

WHETHER THE ARMY COURT IMPROPERLY APPLIED A FEDERAL HABEAS STANDARD THAT IS INCONSISTENT WITH ARTICLE 66, UCMJ, IN FINDING APPELLANT FORFEITED REVIEW OF HIS CLAIM.

Standard of Review

This Court applies a *de novo* standard of review to questions of law. *United States v. Inabinette,* 66 M.J. 320 (C.A.A.F. 2008).

Law

Article 66, UCMJ mandates that a service court of criminal appeals (CCA) affirm only the findings and sentences that the court finds correct in law and fact, *and* determines on the basis of the *entire* record, should be approved. To accomplish this mission, CCAs are afforded "awesome, plenary, de novo power of review" from Article 66. *United States v. Cole,* 31 M.J. 270, 272 (C.M.A. 1990). A complete Article 66 review is a "substantial right" of an accused. *United States*

v. Swift, 76 M.J. 210 (C.A.A.F. 2017) *citing United States v. Jenkins,* 60 M.J. 27, 30 (C.A.A.F. 2004).

In *United States v. Chin*, this Court made clear the service courts are *commanded* by statute to review the *entire* record and "approve only that which 'should be approved.'" 75 M.J. 220, 222 (C.A.A.F. 2016); *see United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); Article 66c, UCMJ (service courts "may affirm only such findings of guilty as the Court finds correct in law, and in fact and determines, on the basis of the entire record, should be approved."). This distinction sets service courts apart from all other federal appellate courts, even to the extent service courts may review the record unconstrained by an appellant's assignments of error. *United States v. Roach*, 66 M.J. 410, 414 (C.A.A.F. 2008).

A review of the findings by a CCA is limited to the evidence presented at trial. *United States v. Beatty,* 64 M.J. 456 (C.A.A.F. 2007) *citing United States v. Duffy,* 11 C.M.R. 20, 23 (1953). In contrast, a review of sentence appropriateness includes "not only evidence admitted at trial, but also the matters considered by the convening authority in his action on the sentence." *Id. citing United States v. Bethea,* 46 C.M.R. 223, 224-225 (1973).

On the other hand, habeas corpus review serves a vastly different purpose. "The historical role of the writ of habeas corpus [is that of] an effective and imperative remedy for detentions contrary to fundamental law." *Fay v. Noia,* 372

U.S. 391 at 439 (1963). The "cause and prejudice" standard was derived to prevent "an endless cycle of petition and re-petition by prisoners with nothing but time on their hands." *Edwards v. Vannoy,* 141 S. Ct. 1547 (2021) *citing McCleskey v. Zant,* 499 U.S. 467 (1991). By definition, the "cause and prejudice" standard is designed to *follow* a completed direct appellate review. Cause and prejudice involves a two-part analysis: first, "cause requires a petitioner to show some objective factor external to the defense impeded counsel's efforts' to raise the claim in state court." *Murray v. Carrier,* 477 U.S. 478, 488, (1986) (cleaned up). After cause is established, a petitioner must then show actual prejudice resulting from the newly assigned error. *McCleskey v. Zant,* 499 U.S. 467, 491 (1991). The one exception to the cause and prejudice exclusionary standard involves "extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime. We have described this class of cases as implicating a fundamental miscarriage of justice." *Id.*

Argument

In refusing to entertain Appellant's constitutional and legal sufficiency claims, the Army Court applied a federal habeas "cause and prejudice" standard.

A. The Army Court Cannot Tie its Own Hands.

By imposing such an unduly strict standard for an appellate court of first review, the Army Court diluted its wide-ranging and awesome plenary review

obligation by creating an extraordinarily high barrier to review additional errors raised while the Court retains continuing jurisdiction. The CCAs are certainly able to create reasonable administrative or technical guidelines for counsel on what an appellate brief should look like before a court of first review. But they cannot abrogate their responsibility under Article 66 by instituting an unreasonably stringent standard like the cause and prejudice habeas standard.

The civilian appellate system has no equivalent to Article 66, UCMJ. The CCAs are obligated to review each case for factual and legal sufficiency and sentence appropriateness because the history of this system is far more paternalistic in construct and action than its civilian counterparts. This Court and the CCAs "accept an appellant's petition on its merits; we listen to issues raised personally by an appellant; and we specify issues form time-to-time, issues not raised by appellate counsel." *United States v. Johnson,* 42 M.J. 443 at 447 (C.A.A.F. 1995).

Imposing such a strict standard like the cause and prejudice habeas standard discounts the frequent turnover in counsel that an appellant may experience during the appellate process, as appellant did in this case[1]. Further, it risks a "potted plant role for appellate counsel with regard to new issues." *Id.* at 446. In sum, this Court and the CCAs are far more concerned with the end result for a

[1] Appellant is currently on his third detailed appellate defense counsel, due to normal personnel rotations and assignment cycles.

servicemember than they are with the procedure. The Army Court should share that noble goal.

B. The Army Court Cannot Complete Plenary Review on an Incomplete Record.

The Army Court acknowledged its obligation to conduct a plenary review under Article 66, but cited to *United States v. Smith* to support the notion an appellant is only entitled to one such review, and that such review was *complete* before they remanded the case to the convening authority. *United States v. Smith*, 41 MJ 385 (C.A.A.F. 1995); (JA 012). The Army Court placed emphasis on this Court's opinion in *Smith*, which found that the Army Court did not abuse its discretion in rejecting additional assignments of error after this Court remanded the case back down to the Army Court for a limited and narrow purpose. *Id.*

The question unanswered in *Smith,* but presented by this case, is whether a CCA can conduct a plenary review on an incomplete record and then refuse to address issues following a completion of the record on remand from the trial court.

The next question is, after receiving the case back from the trial court, can a CCA impose an unduly burdensome test to determine whether additional consideration of new issues is warranted? This case significantly differs from *Smith* in that this case involved a remand to the trial court due to an incomplete record for sentencing – this means that the CCA should not, indeed could not, have performed its Article 66 review prior to remand because it did not possess a

complete verbatim record and it could not evaluate the appropriateness of the sentence. In other words, contrary to its foundational belief, its Article 66 mandate is not satisfied absent a wholly verbatim record. This case differs significantly from circumstances, such as *Smith*, where a CCA completes a full Article 66 review of a verbatim record, and then *this* Court remands a case to a CCA, and the CCA declines to consider issues outside of the remand order. *See United States v. Montesinos,* 28 M.J. 38 (C.M.A. 1989) (finding that when the Court of Military Appeals remands a case to a service court that court can only take action that conforms to the remand order). In those cases, a full Article 66 review was complete – not so in the instant case.

In finding Appellant was not entitled to a complete Article 66 review unless he satisfied the federal habeas standard, the Army Court ignored two important distinctions. The first distinction is the difference between a remand from this Court and a remand from the CCA back down to a trial court. The second distinction is whether the Article 66 plenary review can be started before the CCA receives the case back from the trial court on remand.

When a case is remanded from this Court to a CCA, there is always a condition precedent: the completion of an original Article 66 review by that same CCA before the case advanced to this Court. The purpose of a remand from this Court is usually limited in scope and intent. In contrast, when a CCA remands a

case to the trial court, additional facts and evidence obtained become part of the record. Then the entire record (both old and new) must be considered by the CCA for it to perform a true and complete Article 66 review. In its decision requiring Appellant to establish that a new issue merits review under the cause and prejudice standard, the Army Court diluted its obligation to review qualifying cases pursuant to Article 66.

The Army Court reasoned that the "cause and prejudice" standard it imported from federal habeas caselaw will incentivize appellate counsel to raise all relevant issues at the outset of the appellate process. First, if that is the correct policy goal, that should be articulated by Congress in the UCMJ, not directed by judicial decree. Second, Article 66 review is vastly different than that employed in federal habeas review.

The service courts have an obligation to affirm only that which is correct in law and fact and is appropriate in sentence. This obligation is independent of any issues appellate counsel might raise as an assignment of error. No state or federal court has a similar obligation to independently review a record for sufficiency or sentence appropriateness. This independent obligation does not comport with an unduly burdensome and strict standard for reviewing remanded cases like the cause and prejudice habeas standard, because it cannot be reconciled with the mandate to

review both the findings and sentence of every qualifying case, regardless of issues raised or identified by appellate counsel.

C. The Cause and Prejudice Standard is a Solution in Search of a Problem that Does Not Exist.

Avoiding "piecemeal" litigation and compelling appellate counsel to include all issues in their initial address to the CCA sounds laudable, but is it necessary? And is the "cause and prejudice" test the best way to accomplish that goal? The answer to both questions is "no." A much simpler rule would be for CCAs who order a trial court to conduct additional fact finding or additional proceedings to not begin or conduct their Article 66 review until the record, *in its entirety*, is complete. This would not limit the CCAs authority to order evidentiary hearings, or remand cases back to the convening authority for additional action. Further, remands are not so prevalent in the military justice system that a drastic and burdensome departure from the well-established Article 66 standard is necessary.

The problem in this case is one of the Army Court's own making; the Court conducted a piecemeal Article 66 review in a case where it also found a legal error necessitating remand, preventing a complete review. The Army Court's reliance on *Shavrnoch* ignores the important distinction between remands from this Court and remands from a CCA. In *Shavrnoch,* the CCA was directed by this Court to reconsider an *already complete* record, which had passed through an *already complete* Article 66 review. 47 M.J. 564.

In this case, the CCA opted to give the convening authority the opportunity to add to the record after the court claimed its Article 66 review was complete, and then declined to consider the constitutional challenge to Article 120c under its Article 66 authority. Indeed, the Army Court was responsible for creating the piecemeal litigation, when the appropriate thing to do was return the case to correct the error and *then* conduct its Article 66 review only when the record was complete.

D. The Adoption of a "Cause and Prejudice" Standard Does Not Harmonize with the Unique Mandate of Article 66.

Article 66, which mandates a complete review, and the habeas "cause and prejudice" standard, designed to prohibit additional review absent extraordinary circumstances, are plainly incompatible due to its intent and effect. The cause and prejudice standard applies to a review of last resort occurring only *after* a full direct appellate review has *already occurred*. In *Edwards v. Carpenter,* the Supreme Court detailed the numerous state appellate courts and reviews conducted *before* a federal writ of habeas corpus is filed. 529 U.S. 446 (2000).

Further, the cause and prejudice standard is an intentionally high bar because, absent extraordinary circumstances, federal courts recognize the desire to avoid intervening in state courts. The only exception to the cause and prejudice standard is for an appellant to establish actual innocence, and that his conviction resulted in a miscarriage of justice. This is an extreme standard for a reason – by

the time inmate is seeking a writ of habeas corpus, multiple appellate courts have heard and decided the merits of the case. This stands in direct contrast to the Army Court that functions as an appellate court of first, and full, review.

In *Dretke v. Haley* the Supreme Court determined the "cause and prejudice requirement shows due regard for states' finality and comity interests while ensuring that fundamental fairness remains the central concern of the writ of habeas corpus." 541 U.S. 386 (2004). The cause and prejudice standard is an extraordinary standard designed to only address extraordinary circumstances. Article 66 is exactly the opposite – it requires a CCA to review every record, in its entirety, however mundane, and affirm only that which should be affirmed.

The cause and prejudice standard stands in direct contrast to the mandate that requires a service court to only affirm cases that are correct in law and fact. It should not be applied for Article 66 review in the service courts. This Court and the CCAs "both aim at the same high target – true justice for the servicemember." *Johnson,* 42 M.J. 443 at 446 (C.A.A.F. 1995).

True justice is messy, may take longer, and in rare instances, may be piecemeal in its identification of issues. What is clear is that true justice, especially for a court of first review like the CCAs, must contemplate all issues (even new issues) to achieve its goal. A cause and prejudice standard that bars

new issues raised to a CCA does not further the pursuit of true justice, but merely procedural efficiency. Article 66 demands true justice.

Conclusion

Wherefore, Appellant respectfully requests this Honorable Court remand the case to the Army Court for consideration of Appellant's factual sufficiency and constitutional claims.

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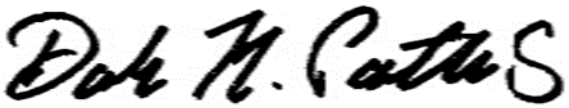

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CERTIFICATE OF COMPLIANCE WITH RULES 21(b) AND 37

1. This brief complies with the type-volume limitation of Rule 21(b) because this brief contains 4,157 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because: This brief has been prepared in a proportional typeface using Microsoft Word with Times New Roman, 14-point type.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Steele, Crim App. Dkt. No. 20170303, USCA Dkt. No. 22-0254/AR was electronically filed via DOD Safe with the Court and Government Appellate Division. Copies were also delivered via courier service to the Court also on December 2, 2022.

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