IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES *Appellee* v. ELIUD I. LOPEZ Machinery Technician Third Class (E-4) U.S. Coast Guard, *Appellant*	BRIEF ON BEHALF OF APPELLEE Crim. App. Dkt. No. 1487 USCA Dkt. No. 24-0226/CG

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

Christopher J. Hamersky
Lieutenant, U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
2703 Martin Luther King Jr. Ave. SE
Washington, D.C. 20593-7213
Tel: (202) 372-3743
Christopher.j.hamersky@uscg.mil
CAAF Bar No. 37925

Index of Brief

Table of Cases, Statutes, and Other Authorities

United States Supreme Court

Court of Appeals for the Armed Forces

Courts of Criminal Appeals

Federal Circuit Courts of Appeal

United States District Courts

United States Code

Manual for Courts-Martial

Other Authorities

Issues Presented

I.

WHAT IS THE STANDARD OF REVIEW WHEN THE COURT OF APPEALS FOR THE ARMED FORCES EVALUATES A DECISION OF A COURT OF CRIMINAL APPEALS ON A REQUEST FOR APPELLATE DISCOVERY?

II.

DID THE LOWER COURT ERR WHEN IT MOSTLY DENIED APPELLANT'S MOTIONS FOR APPELLATE DISCOVERY REGARDING HIS ILLEGAL POST-TRIAL CONFINEMENT, AFTER WHICH IT FOUND "SIMPLY NO EVIDENCE OF ANYTHING OTHER THAN NEGLIGENCE" REGARDING ITS CAUSE?

III.

WHETHER THE LOWER COURT ERRED IN ORDERING BACKPAY FOR APPELLANT'S ILLEGAL POST-TRIAL CONFINEMENT.

Statement of Statutory Jurisdiction

The Coast Guard Court of Criminal Appeals (CGCCA) reviewed this case under Article 66(b)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(3). This Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On 2 November 2022, at a special court-martial composed of a military judge alone, Appellant pleaded guilty to and was convicted of two specifications of

indecent recording in violation of Article 120c, UCMJ, 10 U.S.C. § 920c. (JA0017-18). Appellant was then sentenced to three months' confinement, reduction in rank to E-1, and a bad conduct discharge (BCD). (*Id.*). Upon Appellant's application for clemency, the convening authority (CA) approved only two months' confinement, reduction in rank to E-1, and the BCD. (JA0037). The military judge signed the entry of judgement which trial counsel then sent to defense counsel and court staff, but failed to send it to the brig. (JA0035; JA0086). Appellant was thus confined approximately twenty-six days[1] past when he would have otherwise been released. (JA0045).

On 11 July 2024, the CGCCA rejected Appellant's assertion that trial counsel may have acted intentionally or in bad faith when he failed to send the entry of judgment to the brig, concluding there was not "a scintilla of evidence of anything beyond negligence." (JA0011-12). It therefore denied his request to reconsider its prior denials of appellate discovery, rejected his claims of prosecutorial misconduct and unlawful command influence (UCI), and declined Appellant's request to disapprove his BCD as relief for his excess confinement. (JA0003-14). The CGCCA then affirmed the findings of guilty, affirmed the

[1] Where the brig summary sheet submitted by Appellant showed Appellant was released on 16 January 2023, both Appellant and the Government argued below using an excess confinement count of twenty-five days. (JA0045; JA0174; JA0176; JA0231). The CGCCA utilized a 17 January 2023 release date to calculate twenty-six days of excess confinement. (JA0005).

sentence only so much as it provided for two months' confinement and a BCD, and ordered a monetary credit of twenty-six days' pay and allowance at the E-4 rate. (JA0014).

On 16 December 2024, this Court granted Appellant's petition for review.

Statement of Facts

On multiple occasions between March 2020 and February 2022, Appellant surreptitiously filmed multiple shipmates in varying states of undress in a barracks room and a locker room shower. (JA0004; JA0242; JA0378-79; JA0392).

A. Relevant Court-Martial Proceedings and Processing.

On 23 November 2022, the day before Thanksgiving, the CA granted clemency by disapproving one month of Appellant's sentence. (JA0037). The CA's staff judge advocate (SJA) sent the clemency action that same day to trial counsel. (JA0135). Trial counsel forwarded the clemency action on to the military judge and copied defense counsel, among others. (JA0146).

On 5 December 2022, the military judge signed the entry of judgment with the reduced sentence of two months' confinement, reduction to E-1, and BCD. (JA0039-40). That same day, trial counsel forwarded the entry of judgment, with the clemency action, to defense counsel, the court reporter, special victims' counsel, and assorted support staff. (JA0035). However, due to a misunderstanding of responsibilities, trial counsel never sent the entry of judgment with clemency to

the brig as he was required to,[2] nor did anyone else. (JA0086-87). As a result, Appellant was not released until 16 January 2023, after seventy-five total days of confinement had elapsed. (JA0045).

Sometime between 1 February 2023 and 7 February 2023, an anonymous complaint was submitted to the Department of Homeland Security (DHS) Office of Inspector General (OIG) hotline alleging that Appellant had been confined past his approved sentence. (JA0365). Pursuant to a 2003 Memorandum of Understanding between DHS OIG and the Coast Guard ("the 2003 MOU"), the complaint was referred to the Coast Guard Investigative Service (CGIS) and processed by Special Agent (S/A) J.K. (JA0365).

On 7 February 2023, S/A J.K. and his office found no reason to suspect criminal conduct. (JA0365-36). S/A J.K. emailed the complaint, numbered C23-USCG-WFO-09072 ("the C23 Complaint"), to the Coast Guard's Deputy Judge Advocate General (DJAG), as was standard procedure for matters concerning the legal directorate, requesting a direct reply back describing what actions were taken. (JA0086-87; JA0365-36).

On 8 February 2023, DJAG replied to S/A J.K., copying the heads of the Coast Guard's Legal Services Command (LSC) and Office of Military Justice.

[2] Coast Guard Comd't Instr. M5810.1H, Military Justice Manual, para. 21.D.3.j (July 9, 2021) (hereinafter "MJM").

(JA0072; JA0086). DJAG explained the procedural history of the court-martial, noted that trial counsel had circulated the clemency action on two occasions, and stated that, contrary to policy, trial counsel failed to inform the brig due to a misunderstanding of responsibilities. (JA0086). DJAG finished by describing the remedial actions LSC had taken and closed with "Recommend that CGIS close this complaint." (JA0086-87). S/A J.K. and his office determined that Appellant's excess confinement was the result of a misunderstanding, not criminal conduct, and closed the case. (JA0366). Pursuant to DHS OIG Management Directive 0810.1 from June 2004 ("the 2004 Directive"), S/A J.K. summarized the matter in a spreadsheet tracking all CGIS cases which was shared regularly with the OIG. (JA0365-66). The OIG never requested any further details on the case. (*Id.*).

B. Appellant's Discovery Demands and Appellate Proceedings.

On 30 June 2023, Appellant sent a discovery demand directly to the CA, as well as the Coast Guard's Judge Advocate General (TJAG), the Chief Prosecutor, DJAG, and a CGIS attorney. (JA0046). Largely citing the pre-trial rules of discovery and Articles 37 and 46 of the UCMJ, Appellant demanded the C23 complaint, as well as, in part, all emails, notes, memos, communications, investigations, reports, statements, exhibits, or evidence from fourteen people as they related to Appellant's case, no later than 14 July 2023. (JA0047-49). On 3 July 2023, the Government requested appellate defense counsel direct all discovery

matters to the appropriate appellate government counsel and, on 14 July 2023, stated that Appellant's discovery demands would need to be filed as motions for appellate discovery under *United States v. Campbell*.[3] (JA0050-52).

On 2 August 2023, Appellant moved to compel appellate discovery of the same materials listed above under *Campbell*. (JA0020-23). As support that the materials existed, Appellant relied on: (1) a 3 March 2023 email from the Coast Guard's former Chief Trial Judge to the then-Executive Assistant to TJAG, stating that he was previously made aware of a member's excess confinement and that someone should "salt away the facts" as part of a professional responsibility investigation; and (2) a 21 July 2023 declaration from an attorney in Appellant's appellate defense counsel's office swearing that she had a phone conversation with the CA's deputy staff judge advocate (DSJA). (JA0021; JA0024-26; JA0029).

In relevant part, Lieutenant Commander K.B. swore that the DSJA had told her that she: (1) was troubled the clemency action was not sent to the brig; (2) had spoken to trial counsel's supervisor (but not trial counsel) and was not satisfied that he understood the situation; (3) had spoken with LSC's military justice chief and agreed to speak with defense but not hand over documents; and (4) was at one point copied on an email thread referencing the C23-USCG-WFO09072 complaint and where DJAG and S/A J.K. appeared at least once in an address line. (JA0030-

[3] 57 M.J. 134 (C.A.A.F. 2002).

34) (hereinafter "the K.B. declaration"). Based on these documents and "a reasonable inference" that an investigation would have ensued and generated discoverable materials, Appellant argued that there was a "high probability" the documents would impact "both the type of claims [Appellant could] assert and the type of meaningful relief to which he might be entitled." (JA0024-27).

The CGCCA granted the motion in part and ordered production of "any statements or evidence submitted to the [OIG] by Coast Guard or Navy Department personnel in response to [the OIG complaint]." (JA0064). After relaying the order's language to CGIS for responsive documents, the Government produced the 7-8 February 2023 emails between DJAG and S/A J.K and the relevant case entry from a CGIS case tracker spreadsheet. (JA0085-89).

On 29 August 2023, Appellant sent the Government a second discovery demand for substantially the same materials, as well as a set of interrogatories, due no later than 30 August 2023. (JA0090-91). When the one-day deadline passed, Appellant again moved to compel appellate discovery, admitting that although the OIG complaint did not fall under the discovery order, it should still be produced as it was relevant. (JA0070; JA0075-76). Appellant also argued investigative materials should be produced because the 2003 MOU required CGIS to send full reports on referred OIG complaints to DHS OIG, thereby inferring their existence, and concluding that these materials would impact "both the type of claims he is

able to assert and the type of meaningful relief to which he might be entitled." (JA0077-81). The CGCCA denied Appellant's motion. (JA0121-26).

On 1 May 2023, Appellant moved to attach a yeoman's sworn declaration and Appellant's personnel record to prove Appellant had been involuntary extended for purposes of court-martial and was thus ineligible for any "backpay" based relief. (JA0298-304). That same day, Appellant also moved the CGCCA to take judicial notice of the 2003 MOU, the 2004 Directive, and the 2013 Quality Standards for Investigations from the Council of the Inspectors General on Integrity and Efficiency ("the Quality Standards"), arguing that CGIS did not abide by cumulative policy or investigative standards and so any reliance on DJAG's conclusion of mistaken responsibilities was flawed. (JA0306-13).

On 15 May 2023, in response to Appellant's two motions, the Government moved to attach two sworn declarations. (JA0360-62). One, from S/A J.K., explained that Appellant's interpretations of the judicially noticed materials to the actual OIG complaint process would be "a practical impossibility" while also recounting his actual interaction with DJAG on 7-8 February 2023. (JA0364-66). The other, from Mr. R.T., chief counsel of the Coast Guard's Pay and Personnel Center, was offered to correct a prior factual point in the Government's brief and rebut Appellant's assertion that policy prohibited implementation of a monetary credit, offering assurance that were the CGCCA to order a monetary credit, it

would be effectuated. (JA0367-68). Between 21-22 May 2024, the CGCCA granted all three motions.

Summary of Argument

First, the decision of a Court of Criminal Appeals (CCA) whether to grant appellate discovery under *Campbell* is reviewed for abuse of discretion.

Second, the CGCCA acted within its discretion when it mostly denied Appellant's motions for appellate discovery because he failed to prove that there was a reasonable probability his appeal would have been different had the putative materials been produced. The CGCCA also acted within its discretion by finding there was "simply no evidence of anything other than negligence" because there were no disputes of material fact in either the record or post-trial submissions.

Finally, the CGCCA acted within its discretion by ordering a monetary credit, pursuant to case law precedent and its expanded Article 66(d)(2), UCMJ authority, as "appropriate relief" for Appellant's illegal post-trial confinement.

Argument

I. A COURT OF CRIMINAL APPEALS' DENIAL OF APPELLATE DISCOVERY IS REVIEWED FOR ABUSE OF DISCRETION.

Discovery decisions and procedures are routinely afforded deference under an abuse of discretion standard given the need to weigh facts against the law while simultaneously promoting efficient litigation and flexibility. This Court's decision in *Campbell* reflects the common deference, telling the CCAs to weigh discovery

requests against at least four factors to determine if discovery is actually warranted. *See* 57 M.J. at 138. This Court thereafter stated that CCAs would have discretion in determining the method, due to such "determinations [being] necessarily contextual and not generally conducive to a single solution." *Id.* This deference therefore warrants abuse of discretion review. It would also reflect a trend in the Court's jurisprudence over the years, increasingly allowing more flexibility to address post-trial matters.

In *United States v. DuBay*, the Court of Military Appeals first recognized the limits of "ex parte affidavits" in appeals with collateral post-trial claims, thereafter requiring the CCA's predecessors to remand such cases with material disputes of fact for purposes of an evidentiary hearing. *See* 37 C.M.R. 411, 412-13 (C.M.A. 1967). This bright-line rule was then loosened in *United States v. Ginn* amidst an ineffective assistance of counsel (IAC) claim. *See* 47 M.J. 236 (C.A.A.F. 1997). There, although the petitioner had sworn that his attorney had been deficient, this Court highlighted that recent civilian jurisprudence had begun affording district courts "discretion on how to initially proceed on [post-trial] claims," finding that evidentiary hearings were not required when the claim was "inadequate on its face, . . . state[d] conclusions instead of facts, contradict[ed] the record, or [were] inherently incredible." *Id.* at 244-45 (citing *Machibroda v. United States*, 368 U.S. 487, 495 (1962)); *United States v. McGill*, 11 F.3d 223, 225-26 (1st Cir. 1993)

(internal quotations omitted). This Court ultimately found error in the lower court's invocation of Article 66(c), UCMJ factfinding powers to make a finding of fact amidst conflicting affidavits, but did authorize CCAs to deny *DuBay* hearings when presented with facially deficient claims similar to those described above. *Id*. at 243, 248.

Finally, in *Campbell*, this Court tasked CCAs with deciding, as a threshold matter, whether a petitioner has demonstrated that some measure of appellate discovery is warranted on a post-trial dispute. *Campbell*, 57 M.J. at 138. There, the petitioner convicted of drug use accused trial counsel of prosecutorial misconduct by coercing testimony from three airmen facing drug charges using their plea agreements as leverage, one of whom testified against the petitioner. *Id.* at 135. Based on signed but unsworn letters from said airmen, the petitioner asked the CCA to compel specific production of the "Committee on Ethics and Standards Investigation Report of Prosecutorial Misconduct, *U.S. v. Campbell*" or, alternatively, copies of any statements made by witnesses to the investigation. *Id.* at 135-36. This Court, on review, directed CCAs to consider four factors, "among other things," to determine if appellate discovery is appropriate:

> (1) whether the defense has made a colorable showing that the evidence or information exists;
> (2) whether or not the evidence or information sought was previously discoverable with due diligence;
> (3) whether the putative information is relevant to appellant's asserted claim or defense; and

> (4) whether there is a reasonable probability that the result of the proceeding would have been different if the putative information had been disclosed.

Id. at 138.

These factors, which require a holistic look at all the case facts, claims, and laws, together with the Court's permission to consider "other things" as appropriate,[4] reflect a clear indication that CCAs are to act flexibly, considering appellate discovery requests under a range of acceptable options to meet the "necessarily contextual" demands of each case. *Id*. In other words, the CCAs are afforded discretion and should be able to wield it absent abuse, just like trial judges. *See United States v. Stellato,* 74 M.J. 473, 480 (C.A.A.F. 2015) (reviewing military judge's discovery decision for abuse of discretion and reversing when the "findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the

[4] For example, unusual but concerning patterns in member selection that reasonably warrant a "pee[k] behind the curtain[.]" *See United States v. Bess*, 80 M.J. 1, 16-20 (C.A.A.F. 2020) (Ohlson, C.J., dissenting) (finding abuse of discretion after the denial of a motion to view demographic statistics after consecutive courts-martial of African American sailors by the same convening authority with all-white panels and white accusers); *see also United States v. Boylan*, 898 F.2d 230, 258 (1st Cir. 1990) (recognizing that "the kaleidoscopic variety of possible problems counsels in favor of flexibility" in the context of post-trial inquiries).

law").[5] That the above *Campbell* factors resemble those utilized by district courts when deciding whether to grant a new trial based on new evidence discovered post-trial, a decision reviewed for abuse of discretion, further supports that CCA *Campbell* decisions be reviewed for abuse of discretion. *See, e.g., United States v. Chu*, 99 F.4th 610, 616 n.9 (3d Cir. 2024) (internal citation omitted); *United States v. Banks*, 104 F.4th 496, 507-09 (4th Cir. 2024) (internal citations omitted).

Accordingly, where abuse of discretion is so ubiquitous to discovery disputes, CCA decisions under *Campbell* should be reviewed for abuse of discretion.[6]

---

[5] *See also United States v. Lewis*, 42 M.J. 1, 6-7 (C.A.A.F. 1995) (Sullivan, C.J., concurring) (stating that both questions of whether to order affidavits and the decision to order a *DuBay* hearing are "entrusted" to the CCAs).

[6] Appellant's assertion that *Ginn* and *Campbell* require de novo review is misplaced. (Appellant Brief at 11-16). *Campbell* is indeed the correct legal test for appellate discovery so a CCA would err if it failed to consider the facts against the *Campbell* framework, but how the factors turn based on case facts is a matter of judgment deserving of deference. *See generally United States v. Padilla-Galarza*, 990 F.3d 60, 73 (1st Cir. 2021) ("The abuse of discretion standard is not monolithic but, rather, encompasses de novo review of abstract questions of law, clear error review of findings of fact, and deferential review of judgment calls") (internal quotation and citation omitted). *Compare Campbell*, 57 M.J. at 138 (telling CCAs to see if discovery is warranted based on whether the likelihood of new, relevant evidence had a reasonable probability to change the outcome of the proceeding) *with United States v. Fulcher*, 250 F.3d 244, 249 (4th Cir. 2001) (reviewing a lower court's grant of a new trial based on whether the likelihood of new, relevant evidence would probably produce an acquittal for abuse of discretion). Separately, *Ginn*'s de novo review was due to three distinct questions of law predicated on the lower court's fact finding amidst "competing post-trial affidavits," something not present here because there are no disputes of material facts between the post-trial submissions. *See Ginn*, 47 M.J. at 241

II. THE CGCCA DID NOT ABUSE ITS DISCRETION BY LAREGLY DENYING APPELLANT'S APPELLATE DISCOVERY REQUESTS, NOR WHEN IT MADE A FACTUAL FINDING THAT "THERE IS SIMPLY NO EVIDENCE OF ANYTHING OTHER THAN NEGLIGENCE."

Distilled down to its most salient point, *Campbell* tasks CCAs with determining whether "some measure of appellate inquiry is warranted" based on whether a petitioner has made a colorable showing that new and relevant evidence exists which, with reasonable probability, would have led to a different result of the relevant proceeding. *Campbell*, 57 M.J. at 138. Here, a precise look at exactly what was before the lower court for each request will show that it properly weighed all the facts and circumstances when determining whether appellate inquiry was "warranted." It then acted within its discretion by largely denying Appellant's requests when he failed to prove that further discovery would, with reasonable probability, alter the proceeding's result. The lower court was therefore also within its power to find that there was "simply no evidence of anything other than negligence" when neither the record nor post-trial submissions contained any disputes of material fact.

A. The standard of review is abuse of discretion.

For all the reasons set forth above, this Court should review the CGCCA's decision for abuse of discretion. *See Stellato*, 74 M.J. at 480.

B. The lower court did not err when it mostly denied Appellant's discovery requests because Appellant failed to show a reasonable probability that, but for the denial of discovery, he would have proven trial counsel acted intentionally or maliciously, thereby meriting more relief for his excess confinement.

Although *Campbell* lists four factors, they should *generally* be read together as a threshold test to ensure that appellate discovery is actually warranted. A negative answer to any of the four factors raises serious questions as to why the discovery should be permitted if the sought information is not likely to exist, could have been discovered long ago, is not relevant to the present claim, or is not likely to have changed anything.[7] It is against this framework that the lower court acted within its discretion when it largely denied Appellant's motions for failing to show a reasonable probability that the putative materials would lead to a different result in the proceeding.

1. The lower court properly exercised its discretion when ordering only limited discovery on Appellant's first motion for appellate discovery.

From the start, Appellant's Fifth Amendment claim that he had suffered illegal post-trial confinement has been undeniable and at no point subject to

[7] Since the *Campbell* factors so closely resemble those used by the federal courts when determining whether to grant a new trial, this Court should advise petitioners that the four prongs should generally be met as a requisite for appellate discovery while leaving the door open to exceptional circumstances. *See also Fulcher*, 250 F.3d at 249 ("Without ruling out the possibility that a rare example might exist, we have never allowed a new trial unless all five elements were established.") (internal citation omitted).

dispute. (JA0045). Nonetheless, Appellant's first motion for appellate discovery demanded "a wide swath of communications between government actors and documents related to administrative inquiries, both actual and surmised[.]" (JA0011; JA0020-21). Unlike *Campbell*, where the petitioner sought a specific report (or alternatively the underlying evidence) with undeniable bearing on a specific assignment of error (a named report on a trial counsel's prosecutorial misconduct amidst a claim of prosecutorial misconduct), Appellant's demand simply stated the discovery was "for purposes of determining what assignments of error to submit in his appeal." (JA0023).

In support of his request, Appellant offered the former Chief Trial Judge's email suggesting that someone investigate the incident, concluding that "there is a reasonable inference an investigation was generated[.]" (JA0024). He otherwise just summarized the contents of the K.B. declaration, highlighting an undated email thread on which DJAG and S/A J.K. appeared containing the C23 complaint, itself containing a timeline of the clemency grant with acknowledgment Appellant was released late. (JA0024-25; JA0030-34). With regard to relevancy, Appellant questioned whether his excess confinement was due to inadvertence, negligence, or misconduct, but concluded without specifics that they would be relevant to the "investigation of potential claims" like prosecutorial misconduct and UCI. (JA0026). He closed by merely surmising "a high probability" that the total

"requested evidence" would have a "substantial impact" on appeal by affecting "the type of claims he [could] assert and the type of meaningful relief to which he might be entitled." (JA0027).

Despite the broad nature of the request, the lower court permitted limited discovery due to the fourth *Campbell* factor, the reasonable probability of a different result. The test, tracing back to the Supreme Court's seminal case on IAC, states that such IAC claims require a finding of prejudice wherein a petitioner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the [original trial] *would* have been different." *Strickland v. Washington*, 466 U.S. 668, 695 (1984) (emphasis added). It then clarified that a "reasonable probability" was one "sufficient to undermine confidence in the outcome. *Id*.[8] Placed in context here, the lower court needed to decide whether there was a reasonable probability that, but for denial of these many emails, documents, and OIG materials into his confinement, Appellant *would have* presented well-supported assignments of error on appeal.

[8] *Cf. Ornelas v. United States*, 517 U.S. 690, 696-97 (1996) (noting that precise articulation of terms like *reasonable* suspicion and *probable* cause are not possible because they "are commonsense, nontechnical conceptions that deal with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act") (internal quotation and citation omitted); *Ornelas*, 517 U.S. at 701-02 (Scalia, J., dissenting) ("Where a [lower] court makes such commonsense determinations based on the totality of circumstances, it is ordinarily accorded deference.").

The documents responsive to the lower court's order clearly answered the one specific question Appellant had posed in his motion: "the reasons why he was unlawfully required to serve a month of confinement that had been disapproved." (JA0026). The 8 February 2023 email from DJAG to S/A J.K. clearly stated that it was due to trial counsel's misunderstanding of post-trial responsibilities and the CGIS case tracker showed the complaint as closed for the same reasons. (JA0086-89). Ultimately, this balanced approach cannot be said to be "outside the range of choices reasonably arising from the applicable facts and the law." *See Stellato*, 74 M.J. at 480.

2. The lower court properly exercised its discretion when it denied Appellant's second motion for appellate discovery.

Next, Appellant's second motion for appellate discovery narrowed his original request, this time only seeking: (1) the C23 complaint and any related statements or evidence; (2) any emails on or about 8 February 2023 to, from, or involving LSC's military justice chief responding to questions about the C23 complaint; and (3) any investigative materials pertaining to CGIS Case Control Number CS2302000177 (the internal number assigned by the CGIS case tracker to the C23 complaint). (JA0070-71; JA0089).

In making this new request, Appellant questioned "the manner in which [his] unlawful confinement was brought about, 'investigated,' and disclosed[.]" (JA0074) (quotation and emphasis original). However, besides DJAG's email and

the CGIS case tracker, he provided no new evidence. (JA0086-89). Appellant instead asked the lower court to infer that DJAG's recitation of the matter came from the emails described generally in the K.B. declaration and then infer that more investigative materials existed because the 2003 MOU required quarterly reports on all open OIG complaints. (JA0075-78). He stated the reason behind his excess confinement could impact the relief he was entitled to, but then argued the reason was still "a mystery" without evidence to doubt the already produced materials. (JA0080). He then again argued that there was a "high probability" the requested evidence would have "a substantial impact on [his] appeal, impacting both the types of claims he [could] assert and the type of meaningful relief to which he might be entitled." (JA0081).

In this context, *Campbell*'s fourth factor test becomes whether there is a reasonable probability that, but for the denial of the C23 complaint, emails, and other investigative materials, Appellant *would have* had evidence that contradicted the conclusions in DJAG's email and the CGIS case tracker, strengthening his assignments of error. Based on what was already in the record, the lower court acted within its discretion in denying the motion.

First, Appellant's K.B. declaration described the C23 complaint as having a chronology of Appellant's clemency and an acknowledgment that he was confined too long, things he already knew. (JA0033). Further, where both DJAG and CGIS

had viewed it and concluded Appellant's excess confinement was due to misunderstood responsibilities, Appellant offered nothing to suggest the C23 complaint would indicate otherwise.

Second, regarding the emails and investigative materials, Appellant presented no evidence to believe they would contain anything that contradicted DJAG and CGIS' conclusions. He instead summarily concluded that the reason for his excess confinement was still "a mystery" despite his prior motion producing evidence to the contrary. (JA0080). As such, his suggestions that the materials *might* contain more because DJAG *might* have "used his authority to influence CGIS and [OIG] into prematurely closing an investigation" were only baseless suggestions and speculation with no probative force. *See United States v. Cage*, 42 M.J. 139, 144 (C.A.A.F. 1995) ("Mere suspicion that something improper must have happened, with no direct or circumstantial evidence establishing what happened, is not sufficient") (internal citation omitted); *United States v. Peterson*, 3 C.M.R. 51 (C.M.A. 1952) ("Suspicion, conjecture, and speculation cannot form the basis for fact-finding action").

Appellant's failure to show a reasonable probability that the requested materials *would* show something contradicting DJAG's email and the CGIS case tracker, plus government counsel's signed representation that all evidence generated for DHS in response to the C23 complaint had already been delivered

(JA0066-67), meant that the lower court acted within reasonable bounds in denying the motion.

3. The lower court properly exercised its discretion when it denied Appellant's request for reconsideration of its Campbell appellate discovery denial.

Appellant's final motion was a request to reconsider his second motion for appellate discovery. Because the motion came after initial briefing, it followed specific arguments Appellant made that he believed would go differently had he been granted discovery. (Appellant Brief at 24-25). In particular, he alleged: (1) trial counsel may have failed to inform the brig because it "is conceivable that he resented the [CA]'s clemency action, given he had originally asked the Military Judge to sentence Appellant to six months' confinement" but only two were approved; (2) DJAG committed UCI by utilizing "high-level executive pressure" to "influence CGIS to prematurely close an investigation"; and (3) he could have uncovered the "severity of [trial counsel's] prosecutorial misconduct[.]" (JA0187; JA0190-93). In addition, the motion followed Appellant's request for judicial notice of the 2003 MOU, 2004 Directive, and the Quality Guidelines which he argued established standards CGIS was bound to comply with in all investigations, suggesting their failure to do so supports the notion DJAG improperly shuttered the investigation. (JA0306-13).

In support of his reconsideration, Appellant argued that a sworn declaration from S/A J.K., filed by the Government to refute Appellant's rigid interpretations of the 2003 MOU, 2004 Directive, and Quality Guidelines, proved the existence of the C23 complaint. (JA0375). He also offered a quote from S/A J.K. taken out of context to argue DJAG indeed closed the investigation and that there was a "systemic issue" wherein DJAG would prematurely close CGIS cases. (*Id.*).

Applying *Campbell*'s fourth factor to this context, the test becomes whether there is a reasonable probability that, but for the denial of production of the C23 complaint, emails, and other investigative materials, Appellant *would have* proven that: (1) DJAG engaged in UCI by improperly shutting down the CGIS investigation; (2) that trial counsel engaged in prosecutorial misconduct; and (3) that trial counsel acted intentionally or with malice, likely entitling Appellant to greater relief for his excess confinement.

Because the lower court properly dispensed with the prosecutorial claim as mis-framed and found that Appellant's UCI argument failed on legal grounds not dependent on discovery (JA0004; JA0008), the only claim left was his Fifth Amendment excess confinement claim. Appellant's excess confinement had never been disputed and so the only open question on reconsideration was whether further discovery would have revealed bad faith, thereby better situating him to

have his BCD disapproved. Ultimately, the lower court properly concluded no, and so too should this Court.

Once more, Appellant failed to offer anything beyond speculation that the C23 complaint or materials would contradict CGIS and DJAG's determination that trial counsel was mistaken and proving intentionality. *See Cage*, 42 M.J. at 144. Further, none of Appellant's prior submissions alleged trial counsel acted intentionally or maliciously. The former Chief Trial Judge's email, which came a month after DJAG's email to CGIS, suggested an inquiry take place, but in the same email thread acknowledged that he never heard or saw any inquiry start up. (JA0029). Even the K.B. declaration, the most detailed of Appellant's proffers, failed to allege or even suggest bad faith. It simply: (1) confirmed the November-December 2022 clemency timeline; (2) stated that the DSJA talked with several prosecutors (but never trial counsel); (3) described the C23 complaint as reciting the clemency action history and late release; (4) and then generally discussed minimally specific emails with the LSC trial services chief on which DJAG and S/A J.K. appeared at least once. (JA0030-34). Not one mention was made of trial counsel's alleged malice.

By contrast, and in direct opposition to Appellant's working theory that trial counsel for whatever reason conspired to act maliciously out of resentment for the imposition of a sentence less than what he argued for, (JA0187), the lower court

had: (1) evidence that trial counsel had only been assigned to Appellant's uncontested court-martial for a month, (JA0390); (2) evidence that trial counsel did not even give sentencing argument, but rather assistant trial counsel did, (JA0394; JA0395-406); (3) evidence that despite the alleged conspiracy to hide the clemency action from the brig, trial counsel promptly sent it to defense counsel *twice*, (JA0035; JA0135); and (4) determinations from DJAG and CGIS that there had been a misunderstanding of responsibility. (JA0086-89). Based on this evidence, the lower court reasonably declined to find any malice when CGIS' and DJAG's determinations were supported by the record. (JA0012).[9]

Appellant may object, claiming it improper to dispense with his arguments for lack of evidence "when such evidence could only be found by conducting the [discovery] it refused to order," (Appellant Brief at 19), but the *Campbell* threshold exists to ensure there is at least some basis to open discovery on appeal. To contemplate a claim with zero evidence and then demand discovery because that is the only way to get the evidence would be illogical and circular.

Accordingly, where Appellant failed to show a reasonable probability that, but for the denial to compel discovery, he would have proven trial counsel's actions

[9] *See, e.g., Raila v. Cook Cnty. Officers Electoral Bd.,* No. 19 C 7580, 2021 WL 5179913, at *1 (N.D. Ill. Nov. 8, 2021) (employing Hanlon's Razor to dispense with explanation of intentional, malicious conspiracy in favor of simple explanation of negligence).

were intentional or malicious (and by extension altered the likely relief), the lower court acted within its discretion by denying reconsideration of appellant's second motion for appellate discovery.

C. The lower court did not err when it made a finding of fact because there were no conflicting affidavits or disputes of material fact in the record.

The lower court also acted within its discretion when it found "simply no evidence of anything other than negligence" behind Appellant's excess confinement. As told by this Court in *United States v. Fagan*, the "linchpin of the *Ginn* framework that a [CCA's] factfinding authority under Article 66(c) does not extend to deciding disputed questions of fact pertaining to a post-trial claim, solely or in part on the basis of conflicting affidavits submitted by the parties." *United States v. Fagan*, 59 M.J. 238, 243 (C.A.A.F. 2004) (citing *Ginn*, 47 M.J. at 243). However, it *also* recognized that the "*Ginn* framework requires a *DuBay* hearing only if the *opposing affidavits raise a fact dispute* that is 'material' to the resolution of the post-trial claim" and none of the five *Ginn* exceptions apply. *Id.* (internal citation omitted) (emphasis added).

Ginn involved the petitioner's own affidavit swearing that his attorney was deficient while his attorney's affidavit swore the competing declaration was not true, creating a material dispute of fact. *Ginn*, 47 M.J. at 245. In total contrast, the sworn declarations here swear no competing claims and so do not create a material

dispute of fact. (*Compare* JA0030-34 *with* JA0364-66). Aside from a *de minimis* discrepancy as to date,[10] they are aligned. Both mention how the C23 complaint discussed the timeline prior to Appellant's late release and then diverge to entirely different matters, with S/A J.K. discussing his office's interaction with DJAG while the K.B. declaration generally described the DSJA's interactions with LSC's trial services chief. The K.B. declaration at no point even raised the matter of trial counsel's negligence or maliciousness, let alone made a sworn allegation disputing negligence for Appellant to stand on.[11] Together with the fact that neither unsupported factual conclusions in a brief[12] nor an absence of evidence comprise evidence,[13] the lower court acted within its power to find that there was indeed a lack of evidence showing anything but negligence.

---

[10] The K.B. declaration states the C23 complaint was dated 8 February 2023, but is erroneous because it was attached to the discovered 7 February 2023 email from S/A J.K. to DJAG, meaning it had to be filed earlier. (*Compare* JA0033 *with* JA0087). This discrepancy is not material to the issue of negligence and is explained by the declaration's nature, namely the recollection of a phone conversation with someone describing a document on their computer. *See United States v. Cade*, 75 M.J. 923, 928-30 (A. Ct. Crim. App. 2016) (describing inherent problems with considering affidavit of hearsay from appellate defense counsel's colleague without personal knowledge).

[11] Even if the K.B. declaration contained an accusation of intentionality or maliciousness, the finding of fact would still be permissible as such an accusation without more would be conclusory. *See Ginn*, 47 M.J. at 248.

[12] *Lewis*, 42 M.J. at 4.

[13] Contrary to assertions (Appellant Brief at 20-21), the absence of evidence is not inherently evidence. *See, e.g., Foster v. Globe Life & Acc. Ins. Co.*, 808 F. Supp. 1281, 1282-86 (N.D. Miss. 1992) (finding no dispute of material fact in challenge

D. Conclusion.

The lower court did not abuse its discretion when it limited Appellant's appellate discovery and was within its authority to make a finding of fact in the absence of conflicting affidavits. This Court should accordingly find that the lower court did not err.

III. THE LOWER COURT DID NOT ERR WHEN IT GRANTED "APPROPRIATE RELIEF" BASED ON CASE LAW UNDER ITS ARTICLE 66(d)(2), UCMJ AUTHORITY.

A. Questions of law are reviewed de novo.

The scope and meaning of statutory provisions are questions of law reviewed de novo. *United States v. Nerad*, 69 M.J. 138, 141-42 (C.A.A.F. 2010) (internal citation omitted).

B. The lower court acted within the plain language of Article 66(d)(2), UCMJ to order a monetary credit as "appropriate relief" pursuant to case law.

Article 66(d)(2), UCMJ states that "[i]n any case before the Court of Criminal Appeals [on timely appeal from the judgment of a court-martial], the Court may provide appropriate relief if the accused demonstrates error or excessive delay in the processing of the court-martial after the judgment was entered into the record under section 860c of this title[.]" Pursuant to Article 60c, UCMJ, 10

---

to insurance ruling of suicide as lack of suicide note, generalized love of life, and family member's psychic vision of a murder were not probative evidence).

U.S.C. § 860c and R.C.M. 1111(e)(2),[14] entry of judgment was entered on 5 December 2022 after the CA's clemency action was received. (JA0035; JA0040). There was subsequent error in the processing of the court-martial, specifically the distribution of the entry of judgment pursuant to Coast Guard regulations[15] and the publication of the entry of judgment pursuant to R.C.M. 1111(f)(2), thereby leading to Appellant's illegal post-trial confinement. The lower court therefore acted within the plain meaning of Article 66(d)(2), UCMJ when it ordered "appropriate relief" in the form of a monetary credit equal to one day's pay and allowance for each day in excess confinement, relief previously found appropriate by case law. *See United States v. Schell*, 72 M.J. 339, 343 (C.A.A.F. 2013) ("Unless the text of a statute is ambiguous, the plain language of a statute will control unless it leads to an absurd result.") (internal citations and quotations omitted).

This monetary credit concept originated when this Court remanded an appeal back to the Air Force Court of Criminal Appeals (AFCCA) with instructions to apply eight days of credit for civilian pretrial confinement against the airman's sentence using R.C.M. 305(k) (1995 ed.). *See United States v. Gazurian*, 46 M.J. 299, 1997 WL 33806282 (C.A.A.F. 1997) (summary disposition). AFCCA found on remand that the total recalculated credit was ten days, but because the airman

[14] Rule for Courts-Martial, *Manual for Courts-Martial, United States* (2019 ed.) [R.C.M. (2019)] 1111(e)(2).
[15] MJM, para. 21.D.3.j.

had been released from confinement two years prior, determined that "application of the appropriate credit" required ten days pay and allowance per R.C.M. 305(k). *United States v. Gazurian*, No. ACM31372FREV, 1997 WL 203621, at *1-2 (A.F. Ct. Crim. App. Feb. 20, 1997); *see* R.C.M. 305(k) (1995 ed.) ("For purposes of this subsection, 1 day of confinement shall be equal to 1 day of total forfeiture or a like amount of fine").

AFCCA ordered this credit again on its own accord several years later in *United States v. Sherman*, finding that personnel's failure to account for airman's time in civilian confinement had resulted in five days of excess confinement. 56 M.J. 900, 902 (A.F. Ct. Crim. App. 2002). Finding that disapproval of forfeitures was meaningless as the airman had been placed on appellate leave and thus not eligible for pay, AFCCA ordered payment of five days' pay and allowance, citing this Court's *Gazurian* decision to conclude that "[o]ur superior court has endorsed the use of the punishment equivalencies in [R.C.M. 305(k)] to fashion remedies in cases where an accused has served excess confinement." *Id.* at 902-03 (citing *Gazurian*, 46 M.J. 299).

The credit was first used in a strictly post-trial sense in *United States v. Hammond* when this Court remanded a soldier's appeal to the Army Court of Criminal Appeals (ACCA) to "exercise its authority under [Article 66(c), UCMJ (2005)] to determine whether relief is warranted as to sentence, and if so, what

relief should be granted." *See United States v. Hammond,* 60 M.J. 457 (C.A.A.F. 2005) (summary disposition). When a confinement facility had failed to implement a prior ACCA order, resulting in thirty days excess confinement, ACCA agreed the soldier deserved relief but rejected disapproval of his punitive discharge and was skeptical that adjusting confinement or forfeitures would comprise relief because the soldier's expiration of term of service (ETS) had passed. *United States v. Hammond*, 61 M.J. 676, 677-78 (A. Ct. Crim. App. 2005). ACCA thereafter adapted *Gazurian* and *Sherman* to a post-trial context, finding that "a monetary credit of thirty days of pay and allowances" was appropriate per the R.C.M. 305(k) equivalencies. *Id*. at 678-80.

The *Sherman* and *Hammond* frameworks were thereafter used a number of times in other cases of excess confinement, their adoption of which supports the notion that a monetary credit is "appropriate relief" for excess confinement, a benchmark that one day illegally confined was worth one day's pay and allowance regardless of before or after trial.[16]

[16] *See generally United States v. Powell,* ARMY 20040841, 2006 WL 6624103, at *1 (A. Ct. Crim. App. June 22, 2006) (thirty-one days' pay and allowances); *United States v. Herman*, ARMY 20041293, 2006 WL 6624114, at *2 (A. Ct. Crim. App. April 18, 2006) (forty-six days' pay and allowances); *United States v. Lenoir*, ACM S30161, 2005 WL 753198, at *2 (A.F. Ct. Crim. App. March 22, 2005) (eight days' pay); *United States v. Langer*, 68 M.J. 540, 543 (C.G. Ct. Crim. App. 2009) (six days' credit and disapproving total forfeiture); *United States v. Kilgore*, ARMY 20070941, 2008 WL 8105413, at *1 (A. Ct. Crim. App. Aug. 28, 2008) (twenty-eight days' of pay and allowance); *United States v. Pierce*, ARMY 20080009, 2012

Appellant is correct, Article 66(c), UCMJ does not authorize the provision of "compensation" for excess confinement and Article 75, UCMJ, 10 U.S.C. § 875 simply returns rights, property, and privileges to members whose sentences have been set side in full or in part, something seemingly inapplicable to Appellant as he was past his end of enlistment (EOE) at the time. (Appellant Brief at 34-36). However, that is precisely why the lower court cited its expanded authority under the current Article 66(d)(2), UCMJ, authority surpassing what *Sherman* and *Hammond* had. (JA0014). The repeated ordering of a tailored credit by multiple CCAs to help right a wrong like excess confinement cannot be absurd, only "appropriate," and therefore falls within the plain, ordinary meaning of the statute. *See Schell*, 72 M.J. at 343.

C. Conclusion.

The lower court's order of a monetary credit under Article 66(d)(2), UCMJ pursuant to case law fits the plain language of "appropriate relief." This Court should accordingly find that the lower court did not err.

WL 652518, at *2 (A. Ct. Crim. App. Feb. 27, 2012) (sixteen days' of pay and allowance).

Conclusion

For all the reasons set forth above, the United States requests this Court affirm the decision of the lower court.

HAMERSKY.CHRISTOPHER.JAMES.1610883490 Digitally signed by HAMERSKY.CHRISTOPHER.JAMES.1610883490 Date: 2025.02.14 20:24:25 -05'00'

Christopher J. Hamersky
Lieutenant, U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
2703 Martin Luther King Jr. Ave. SE
Washington, D.C. 20593-7213
Tel: (202) 372-3743
Christopher.j.hamersky@uscg.mil
CAAF Bar No. 37925

Certificate of Filing and Service

I certify that a copy of the foregoing was delivered electronically to the Court and transmitted by electronic means to Appellate Defense Counsel and Special Victim's Counsel on 14 February 2025.

HAMERSKY.CHRISTOPHER.JAMES.1610883490 Digitally signed by HAMERSKY.CHRISTOPHER.JAMES.1610883490 Date: 2025.02.14 20:24:45 -05'00'

Christopher J. Hamersky
Lieutenant, U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
2703 Martin Luther King Jr. Ave. SE
Washington, D.C. 20593-7213
Tel: (202) 372-3743
Christopher.j.hamersky@uscg.mil
CAAF Bar No. 37925

Certificate of Compliance with Rule 24(b)

This brief complies with the type-volume limitations of Rule 24(b) because:

This brief contains 7,552 words.

This brief complies with the typeface and type style requirements of Rule 37. Undersigned counsel used 14-point, Times New Roman font with one-inch margin on all four sides.

HAMERSKY.CHRISTOPHER.JAMES.1610883490

Digitally signed by HAMERSKY.CHRISTOPHER.JAMES.1610883490
Date: 2025.02.14 20:25:22 -05'00'

Christopher J. Hamersky
Lieutenant, U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
2703 Martin Luther King Jr. Ave. SE
Washington, D.C. 20593-7213
Tel: (202) 372-3743
Christopher.j.hamersky@uscg.mil
CAAF Bar No. 37925