IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*, v. Chief Warrant Officer (CW2) LAMONT S. JESSIE, United States Army, *Appellant*.	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20160187 USCA Dkt. No. 19-0192/AR

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

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I.

WHETHER THE ARMY COURT ERRED BY CONSIDERING MILITARY CONFINEMENT POLICIES BUT REFUSING TO CONSIDER SPECIFIC EVIDENCE OF APPELLANT'S CONFINEMENT CONDITIONS.

II.

WHETHER THE ARMY COURT CONDUCTED A VALID ARTICLE 66 REVIEW WHEN IT FAILED TO CONSIDER APPELLANT'S CONSTITUTIONAL CLAIMS.

III.

WHETHER APPELLANT’S CONSTITUTIONAL RIGHTS WERE VIOLATED BY A CONFINEMENT FACILITY POLICY THAT BARRED HIM FROM ALL FORMS OF COMMUNICATION WITH HIS MINOR CHILDREN WITHOUT AN INDIVIDUALIZED ASSESSMENT DEMONSTRATING THAT AN ABSOLUTE BAR WAS NECESSARY.

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 (UCMJ), 10 U.S.C. § 866. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867 (a)(3).

Statement of the Case

A panel of officers, sitting as a general court-martial, convicted Chief Warrant Officer Two (CW2) Lamont S. Jessie, appellant, contrary to his pleas, of two specifications of sexual assault of a child over the age of 12 years but under the age of 16 years, in violation of Article 120b, UCMJ, 10 U.S.C. § 920b. (JA 33–35, 53). On March 24, 2016, the panel sentenced appellant to be reprimanded, to be confined for four years, and to be dismissed from the service. (JA 30, 54).

On December 28, 2018, the Army Court issued a memorandum opinion *en banc*, in a 6-4 decision. (JA 3–28). On February 25, 2019, the counsel filed a Petition for Grant of Review and Supplement to the Petition. On April 19, 2019, counsel filed a two-part motion to supplement the record. (JA 91). On July 11, 2019, this Court granted appellant's motion in part, supplementing the record with Defense Appellate Exhibits A–E, I–J, and M–N, and Government Appellate Exhibits A–C, and E. (JA 90). On July 16, 2019, this Court granted appellant's petition for review. (JA 1).

Statement of Facts

Appellant's Offenses and Trial

In June 2012, appellant moved into a friend's home in preparation for his fifth deployment. *United States v. Jessie*, ARMY 20160187, 2018 CCA LEXIS 609, slip op. *1 (A. Ct. Crim. App. Dec. 28, 2018) (mem. op.) (JA 3–28). During this time, appellant was also joined by his daughter from his previous relationship, ZR-J, who was eight years old at the time.[1] (JA 58, 72–73). The government alleged that at some point during appellant's stay he began having sex with his friend's thirteen-year-old daughter. *Id*. at *2. According to the alleged victim, she had sex with appellant on several occasions. *Id*. at *3. When appellant deployed, the two continued to communicate via text, phone, and video messaging. *Id*. In September 2013, appellant's friend discovered her daughter's messages to appellant and contacted the police. *Id*. at *3.

At trial, appellant maintained that he did not commit sexual acts with the alleged victim, and was not, in fact, even in the same location as her for much of the time the conduct is alleged to have occurred. (JA 76–78). Nevertheless, the panel found appellant guilty. (JA 53).

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[1] Appellant also has two younger daughters from his current marriage who were three years old and eight months old at the time of the alleged offenses. Today, appellant's three children are fifteen, ten, and seven years old.

At sentencing, the mother of appellant's oldest daughter described appellant as "an amazing father," and testified that prior separations from his family were "really rough" for his daughter. (JA 83, 85). Appellant's current wife similarly testified that appellant "is a wonderful, amazing father" who "spends every moment he possibly can with his kids making sure they have everything they need or want and beyond." (JA 87). Appellant's wife told the panel she feared "my girls losing their dad, all three girls are very close to their dad." (JA 88). The panel ultimately sentenced appellant to dismissal, reprimand, and four years' confinement. (JA 54).

The Joint Regional Correctional Facility Policy

Military Correctional Complex Standing Operating Procedures 310 (the "policy"), dated 2015 and 2017, precluded all inmates at the Joint Regional Correctional Facility (the "facility") convicted of sexual offenses with minors from having *any* written, telephonic, in-person, *or indirect* contact with *any* minor without prior approval from the facility's commanding officer. (JA 102–05, 184). This one-sized-fits-all policy did not distinguish between inmates who offended against their own children and inmates who offended against non-family members nor did it provide for an individualized determination of the risk an inmate posed to his children. (JA 102).

Inmates who desired to contact their own minor children had to request an exception to policy and were required to have "completed" Sex Offender Treatment (SOT). (JA 102). As a prerequisite to even beginning SOT, the policy required an inmate to admit guilt for the conduct for which he was imprisoned. (JA 110–11, 194). Inmates who had not completed SOT were uniformly denied an exception to policy and informed that they must complete SOT prior to *consideration* for an exception to policy. (JA 103). If an inmate's request was denied, the inmate was barred from requesting an exception to policy for one calendar year from the date the request was denied. (JA 105).

Appellant did not abuse his children. Nevertheless, since appellant was confined on March 24, 2016, he was denied *all* contact and communication with his own children until the policy's most recent change on November 7, 2018. (JA 108). Appellant's children had their father erased from their lives for 958 days. Appellant maintains his innocence to this day.

The Facility's Stated Basis for the Policy

The facility outlined the basis of the policy in an affidavit that identified protection of children and promotion of inmate rehabilitation as the two governmental interests the policy was designed to advance. (JA 191–92). Neither party disputes that these are legitimate government interests. This appeal challenges the assertion that the policy advanced either of these objectives.

As evidence that the policy promoted the well-being of appellant's children, the affidavit cited one thirty-year-old study that looked at *intrafamilial* abuse. Based solely on that study, the policy concluded that "non-victim minor children *in the home with the victim* also become victimized by the choices of the sex offender." (JA 192) (emphasis added). Finally, it determined that "the non-victim minor must deal with the stigma and familial instability associated with interfamilial [sic] abuse." (JA 192). Neither the study nor the affidavit explain how precluding interaction with a parent fosters stability or reduces stigma. Beyond this 1992 study of family dynamics in intrafamilial abuse, the facility cited no other research.

Turning to the government interest in rehabilitation of the inmate, the affidavit stated that "research suggests"—without citing what research—that the mere presence of children may increase "deviant sexual fantasies" and cause inmates to "masturbate to thoughts of a minor-age child they have seen in prison waiting/visitation rooms." (JA 192).

In lieu of relying on reviewable literature, the facility claimed its policy was "created through consultation with expert leaders in the field of sex offender management and [was] in accordance with generally accepted clinical best practices." (JA 191). The facility claimed specifically that the policy "align[ed]

with practice standards and guidelines of the Association for Treatment of Sexual Abusers (ATSA)." (JA 191).

Appellant's Response to the Facility's Stated Rationale

After reviewing the facility's basis for its policy, appellant successfully moved the Army Court to attach several affidavits, research articles, guidelines, and policies. Appellant submitted these attachments in furtherance of his claim that the policy (1) did not accord with best practices in the corrections community or with the standards set forth by ATSA; (2) contradicted the Army's and the Department of Defense's own regulations; (3) was not supported by contemporary social science research in the field; and (4) was being arbitrarily enforced by the facility. In sum, appellant asserted that these attachments demonstrated that the policy was not rationally related to the facility's legitimate government purposes because the policy actually harmed the very children it was designed to protect and undermined appellant's rehabilitation by precluding him from treatment he otherwise willingly sought.

Social Science and Experts in the Field

After appellant informed ATSA that the facility's policy was purportedly based on its guidelines, ATSA opined that a one-sized-fits-all prohibition preventing inmates from speaking to their children, such as the prohibition in the policy, did not meet its practice standards and guidelines. (JA 118). According to

ATSA, such "unilateral strategies to manage the risk of individuals who may be at risk of offending do not meet best practice guidelines that promote community or institutional safety." (JA 118). Additionally, ATSA noted that the policy relied on the 2005 ATSA guidelines and that these had been superseded by new guidelines published in 2014. (JA 118). Even after the facility published a new version of the policy in 2017, it still seems to have relied on the 2005 guidelines despite the facility's statement to the contrary. (*Compare* JA 200 *with* 194).

The policy was wanting in other ways. As previously noted, the policy relied on one outdated and irrelevant study published in 1992 that exclusively addressed intrafamilial abuse—a dynamic irrelevant to appellant as it was never alleged that he abused a family member. (JA 192).

What actual research does reflect is a broad consensus that acceptance of responsibility is not a prerequisite to efficacious treatment; inmates who deny responsibility for their crimes still benefit from treatment. *See* Jill S. Levenson, *"But I didn't Do It!": Ethical Treatment of Sex Offenders in Denial*, Sexual Abuse: A Journal of Research and Treatment (2011); Leigh Harkins, et al., *Examining the Influence of Denial, Motivation, and Risk on Sexual Recidivism*, Sexual Abuse: A Journal of Research and Treatment (2010); Joanne Hulley, "*While This Does Not in Any Way Excuse My Conduct*. . ." International Journal of Offender Therapy and Comparative Criminology (2016). After being confronted with this research

midway through the litigation of this case, the government's representative from the facility conceded the value in allowing those in denial to pursue treatment opportunities. (JA 197). By that time, however, appellant had already been denied any form of contact with his own children for almost three years.

Finally, other studies demonstrate that the lack of communication between confined parents and their children, far from protecting the children, harms them. The risks, trauma, and stigma affecting children of incarcerated parents are *exacerbated* by deprivation of contact with their incarcerated parent. Nancy G. La Vigne, et al., *Broken Bonds: Understanding and Addressing the Needs of Children with Incarcerated Parents*, Urban Institute Justice Policy Center (2008). "Children can suffer from short-term coping mechanisms to deal with their loss, which can develop into long-term emotional and behavioral challenges such as depression, problems with school, delinquency, and drug use." *Id*. at i. These children are at greater risk for long-term reactive behaviors, coping patterns, and criminal activity. *Id*. Accordingly, "maintaining contact with one's incarcerated parent appears to be one of the most effective ways to improve a child's emotional response to the incarceration and reduce the incidence of problematic behavior." *Id*. at 10.

Best Correctional Practices

The facility's policy also appears inconsistent with those of other federal correctional facilities. The Federal Bureau of Prisons [BOP] does not utilize a

blanket prohibition on contact with minors. Instead, the BOP takes an individualized approach by using "Correctional Management Plans" for sex offenders that require "accurate assessment of risk-relevant behavior[.]" U.S. Department of Justice, Federal Bureau of Prisons, Sex Offender Programs, No. 5432.10, Ch. 4.1 (Feb. 15, 2013).

The policy did not even parallel Army regulations. Consistent with federal practice, the Army Regulation provides that communication is the rule, not the exception. "A prisoner's spouse, *children*, parents. . . should uniformly be approved unless disapproval is required in the interest of safe administration, the prisoner's welfare, or in furtherance of his correctional treatment." Army Regulation 190-47, The Army Corrections System (Jun. 8, 2005), para. 10-10 (emphasis added). Even "[r]ejection of mail on the basis of content is authorized only when it is determined detrimental to the security, good order, discipline, or correctional mission of the institution, or might facilitate criminal activity." *Id.* at para. 10(b)(3).

The Actual Application of the Policy

Despite the facility's complete prohibition on parent-child communications, (JA 102, 184), the facility nevertheless allowed appellant to visit with adult family members while seated next to other visitors and their children. (JA 177, 181).

Appellant's wife attested to the fact that while visiting with her husband at the facility:

> There was also another family visiting, with his two children, at a table directly next to us. On my other visits, occasionally other families would be visiting at nearby tables. These families had children present, whether sixteen year olds, toddlers, or infants. Meanwhile, my husband and I visited alone, without our children.

(JA 181–82). The only children appellant could not be in close proximity to were his own. Eventually, the facility acknowledged this contradictory practice after confronted with documentation. (JA 197, stating "it is accurate that minor aged children are in the visitation room with other visitors, inmates, and child sex offense convicted inmates conducting visitation."). The facility did not address how this acknowledged practice was consistent with its conclusion that "research suggests" the mere presence of children may increase "deviant sexual fantasies" and cause inmates to "masturbate to thoughts of a minor-age child they have seen in prison waiting/visitation rooms." (JA 192).

The policy was arbitrarily enforced in other ways. The original policy clearly stated that appellant must "*completed*" sex offender treatment prior to processing an exception to policy. (JA 102, 186). But during this litigation the facility's interpretation of its own policy shifted and morphed. Months after the initiation of this litigation, the facility stated that the appellant still must accept responsibility for his confining offenses, but need only *participate* in treatment

programs and consent to two sexual offense risk assessments. (*Compare* JA 102 *with* 194). After the filing of this affidavit, the standards morphed again. Now appellant could apply for an exception to policy if he consented to an individualized assessment—regardless of whether he took responsibility for the underlying offense. (JA 197).

The facility also appeared unsure of its own processes. Indeed, it appears the facility had no meaningful idea of how long a child would be deprived of contact with an incarcerated parent, even when that parent was willing to take responsibility for his offense. In 2016, the facility's legal advisor stated that it could take "one to two years to complete" the treatment program, but admitted that the facility was "backed up since [it] didn't have an SOT program for so long" and therefore that "it would most likely be anywhere from two to three years before [an inmate] takes an actual sex offender portion." (JA 187). Considering the two to three years it takes to even be enrolled in the program, plus the one to two years to complete it, even inmates willing to admit guilt could neither speak nor write to their children for anywhere between three and five years.

Appellant's Attempts at Redress

The facility's second affidavit was the first to specifically address appellant's case. According to the facility, appellant "has not been eligible for sex offender treatment and sex offender recidivism risk assessment due to his personal

choice to not accept responsibility for his sexual confining offenses against a 15 [sic] year old female." (JA 110, 194). In that affidavit, the facility erroneously stated it had "reviewed" appellant's file and he had not requested an exception to policy. (JA 194).

In fact, appellant had repeatedly sought exceptions to the policy and redress through other channels. (JA 110–11). On March 30, 2017, appellant submitted an Inmate Request Slip ("510 slip") requesting an exception to policy, asking "if and when I can see my children?" and pleading, "If there are treatment programs that I must have, what are they and when will they be available?" (JA 110). The facility responded, "You are not currently eligible for your sex offender treatment as you do not take responsibility for your confining offense." (JA 110–11).

A week later, on June 12, 2017, the appellant filed Request for Redress pursuant to Article 138, UCMJ. (JA 109). The redress request alleged the policy violated his constitutional rights because his "offenses had nothing to do with [his] own children." (JA 109). As redress, appellant "respectfully request[ed] to be able to talk to [his] children immediately" and for "time off" his confinement term for past constitutional deprivations. (JA 109). In response, the company commander informed appellant the facility was merely following policy, denied appellant redress, and suggested that appellant instead submit a request for an exception to policy, *i.e.*, a 510 slip. (JA 116). The company commander did not explain how

the appellant might receive an exception given the facilities previous determination he was not eligible for one.

The Army Court's Attachment, then Detachment, of the Post-Trial Evidence

A panel of the Army Court heard oral argument on October 4, 2018. Both prior to and after oral argument, both parties sought to attach documents to the record, and the panel granted both parties' motions and attached the documents.

On October 26, 2018, on its own motion, the Army Court ordered that appellant's case would be considered *en banc*. Two months later, on December 28, 2018, the Army Court issued its *en banc* memorandum opinion, decided by a 6-4 vote, and declined to grant appellant the requested relief. *United States v. Jessie*, slip op. at *12. Relying on this Court's decision in *United States v. Healy*, 26 M.J. 394 (C.A.A.F. 1988), the majority also *detached* from the record those appellate exhibits previously attached by the three-judge panel. *Id*. In a footnote, the majority stated that although the documents were detached, they remained with the record and the dissenting judges could refer to those documents that they would both admit and consider. *Id.* at *12 n. 14. Additionally, the majority denied all the remaining motions to attach. *Id.* All three judges who had originally considered the case and heard oral argument dissented. They were joined in dissent by the Chief Judge of the Army Court.

I.

WHETHER THE ARMY COURT ERRED BY CONSIDERING MILITARY CONFINEMENT POLICIES BUT REFUSING TO CONSIDER SPECIFIC EVIDENCE OF APPELLANT'S CONFINEMENT CONDITIONS.

Standard of Review

The Court of Criminal Appeals has "discretion to receive and consider evidence by affidavit, testimony, stipulation, or a factfinding hearing, as it deems appropriate." *United States v. Boone*, 49 M.J. 187, 193 (C.A.A.F. 1998) (citing *United States v. Lewis*, 42 M.J. 1, 6 (C.A.A.F. 1995). This Court will disturb the decision of a CCA to prevent "obvious miscarriages of justice or abuses of discretion." *United States v. Jones*, 39 M.J. 315, 317 (C.A.A.F. 1994) (citing *United States v. Dukes*, 5 M.J. 71, 72–73 (C.M.A. 1978) (applied in the context of sentence reassessment).

Law and Argument

a. Summary of the Argument

It is axiomatic that military appellate courts have broad latitude to consider post-trial evidence. The authority to decline to attach such matters is necessarily more limited. While courts undoubtedly have the authority to decline to attach matters dealing solely with clemency, this Court has held that the CCAs' discretion is more limited when applied to matters that render a finding or a sentence

incorrect as a matter of law. Indeed, these later cases suggest the CCAs have a duty to attach and consider such evidence. Thus, the Army Court's reliance on an inapplicable case about clemency was an incorrect application of law, and therefore its decision to detach these matters was an abuse of discretion.

b. History of this Court's authority to append post-trial evidence to the record.

Due to the distinct nature of military appellate practice, this Court has repeatedly addressed the nature and scope of military courts' authority to supplement the record with post-trial evidence. *Compare United States v. Gay*, 75 M.J. 264 (C.A.A.F. 2016) (permitting a CCA to consider post-trial evidence raised, in part, in his clemency matters regarding violations that did not rise to Article 55, UCMJ, and Eighth Amendment claims); *United States v. Pena*, 64 M.J. 259 (C.A.A.F. 2007) (permitting a CCA to attach post-trial evidence regarding Article 55, UCMJ, and Eighth Amendment claims); *United States v. White*, 54 M.J. 469, 472 (C.A.A.F. 2001) (same); *United States v. Erby*, 54 M.J. 476, 478 (C.A.A.F. 2001) (same); *United States v. Sanchez*, 53 M.J. 393 (C.A.A.F. 2000) (same); *Boone*, 49 M.J. at 187 (permitting a CCA to obtain post-trial affidavit from defense counsel to address ineffective assistance of counsel claim) *with Healy*, 26 M.J. at 394 (affirming CCA's denial of appellant's motion to submit twenty-two affidavits related to clemency).

The lion's share of these cases have resulted in post-trial evidence being admitted. And for good reason. As the Supreme Court has long held:

> Implicit in the congressional scheme embodied in the Code is the view that the military court system generally is adequate to and responsibly will perform its assigned task. We think this congressional judgment must be respected and that it must be assumed that the military court system will vindicate servicemen's constitutional rights.

Schlesinger v. Councilman, 420 U.S. 738, 758 (1975). On the other hand, this Court in *Healy* made plain that not all evidence related to all issues must, or even should, be attached to the record. *Healy*, 26 M.J. at 394.

While this Court has established no bright line rule with respect to what may or may not be attached, its cases reflect a spectrum ranging from evidence that should be appended to that which the CCA is firmly in its discretion to deny. At one end of this spectrum lie those cases in which an appellant raises constitutional or statutory violations. *Pena*, 64 M.J. at 264; *White*, 54 M.J. at 472; *Erby*, 54 M.J. at 478. In those cases, this Court put the onus on the appellant to supplement the record:

> When an appellant asks us to review the post-trial administration of a sentence, we are typically confronted by issues in which the pertinent facts are not in the record of trial. In such a case, it is *particularly important* that appellant provide us with a 'clear record' of the facts and circumstances relevant to the claim of legal error.

Pena, 64 M.J. at 266 (emphasis added); *see also White*, 54 M.J. at 472. When such evidence demonstrates a bona fide legal defect in the manner in which the sentence is being carried out, the CCAs have "the *duty and the authority* under Article 66(c) to determine whether the sentence is correct 'in law.'" *Erby*, 54 M.J. at 478 (emphasis added). Thus, at this end of the spectrum lies constitutional or statutory violations, where an appellant *should* supplement the record and the CCA *shall* ensure it is correct in law.

On the other end of the spectrum lies *Healy*. Healy's appellate defense counsel moved the service court to admit twenty-five "documents consisting of letters recommending reduction of the period of confinement." 26 M.J. at 395. These documents did not allege a legal error with the findings, sentence, or the manner in which the sentence was executed. *Id.* "Noting that the documents were in the nature of clemency materials, the Court of Military Review denied the motion to file[.]" *Id*. In affirming the service court's decision, this Court held the CCAs "have no duty to receive information or data that purports to be relevant *only to clemency*." *Id*. at 397 (emphasis added). This Court recognized that Congress "assigns to the Courts of Military Review only the task of determining sentence appropriateness: doing justice. Of course, a judicial body is especially suited to perform this task. The responsibility for clemency, however, was placed

by Congress in other hands." *Id*. at 395–96. If the CCA had no authority to grant clemency, post-trial clemency submissions were simply irrelevant.

The holding in *Healy* dealt purely with clemency submissions. *See Jessie*, slip op. at *16, n. 15 (Schasberger, J., dissenting). "We need not decide whether the Court of Military Review, if it chooses, may grant a motion to supplement the 'record' by the filing of additional documents allegedly relevant to sentence appropriateness." *Healy*, 26 M.J. at 397. Nor could it have decided this was prohibited, at least without carving out significant exceptions. *Id*. at 397 n. 6 (recognizing that *United States v. Lilly*, 25 M.J. 403 (C.M.A.1988), expressly held an appellant could supplement the record with post-trial evidence bearing on competency.).

After *Healy*, this Court determined that the CCAs had the authority to receive affidavits from trial counsel to resolve ineffective assistance of counsel claims. *Boone*, 49 M.J. at 193. And, as discussed above, *Erby*, *White*, and *Pena* extended the CCA's authority to supplement the record to cases involving Eighth Amendment and other claims that "the adjudged and approved sentence has…been unlawfully increased by prison officials." *White*, 54 M.J. at 472.

c. *<u>Healy</u> addressed clemency submissions and this Court's more relevant cases demonstrate that the Army Court abused its discretion.*

This Court has determined that, when dealing with prison conditions cases, the CCAs have "the duty and the authority under Article 66(c) to determine

whether the sentence is correct 'in law.'" *Erby*, 54 M.J. at 478. If the CCAs have a "duty" to resolve these claims, it would seem inconsistent to suggest they do not have the concomitant duty to admit evidence of these claims.

Furthermore, unfettered discretion to deny an appellant's attempts to supplement the record would also run contrary to this Court's emphasis that it is critical that "appellant provide us with a 'clear record' of the facts and circumstances relevant to the claim of legal error." *Pena*, 64 M.J. at 266; *see also White*, 54 M.J. at 472. This is precisely what appellant attempted to do here, providing evidence going to the heart of an issue that the court had a "duty" to address pursuant to its statutory mandate. *Erby*, 54 M.J. at 478.

Healy is simply irrelevant and the Army Court erred in relying on it. It stands merely for the notion that the CCAs have "no duty to receive information or data that purports to be relevant only to clemency[.]" *Healy*, 26 M.J. at 397. As the dissent in *Jessie* stated, "This is not a clemency case. Unlike *Healy*, appellant is seeking sentence appropriateness relief based on a 'legal deficiency in the post-trial confinement conditions." *Jessie*, slip op. at *16 n. 15 (Schasberger, J., dissenting) (citing *Gay*, 75 M.J. at 269).

d. The Army Court's decision here was also arbitrary and capricious.

The Army Court was inconsistent in the way it dealt with the litigants' post-trial evidence. It initially attached the exhibits, in light of their patent relevance,

and the case was argued. Only after oral argument did the Army Court *sua sponte* consider the case *en banc* and issue its decision detaching the exhibits. *Jessie*, slip op. at *12. Both appellant and the government litigated the entirety of the case, up to and including oral argument, with the documents appended to the record. The Army Court's irregular decision to *sua sponte* reconsider appellant's motion to attach deprived both parties of the opportunity to litigate this ruling or change tactics based on the decision.

Despite the Army Court's decision to detach these submissions, the majority nevertheless relied upon three of the appellate attachments containing versions of the policy in its decision. *Jessie*, slip. op. at *3–4. The practical effect of this curious locution was that the majority considered the government's policies but not the evidence regarding the context and implementation of these policies. *Id*. at *11. Accordingly, despite purporting to detach *all* post-trial submissions, the majority arbitrarily and capriciously considered *some* exhibits while ignoring others.

e. Conclusion

The Army Court considered evidence supporting arguments advanced by the government, but denied appellant the opportunity to substantiate his claims of constitutional violations. In doing so, the Army Court relied on irrelevant precedent while ignoring binding precedent. Appellant therefore requests this

Court set aside the Army Court's decision and remand for a proper review pursuant to Article 66(c).

II.
WHETHER THE ARMY COURT CONDUCTED A VALID ARTICLE 66 REVIEW WHEN IT FAILED TO CONSIDER APPELLANT'S CONSTITUTIONAL CLAIMS.

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." *Gay*, 75 M.J. at 267 (citing *United States v. Schloff*, 74 M.J. 312, 313 (C.A.A.F. 2015), cert. denied, 136 S. Ct. 915, 193 L. Ed. 2d 793 (2016)).

Law and Argument

a. Summary of Argument

The Army Court's refusal to address a constitutional violation on direct appeal is improper. "By abstaining from answering [appellant's constitutional claims], the majority: (1) adopts an unnecessarily restrictive view of Article 66(c); and (2) fails to appreciate the effect of its abstention when addressing sentence appropriateness and post-trial delay." *Jessie*, slip. op. at *21 (Schasberger, J., dissenting). While the CCAs undoubtedly have discretion in how they resolve claims, this discretion does not allow them to ignore fully substantiated

constitutional claims. The Army Court may call balls and strikes, but it cannot decide it no longer wants to umpire the game.

b. The Army Court erred in reviewing this case using a collateral attack lens.

The Army Court's fundamental error was reviewing appellant's claims as if he were mounting a collateral attack on his conviction, rather than seeking review under Article 66, UCMJ. The Army Court erroneously concluded that appellant was seeking injunctive relief, *Jessie*, slip op. at *11, and imported jurisprudential bars granting courts considerable discretion to simply demur.

Appellant does not request injunctive relief, and this case is not a collateral attack. Indeed, at the time the Army Court issued its opinion, the facility had revised its policy to conduct individualized risk assessments on inmates, and was no longer requiring an admission of guilt as a prerequisite for the assessment or treatment. *Id*. at *3.

By miscasting this case as a request for injunctive relief, the Army Court treated it as though it was brought pursuant to the All Writs Act, which provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The Army Court's analysis of the case—*i.e.*, whether the Court *should* reach the merits—was a "necessary and appropriate" determination. But this case was not brought pursuant to 28 U.S.C. §1651(a). It

was brought pursuant to 10 U.S.C. §866(c), and requested a form of relief appropriate to that statute. *See Pena*, 64 M.J. at 266; *White*, 54 M.J. at 472; *Erby*, 54 M.J. at 478. Accordingly, the Army Court erred in abstaining from considering appellant's claim.

c. The Army Court adopted an impermissibly restrictive view of Article 66(c).

In *White* and *Erby*, this Court rejected an Air Force Court's conclusion, similar to the opinion below in this case, that it lacked jurisdiction to hear complaints about confinement conditions framed as Eighth Amendment and Article 55 violations.[2] *White*, 54 M.J. at 472; *Erby*, 54 M.J. at 478. This Court determined that the Air Force Court had not only the authority but the duty to review such claims. "In addition to its duty and authority to review sentence

[2] In reaching this conclusion, the Air Force Court relied on its prior decision in *United States v. Haymaker*, 46 M.J. 757 (A.F. Ct. Crim. App. 1997). *See United States v. White*, ACM 33583, 1999 CCA LEXIS 220, at *2–3 (A.F. Ct. Crim. App. Jul. 23, 1999); *United States v. Erby,* ACM 33282, 2000 CCA LEXIS 120, at *3 (A.F. Ct. Crim. App. Apr. 14, 2000). As the dissent in this case observed, "The analysis in *Haymaker* is strikingly similar to the majority's analysis in this case. Among other things, *Haymaker* stated 'we are not the appropriate forum for this complaint,' 'the conditions of confinement are…not in the record of trial,' 'the question of matching the remedy to the specific injury alleged is by no means incident to our discussion as to the appropriateness of our consideration of appellants' complain,' and '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.' 46 M.J. at 760–61. While *White* and *Erby* involve Eighth Amendment and Article 55 claims (and are therefore not necessarily dispositive in this case), the CAAF's rejection of their reliance on *Haymaker* is noteworthy and lends strength to the notion that we should consider appellant's claim." *Jessie*, slip op. at *16 n. 15 (Schasberger, J., dissenting).

appropriateness, a Court of Criminal Appeals also has the *duty and authority* under Article 66(c) to determine whether the sentence is correct 'in law.'" *Erby*, 54 M.J. at 478 (emphasis added).

In *White*, decided the same day as *Erby*, the concurrence noted that these cases "squarely held" that "the lower courts have *the duty* . . . to review whether the sentence imposed by a court-martial is being unlawfully increased by prison officials." *White*, 54 M.J. at 475 (Sullivan, J., concurring) (emphasis added). Moreover, even Article 67(c) "encompasses more than authority merely to affirm or set aside a sentence; [i]t also includes the authority to ensure that the severity of the adjudged and approved sentence has not been unlawfully increased by prison officials, and to ensure the sentence is executed in a manner consistent with Article 55 and the Constitution." *White*, 54 M.J. at 472.

In *Pena*, this Court again considered a claim that the government had unlawfully increased punishment. "Accordingly, our review in the present appeal focused on whether the post-trial conditions at issue: (1) constituted cruel or unusual punishment or otherwise violated an express prohibition in the UCMJ; (2) unlawfully increased Appellant's punishment; or (3) rendered his guilty plea improvident." 64 M.J. at 264.

These cases make three things clear: (1) the CCAs have a duty to address legal deficiencies; (2) this is independent from the CCAs' sentence appropriateness

power; and (3) such deficiencies often fall under the rubric of the Eighth Amendment, but all constitutional claims are cognizable. Together, these points wholly undermine the Army Court's decision.

First, *White* makes clear that the CCAs' mandate includes the duty "to ensure the sentence is executed in a manner consistent with Article 55 *and the Constitution*." *White*, 54 M.J. at 472 (emphasis added). Accordingly, the plain-language of the opinion extends *White* beyond merely Eighth Amendment or Article 55 claims, but to all constitutional claims. This flatly refutes the Army Court's conclusion that *Erby* and *White* are strictly limited to Article 55 and Eighth Amendment cases. *Jessie*, slip op. at *6–7.

Second, *Erby* makes clear this duty arises independently of the CCAs' duty to review for sentence appropriateness. "In addition to its duty and authority to review sentence appropriateness, a Court of Criminal Appeals also has the duty and the duty and authority under Article 66(c) to determine whether the sentence is correct 'in law.'" *Erby*, 54 M.J. at 478 (emphasis added). This undermines the Army Court's reliance on *Healy*. *Healy* dealt specifically with additional evidence relevant to clemency or, at its absolute broadest, it referred in *dicta* to the court's duty to receive additional evidence relevant to sentence appropriateness. 26 M.J. at 397. Nowhere did *Healy* suggest that a CCA could decline to reach an issue integral to the legality of the sentence or to decline to entertain evidence of such.

Nor could it. The CCAs have an independent duty to affirm only those convictions and sentences which are correct in law and fact. Article 66(c), UCMJ.

d. The Army Court also fundamentally misunderstood the nature of sentence appropriateness and its duty to determine whether a sentence "should be approved."

The Army Court also abused its discretion by abdicating "its affirmative obligation to consider sentence appropriateness[.]" *United States v. Bodkins*, 60 M.J. 322, 324 (C.A.A.F. 2004) (citing *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002)); *see also United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005). As the Army Court itself has recognized in other contexts, even when the sentence as adjudged may have been appropriate at the time of sentencing, the CCA's duty to review "the sentence as approved" includes post-trial violations of the accused's rights. *See United States v. Banks*, 75 M.J. 746 (A. Ct. Crim. App. 2016) (finding the duty to review a sentence "as approved" includes an assessment of unreasonable post-trial delay).

At a fundamental level, the Army Court opinion misunderstands the discretionary nature of its sentence appropriateness authority. Put simply, the CCAs may have significant discretion in *how* they resolve sentence appropriateness claims, but they have a duty in every instance to do so. Even *if* the Army Court had discretion to decline to supplement the record, it still had the duty to determine, for itself, that the sentence "should be approved." The Army

Court's failure to recognize the distinction between discretion as to *how* a claim is resolved and *whether* it is resolved leads directly to its misapplication of *Healy* and *Gay*.

Healy dealt solely with the court's discretion to attach evidence in support of a claim, 26 M.J. at 395, not with its authority to decline to consider the claim. And because the sentence appropriateness claim was fundamentally a plea for clemency, that court could properly conclude the sentence was appropriate even without that appellant's attempts to supplement the record. *Id*. at 395–96.

Gay, on the other hand, dealt with the court's authority to provide sentence appropriateness relief for post-trial confinement conditions that did not rise to Eighth Amendment or Article 55 violations. 75 M.J. at 265. Ultimately, this Court determined that the CCA had the authority to provide relief. *Id*. at 269. In doing so, this Court emphasized that Article 66(c) "clearly establishes a discretionary standard for sentence appropriateness *relief* awarded by the Courts of Criminal Appeals." *Id*. at 268 (emphasis added) (citation omitted). In other words, the CCAs have discretion in *how* they resolve such claims, not in whether to do so. To read *Gay* as providing discretion to address such claims in the first place, as the Army Court did, would make the opinion both internally inconsistent and inconsistent with this Court's jurisprudence.

First, *Gay* cited *Fagan*, where this Court held that the CCA could not grant relief as "a mechanism to 'moot claims' as an alternative to ascertaining whether a legal error or deficiency exists in the first place." *United States v. Fagan*, 59 M.J. 238, 244 (C.A.A.F. 2004). In other words, the court could not abdicate its duty to affirm a sentence as "correct in law and fact" by simply granting relief under its sentence appropriateness authority. *Id*. If the CCAs—as the "proverbial 800-pound gorilla when it comes to their ability to protect the accused," *United States v. Parker*, 36 M.J. 269, 271 (C.A.A.F. 1993)—cannot ignore a claimed constitutional error by granting an appellant relief, they surely may not ignore one to deny him appropriate relief. The fact that the Army Court declined to resolve appellant's claim in part based on the difficulty of the issue, while simultaneously exercising its "discretion" to deprive itself of the post-trial submissions that would ameliorate this difficulty, simply highlights the arbitrary and capricious nature of the majority's ruling.

Second, the Army Court's interpretation would make *Gay* squarely inconsistent with *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005). In *Baier*, this Court concluded that it could not determine whether the CCA "independently determined" the sentence's appropriateness and believed the CCA "may have relied on an improperly circumscribed standard." *Id.* at 384. This Court observed, "Article 66(c) *requires* that the members of the Courts of Criminal Appeals

independently determine…the sentence appropriateness of each case they affirm." *Id*. at 384–85 (internal bracketing and citation omitted) (emphasis added). In remanding the case to the CCA, this Court stated, "Of course, we express no opinion as to how that new sentence appropriateness review should be resolved. That is a matter committed to the sound discretion of the lower court, using proper legal standards." *Id*. at 385. Thus, the CCAs have the duty to determine the sentence "should be approved" but have "sound discretion" in whatever conclusion they come to.

e. *The Army Court failed to recognize and consider the impact of abstention and exhaustion doctrine.*

The Army Court entirely failed to consider the impact of two keystone principles that govern the intersection between military and Article III courts—abstention and exhaustion doctrines. *See Schlesinger*, 420 U.S. at 758; *Burns v. Wilson*, 346 U.S. 137, 140 (1953). In *Burns*, the Supreme Court observed that "Congress has taken great care both to define the rights of those subject to military law, and provide a *complete system* of review within the military system to secure those rights." 346 U.S. at 140 (emphasis added). Accordingly, the Court held that as a matter of comity and respect for the statutory regime established by Congress under the UCMJ, Article III review of cases arising from the military justice system will proceed under the exceedingly deferential standard of full and fair consideration. *Id*. at 142. In other words, the best, if not the last, hope for

meaningful relief for servicemembers comes not from federal district court, but from the military courts themselves.

Building on this deference, in *Schlesinger* the Supreme Court held, "[I]mplicit in the congressional scheme embodied in the Code is the view that the military court system generally is adequate to and responsibly will perform its assigned task. We think this congressional judgment must be respected and that it must be assumed that the military court system will vindicate servicemen's constitutional rights." 420 U.S. at 758. Accordingly, the Court concluded that Article III courts would not entertain extraordinary relief "until all available military remedies have been exhausted." *Id*.

As this Court observed, the Supreme Court has "noted the need for 'a substantial degree of civilian deference to the military tribunals' and specifically referenced our Court's 'primary responsibility' for the supervision of military justice…. This deference to our Court was rooted in both judicial economy (avoiding needless civilian judicial intervention) and respect for our Court's expertise in interpreting the technical provisions of the UCMJ." *Loving v. United States*, 62 M.J. 235, 250 (C.A.A.F. 2005) (citing *Noyd v. Bond*, 395 U.S. 683, 694 (1969)).

The Army Court cited one line of cases implicating these notions, but drew the wrong conclusion from it. *Jessie*, slip op. at *11 n 12 (citing *Gray v. Belcher*,

No. 5:08-cv-03289-JTM, 2016 U.S. Dist. LEXIS 149574 (D. Kan. 26 Oct. 2016) (declining to consider jurisdiction because the Army Court had not yet acted); *Gray v. United States*, 76 M.J. 579 (A. Ct. Crim. App. 2017) (declining to grant relief because of the availability of relief in the Kansas district court)). Specifically, the Army Court cited these cases as a reason *not* to address appellant's claims, because to do so "might invite confusion" in the district court. *Id.*

During Gray's district court proceeding, however, the court's doctrinal impediment was not that the military courts *had* acted; the impediment was that the military courts had not acted. *Gray*, No. 5:08-cv-03289-JTM, 2016 U.S. Dist. LEXIS 149574 at *3. If they can be said to stand for anything, the *Gray* cases stand for the proposition that the military accused must exhaust his claims in military courts before petitioning for habeas relief in federal district court. Accordingly, the *Gray* saga perfectly illustrates one more reason why the Army Court abused its discretion in declining to reach the merits of appellant's claims.

The Army Court's decision turns *Schlesinger*'s assumption that military courts "will vindicate servicemembers' constitutional rights" on its head and presumes, instead, that the Article III courts will address the issue. Accordingly, the Army Court could not meaningfully exercise its discretion without factoring in the considerable challenges that any claim brought in Article III courts would face.

f. The failure to reach the underlying constitutional claims uniquely impacts appellant's post-trial delay claims.

The dissent below highlighted how the majority's flawed analysis also affected appellant's second assignment of error—post-trial delay. To illustrate this point, the dissent provided the following example:

> A service court could find that the post-trial confinement conditions—when exacerbated by dilatory post-trial processing—change appellant's sentence from one that is appropriate to one that is inappropriately severe. Put another way, an individual error may not warrant the same relief as its cumulative effect. Notably, in *Gay*, our sister court concluded the sentence was inappropriate 'on the basis of his post-trial confinement conditions *and* the government's delay in forwarding the record of trial for [its] review.'

Jessie, slip op. at *22 (Schasberger, J., dissenting) (citation omitted) (alteration in original). By refusing to decide whether there was error in the manner the sentence was being carried out, the Army Court barred itself from addressing the cumulative effect of this on his post-trial delay claims. The cumulative effect is important here because, like in the dissent's example, appellant raised post-trial processing *and* constitutional violations to the CCA.

The refusal to reach the merits of appellant's sentencing claims impinged on the resolution of his delay claim for another reason. For the Army Court to address post-trial delay, it must address the likelihood of "success of failure of an appellant's substantive appeal. *United States v. Moreno*, 63 M.J. 129, 139

(C.A.A.F. 2006). "If the substantive grounds for the appeal are not meritorious, an appellant is in no worse position due to the delay, even though it may have been excessive…. However, if an appellant's substantive appeal is meritorious and the appellant has been incarcerated during the appeal period, the incarceration may have been oppressive." *Id*. In other words, the Army Court could not discharge its statutory mandate under Article 66(c) to address post-trial delay without first having addressed the merits of appellant's constitutional claims. In failing to address the latter, the Army Court failed to properly address the former.

Finally, as the dissent also highlighted, this case presented unique considerations posed by the policy that were valid pursuant to *Tardif*, 57 M.J. at 224. For example:

> An appellant's ability to make choices on whether and when to waive his right to self-incrimination can be impacted by the state of his appeal. As such, any post-trial delay has a potential impact on an appellant's choices and when his assignments of error will be considered by this court.

Jessie, slip op. at *23 (Schasberger, J., dissenting). By delaying the resolution of appellant's constitutional claims, the court unnecessarily extended the predicament in which appellant was forced to pick and choose between his Fifth Amendment and First Amendment rights.

g. Conclusion

The Army Court fundamentally misconstrued the nature of its discretion. While it may have had the discretion to decline to grant exceptional relief in a collateral appeal, neither this Court nor any other has ever subscribed to the truly radical notion that on direct, mandatory appeal, the court could simply choose not to consider appellant's claims. As such, the Army Court abused its discretion. Appellant requests this Court set aside the Army Court's decision and remand for a proper review pursuant to Article 66(c).

III.

WHETHER APPELLANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY A CONFINEMENT FACILITY POLICY THAT BARRED HIM FROM ALL FORMS OF COMMUNCATION WITH HIS MINOR CHILDREN WITHOUT AN INDIVIDUALIZED ASSESMENT DEMONSTRATING THAT AN ABSOLUTE BAR WAS NECESSARY.

Standard of Review

Generally, a prison regulation that impinges on a prisoner's constitutional rights is valid if it is reasonably related to legitimate penological interests. *Turner v. Safley*, 482 U.S. 78 (1987). Under *Turner*, a prison regulation does not withstand constitutional scrutiny if "the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational," or

if the regulation represents an "exaggerated response" to legitimate penological objectives. *Id.* at 89–90, 98.

Law and Argument

a. *Summary of Argument*

Appellant's claims sound in his constitutional rights as a person, as a parent, and as a criminal defendant. The government's right to infringe on these rights, because of his status as a prisoner, depends on a logical connection between the infringing prison policy and a valid government interest. Not surprisingly, the government has not demonstrated a valid government interest in prohibiting appellant from sending birthday cards to his children for the years when this draconian policy was in effect.

b. *The right to association and parental rights are fundamental rights protected by the First and Ninth Amendments.*

Parental rights are "perhaps the oldest of the fundamental liberty interests recognized by [the Supreme Court]." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). The Supreme Court has "held that parents have a liberty interest, protected by the Constitution, in having a reasonable opportunity to develop close relations with their children." *Hodgson v. Minnesota*, 497 U.S. 417, 483 (1990) (Scalia, J., concurring in part and dissenting in part) (citations omitted). In the prison context, courts and commentators have observed that visitation may significantly benefit both the prisoner and his family. *See Ky. Dep't of Corr. v. Thompson*, 490 U.S.

454, 465–70 (1989) (Marshall, J., dissenting); *see also Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989) (stating that "access [to prisons] is essential . . . to families and friends of prisoners who seek to sustain relationships with them").

c. The policy also implicated appellant's Fifth Amendment rights.

The facility would not allow appellant to participate in sex offender treatment unless he admitted guilt. (JA 102, 110, 191, 194). However, appellant was constitutionally entitled to maintain his innocence on direct appeal, especially as his case was being reviewed for factual and legal sufficiency, and the admission of guilt for the underlying offenses would also mean admitting that appellant perjured himself when he testified in his own defense.

To claim protection under the Fifth Amendment, a person must demonstrate "that the disclosures to which he objects are (1) testimonial, (2) incriminating, and (3) compelled." *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt Cnty.*, 542 U.S. 177, 189 (2004). As a statement compelled by, and given to, the prison administrators, there is no disputing that an admission of guilt would be testimonial. After all, "A judgment as to the legality of the proceedings is final" only after this Court has taken action on appellant's petition for review. Art. 71, UCMJ. "Whatever else the term [testimonial] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to

the abuses at which the Confrontation Clause was directed." *Crawford v. Washington*, 541 U.S. 36, 69 (2004).

To demonstrate that a testimonial statement is "incriminating," appellant must show the risk that flows from such a statement would be "real and appreciable," rather than "imaginary and insubstantial." *Marchetti v. United States*, 390 U.S. 39, 48 (1968). Appellant can do so even if the required disclosures would not "in themselves support a conviction," so long as they would "furnish a link in the chain of evidence" that could lead to a criminal prosecution. *Hoffman v. United States*, 341 U.S. 479, 486 (1951). Appellant chose to testify at trial in his own defense and assert his innocence. Accordingly, when the facility insisted that he admit guilt, it was directly insisting appellant expose himself to perjury charges. This risk of self-incrimination was not "remote" or "speculative." *Zicarelli v. N.J. State Comm'n of Investigation*, 406 U.S. 472, 478 (1972).

Finally, appellant must demonstrate that this pressure crosses "the line between permissible pressure and impermissible compulsion." *Lacy v. Butts*, 922 F.3d 371, 377 (7th Cir. 2019). This line is "difficult to draw." *Id*. (citing *McKune v. Lile*, 536 U.S. 24, 50 (2002)). Nevertheless, *Lacy* teased out two discrete principles that the Supreme Court suggested would cross that line: (1) compulsions that applied automatically and (2) those that actually extended a sentence. *Id*. at 378.

The policy at issue here, similar to *Lacy*, was an automatic blanket policy that rejected any form of individual determination. Indeed, this is precisely what made the policy so troubling. And although the policy does not actually extend a sentence, it is not at all clear that a lengthier confinement period, is more detrimental than the wholesale banishment of a parent from the lives of his or her children for the entirety of his period of confinement. Some parents, even most, would choose to remain in confinement longer than be erased entirely from the lives of their children. As such, this policy is arguably more compulsive than the one the court found unconstitutional in *Lacy*.

d. The Turner factors overwhelmingly favor appellant's claims.

While "freedom of association is among the rights least compatible with incarceration[,]" *Overton v. Bazzetta*, 539 U.S. 126 (2003), "a prison regulation impinging on inmates' constitutional rights . . . is valid [only] if it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. To weigh these competing interests, *Turner* employed a four-part test: (1) whether a rational connection exists between the prison policy regulation and a legitimate governmental interest advanced as its justification; (2) whether alternative means of exercising the right are available notwithstanding the policy or regulation; (3) what effect accommodating the exercise of the right would have on guards, other prisoners, and prison resources generally; and (4) whether ready, easy-to-

implement alternatives exist that would accommodate the prisoner's rights. 482 U.S. at 89–91.

As a starting point, "*Turner* thus requires courts, on a case-by-case basis, to look closely at the facts of a particular case and the specific regulations and interests of the prison system in determining whether prisoners' constitutional rights may be curtailed." *Beerheide v. Suthers*, 286 F.3d 1179, 1185 (10th Cir. 2002). The policy at issue, however, employs a one-sized-fits-all policy against all offenders irrespective of any individualized assessment of the offender, the family, or the circumstances of the welfare of the children the policy portends to protect.

i. There was no rational connection between the policy and the two legitimate government interests cited by the government: protection of children and promotion of inmate rehabilitation.

While the majority determined this factor is a "close call" in favor of appellee, the minority correctly found that the policy is an "exaggerated response" to the stated objectives. *Jessie*, slip op. at *20 (Schasberger, J., dissenting); *id*. at *24 (Hagler, J., dissenting). In point of fact, the social science marshaled by appellant showed that neither of those characterizations is accurate. The policy actively worked *against* both the penological interests cited by the government.

The sheer breadth of this policy places it in a class unto itself. The policy: "(1) bans all direct and indirect contact with a non-victim biological child, when the child's custodian approves the requested contact; (2) requires admission of

guilt as a precondition to sex offender treatment; and (3) requires treatment that may take years to complete before even requesting an exception to the policy[.]" *Jessie*, slip op. at *24 (Hagler, J., dissenting). "Unlike similar policies in other cases, the challenged policy precluded all forms of contact to include indirect contact." *Id*. at *20 (Schasberger, J., dissenting). Despite its uniquely restrictive policy, "the government offers no convincing, or even reasonable, explanation why the MCC needs policies that, to my knowledge, are more restrictive than any other federal or state jurisdiction." *Id*. at *24 (Hagler, J., dissenting).

Appellant readily concedes that "'protection of children' and 'rehabilitation of inmates' are valid penological interests, but simply invoking these phrases provides no rational basis for why the [facility] draws the line where it does, or why these interests should apply differently within military facilities." *Id*. at *24–25 (Hagler, J., dissenting). It is especially difficult to accept the prison officials' rationale "when in practice, they take neither of these into account on an individualized basis." *Id*. at *24 (Hagler, J., dissenting).

The facility claimed that the policy "align[ed] with practice standards and guidelines of the Association for Treatment of Sexual Abusers," (JA 191), but ATSA emphasized that "unilateral strategies to manage the risk of individuals who may be at risk of offending do not meet best practice guidelines that promote community or institutional safety." (JA 118).

What is most offensive about facility's proffered explanations is the fact that its policy actively harmed the same children that it was purporting to protect. Appellant provided affidavits showing the cruel and emotional damage the policy was causing his children specifically. (JA 177, 181). Indeed, appellant's wife stated she was concerned that the "no contact policy was going to break my oldest daughter." (JA 181). Just as troubling is the fact that this impact was entirely predictable.

Prevailing research in the area demonstrates that separation from a parent results in stress, sadness, and fear. Nancy G. La Vigne, et al., *Broken Bonds: Understanding and Addressing the Needs of Children with Incarcerated Parents*, Urban Institute Justice Policy Center, at i (2008). "Children of incarcerated parents often display short-term coping mechanisms to deal with their loss, which can develop into long-term emotional and behavioral challenges such as depression, problems with school, delinquency, and drug use." *Id*. In fact, "maintaining contact with one's incarcerated parent appears to be one of the most effective ways to improve a child's emotional response to the incarceration and reduce incidence of problematic behavior." *Id*. at 10.

Finally, the policy unnecessarily served to preclude treatment for inmates otherwise amenable to treatment but for their insistence on maintaining innocence. Notably, the policy fails entirely to advance *any* reason for requiring inmates to

admit guilt as a prerequisite to treatment. To the contrary, even the facility ultimately agreed that inmates who maintain their innocence benefit from treatment programs. (JA 197). Not surprisingly, studies demonstrate that maintaining contact with their children lowers recidivism rates among inmates and is linked to positive outcomes associated with reentry. Nancy G. La Vigne, et al., *Broken Bonds: Understanding and Addressing the Needs of Children with Incarcerated Parents*, Urban Institute Justice Policy Center, at 10 (2008).

ii. There are no alternative means of exercising the rights.

Unlike similar policies in other federal court cases, "the challenged policy precluded all forms of contact to include indirect contact." *Jessie*, slip op. at *20 (Schasberger, J., dissenting). As a dissenting Army Court judge succinctly put it, "the government offers no convincing, or even reasonable, explanation why the MCC needs policies that, to my knowledge, are more restrictive than any other federal or state jurisdiction." *Jessie*. slip op. at *24 (Hagler, J., dissenting). The policy was actually unique in two ways that, when considered in tandem, make this policy patently unconstitutional. First, the absolute and mandatory nature of the prohibition on *all* forms of direct and indirect communication with appellant's children. Second, the fact that the compelled result was not the loss of a privilege, but the loss of constitutional rights. Accordingly, when held up to the governing test the Supreme Court established in *Turner*, the policy was manifestly deficient.

See, *e.g.*, *Overton*, 539 U.S. at 133–35 (biological children allowed to visit and inmate can speak with nieces and nephews by phone or mail); *Pell v. Procunier*, 417 U.S. 817, 824–25 (1974) (inmates permitted to, among other things, communicate with those who cannot visit by sending messages through those who can visit).

As another dissenting judge noted, "*Overton* was very clear on this point: 'Alternatives to visitation need not be ideal . . . they need only be available.' 539 U.S. at 135. Here, none are." *Jessie*, slip op. at *25 (Hagler, J., dissenting).

iii. There are no effects from accommodating inmates in sending cards or letters or other forms of communication.

The appellee did not assert any impact on guards and prison resources from allowing an inmate to send or receive cards or letters or make collect calls to immediate family. This factor weighs heavily against the government.

iv. Ready, easy-to-implement alternatives exist that would accommodate prisoner's rights.

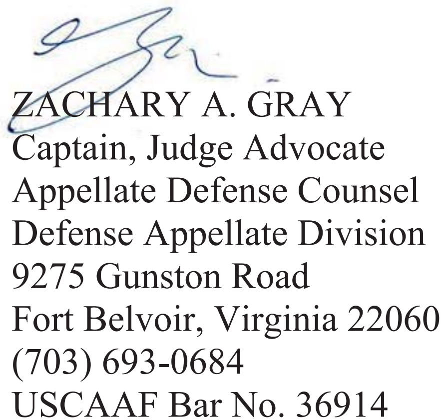
Appellant maintains that phone calls and letters are reasonable alternatives in addition to an individualized approach to restrictions on communication. The reasonableness of these alternatives is readily apparent in light of the fact that this is a common practice throughout the United States corrections community. *See*, *e.g.*, *Overton*, 539 U.S. at 135; *Wirsching v. Colorado*, 360 F.3d 1191, 1200–01 (10th Cir. 2004) (appellant's ability to "maintain contact with his children through

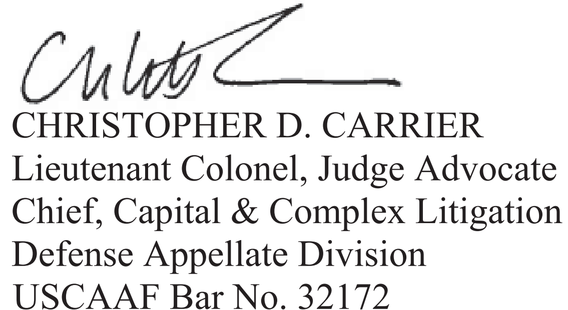
means other than visitation supports the reasonableness of CDOC policy"); *Simpson v. Cty. of Cape Girardeau*, 879 F.3d 273, 280–81 (8th Cir. 2018) (appellant could send postcards and receive collect calls as part of "alternative means of communication"); *Royer v. Fed. Bureau of Prisons*, 933 F. Supp. 2d 170, 186 (D.D.C. 2013) (appellant retained right to make phone calls, write letters, and have noncontact visits); *Vega v. Tegels*, 2018 U.S. Dist. LEXIS 118801, *18 (W.D. Wis. July 17, 2018) ("[D]efendants have provided plaintiff with other means of communication, including unlimited phone calls, messaging, and mail.").

Simply put, despite the existence of readily identifiable alternatives allowing inmates' children to have some form of a relationship with their parents, the facility obstinately maintained, against all evidence, its policy to the contrary. This absolute and unyielding severance in the relationship between parent and child failed to advance any government interest and actually resulted in harm to the same children it purported to protect. As such, this policy was an unconstitutional violation that illegally increased appellant's sentence to confinement.

CONCLUSION

WHEREFORE, CW2 Jessie respectfully requests this Honorable Court set aside the Army Court's decision and remand for a proper review pursuant to Article 66(c).





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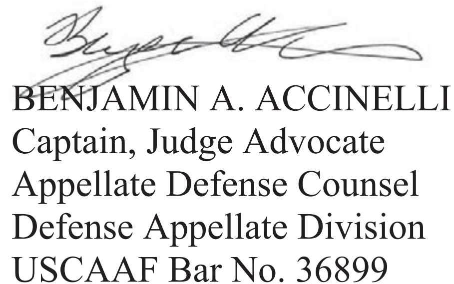

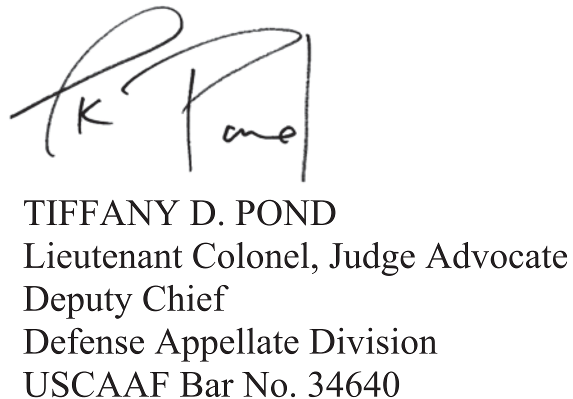

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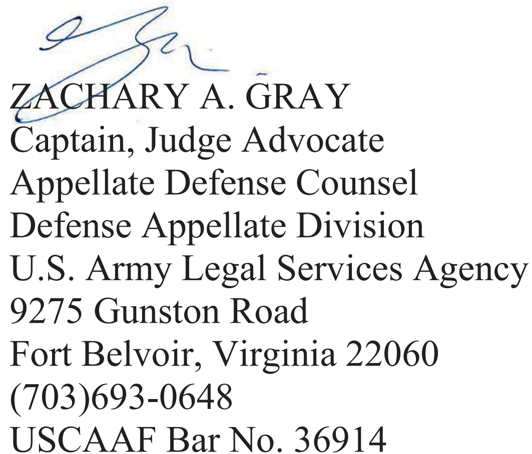

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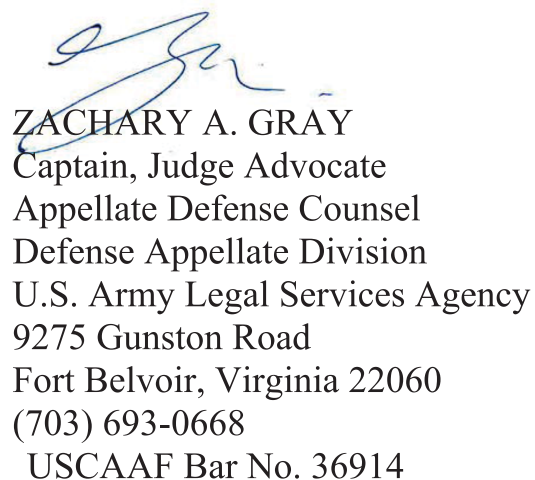
I certify that a copy of the foregoing in the case of *United States v. Jessie,* Army Dkt. No. 20160187, USCA Dkt. No. 19-0192/AR, was electronically filed brief with the Court and Government Appellate Division on August 13, 2019. Hardcopies of the Joint Appendix will be delivered via courier service tomorrow, August 14, 2019. An electronic version of the Joint Appendix is filed contemporaneously.



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