IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*, v. Staff Sergeant (E-6) MICHAEL J. GUINN, United States Army, *Appellant*.	BRIEF ON BEHALF OF APPELLANT USCA Dkt. No. 19-0384/AR Crim. App. Dkt. No. 20170500

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

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

ISSUE PRESENTED

WHETHER THE ARMY COURT CONDUCTED A VALID ARTICLE 66 REVIEW WHEN IT FAILED TO CONSIDER APPELLANT'S FIRST AND FIFTH AMENDMENT CLAIMS EVEN WHILE ENTERTAINING HIS EIGHTH AMENDMENT CLAIMS.

The Army Court of Criminal Appeals [Army Court] had jurisdiction over this matter under Article 66, Uniform Code of Military Justice [hereinafter 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 appellant, Staff Sergeant Michael J. Guinn, contrary to his pleas, of one specification of sexual assault of a child under the age of twelve in violation of Article 120b, UCMJ, 10 U.S.C. § 920b (2012). (JA 78). The panel sentenced appellant to be reprimanded, confined for four years, and dishonorably discharged. The convening authority approved the sentence as adjudged. (JA 79).

On March 28, 2019, a panel of the Army Court issued a memorandum opinion affirming the findings and sentence in accordance with its decision in *United States v. Jessie,* ARMY 20160187, 2018 CCA LEXIS 609 (A. Ct. Crim. App. Dec. 28, 2018). *United States v. Guinn*, ARMY 20170500, 2019 CCA LEXIS 143, *7 (A. Ct. Crim. App. Mar. 28, 2019). Appellant requested reconsideration on April 26, 2019. (*Guinn*, ARMY 2017050, Order, May 17, 2019) [hereinafter JA 10]. On May 17, 2019, the Army Court granted the motion but again declined to address appellant's asserted constitutional violations. (JA 10).

Appellant was notified of the Army Court's decision and, in accordance with Rule 19 of this Court's Rules of Practice and Procedure, filed a Petition for Grant of Review and the accompanying Supplement to the Petition.

On September 24, 2019, this Court granted appellant's petition for review and did not order further briefing. (JA 1). On May 13, 2020, after issuing its decision in *United States v. Jessie*, 79 M.J. 437 (C.A.A.F. 2020), this Court ordered briefing on the issue of whether the Army Court had adequately fulfilled its statutory duty under Article 66(c), UCMJ. (JA 2).

STATEMENT OF FACTS

In the present case, the Army Court concluded, "For many of the reasons outlined in *Jessie*, appellant's First and Fifth Amendment claims…remain 'unsuitable for an [Article 66] sentence appropriateness assessment.'" *Guinn*, 2019 CCA LEXIS 143, at *7 (Mulligan, S.J., concurring). *Jessie*, a splintered *en banc* decision, included four dissenting judges who concluded the challenged policy violated appellant's First Amendment rights. Two of those judges, including the former Chief Judge of the Army Court, called the policy an "epic" failure when held up to the governing constitutional standards laid out by the Supreme Court in *Turner v. Safely*, 482 U.S. 78 (1987). *Jessie*, 2018 CCA LEXIS 609, at *39 (Hagler, J., dissenting).

The *Jessie* majority, however, denied relief. It did so *not* because it held the policy was constitutionally sound, but instead because it concluded it had discretion to reach the merits of these claims and declined to do so. *Id*. at *9–10. After granting appellant's request for reconsideration, the Army Court again

denied relief because "[T]he majority of this court still believes that [an Article III] court is better positioned to address appellant's First and Fifth Amendment claims. As such, we again decline to address these claims within our Article 66 review." (JA 10).

SUMMARY OF ARGUMENT

The Army Court's decision advances the novel position that an appellate body—in a first appeal of right endowed with Article 66(c)'s statutory mandate—may nevertheless decline to resolve an assignment of constitutional error because it believes that "another court is better positioned to address" these claims. (JA 10). This violates the Due Process Clause of the United States Constitution and directly contradicts decades of precedent from this Court. *See* U.S. CONST. amend. V.

When Congress vested servicemembers with the right to mandatory, plenary appellate review—a review that this Court has called a "proverbial 800-pound gorilla when it comes to their ability to protect the accused," *United States v. Parker*, 36 M.J. 269, 271 (C.M.A. 1993)—it did so to ensure that military courts of criminal appeals would have the "duty and authority to review sentence appropriateness" and "to determine whether the sentence is correct 'in law.'" *United States v. Erby*, 54 M.J. 476, 478 (C.A.A.F. 2001). If the Army Court can simply decline to address the issues it finds arduous or thinks could be raised in a

different forum, the right to a plenary review is meaningless. *See* Art. 66(c), UCMJ.[1]

But even if the Army Court had discretion to decline to resolve identified legal deficiencies, it based its decision on erroneous legal conclusions. The presumption that federal appellate courts are "better positioned to address appellant's First and Fifth Amendment claims" is simply wrong. (JA 10). This rationale was rejected by this Court in *United States v. White*, 54 M.J. 469, 472 (C.A.A.F. 2001) ("Unlike civilians, military prisoners have no civil remedy for alleged constitutional violations."). Furthermore, in this case, both parties seemingly agree that meaningful relief is not available in Article III courts. (*See infra* § 2.c and Def. App. Ex. BC).

Moreover, the Army Court's conclusion that it was ill-suited to address appellant's constitutional claims is similarly erroneous. This conclusion is belied by the ease with which other CCAs have addressed similar claims. And finally, to the extent the Army Court rested its conclusion on other reasons pronounced in *Jessie*, the present case is factually distinct in ways that clearly make *Jessie* incongruous to the resolution of *this* appeal.

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[1] Congress amended Article 66, UCMJ, effective January 1, 2019. National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, §§ 531(j), 1081(c)(1)(K), 131 Stat. 1385, 1598 (Dec. 12, 2017). The amendment moved the language in paragraph (c) to paragraph (d)(1) and modified it in minor ways that are irrelevant to this issue.

STANDARD OF REVIEW

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

1. The Army Court's refusal to address appellant's claims violates Due Process and contradicts decades of precedent holding that service courts have the duty to ensure the sentence is "correct in law" and "appropriate."

a. The Army Court's failure to resolve appellant's constitutional claims violates the Due Process clause of the Fifth Amendment to the United States Constitution.

Where the government has created an appellate court system, the procedures it implements to administer that system must comport with the demands of due process. *Evitts v. Lucey*, 469 U.S. 387, 393 (1985). This necessarily includes establishing safeguards to ensure that a first appeal of right is "adequate and effective." *Id*. at 392 (citing *Griffin v. Illinois*, 351 U.S. 12, 20 (1951)). As the Army Court itself chronicled, the genesis of Article 66(c), UCMJ, emerged from a series of perceived injustices and therefore created an appellate system with a "statutory *responsibility* [that] is one of the broadest and most unusual of any criminal court in this country." *United States v. Bauerbach*, 55 M.J. 501, 504 (A. Ct. Crim. App. 2001) (emphasis added).

Review by a Court of Criminal Appeals [CCA] pursuant to Article 66, UCMJ, is a first appeal of right. *See*, *e.g.*, *United States v. Ribaudo*, 62 M.J. 286, 288 (C.A.A.F. 2006) (citing *United States v. Rorie*, 58 M.J. 399, 406 (C.A.A.F. 2003)). Pursuant to this right, a CCA must consider issues raised by an appellant. *See United States v. Grostefon*, 12 M.J. 431, 436 (C.M.A. 1982) (requiring a CCA to "at a minimum, acknowledge that it has considered those issues enumerated by the accused and its disposition of them"); *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987) (noting that where a CCA indicates it has considered an issue raised by an appellant, a single sentence disposition is sufficient).

An appellant must also have a fair chance to present arguments during the appellate process. *See United States v. Moreno*, 63 M.J. 129, 149 (C.A.A.F. 2006) (Crawford, J., dissenting); *see also United States v. Boyce*, 76 M.J. 242, 253 (C.A.A.F. 2017) (federal courts have an independent interest in ensuring that legal proceedings appear fair to all who observe them). If an appellant is not presented such an opportunity, or if his/her issues are not afforded due consideration, then the appellate process is not "adequate and effective." *Evitts*, 469 U.S. at 392. Rather, it is akin to a meaningless ritual. *Cf. Moreno*, 63 M.J. at 135 ("An appeal that is inordinately delayed is as much a 'meaningless ritual,' as an appeal that is adjudicated without the benefit of effective counsel or a transcript of the trial court proceedings.") (internal citations omitted).

The failure to resolve appellant's claims is even more disturbing given the unique statutory regime Congress established for servicemembers under the Code. "The procedures followed here do not produce the type of appellate review contemplated by Congress." *United States v. Mitchell*, 250 M.J. 350 (C.M.A. 1985) (per curiam) (remanding the case back to the CCA after it denied appellant's right to supplement the record without explanation). The Army Court had an obligation to consider appellant's timely raised issues, thereby affording him an "adequate and effective" opportunity for relief. *Evitts*, 469 U.S. at 392. Even *if* appellant had not expressly raised these issues, the Army Court had the responsibility to "read the entire record and *independently arrive at a decision* that the findings and sentence are correct in law and fact…." *Grostefon*, 12 M.J. at 435 (emphasis added). The fact appellant did raise these issues before the Court makes the failure that much greater. Without resolving appellant's constitutional claims, the Army Court could not conclude his sentence was "correct in law[,]" let alone fulfill its separate duty to meaningfully determine whether that sentence "should be approved" in the event this was error. Art. 66(c), UCMJ. As such, the lower court's decision runs afoul of the system Congress established and therefore violates appellant's Due Process protections.

b. Since the passage of the UCMJ, this Court has made clear Article 66(c) mandates review and resolution of an appellant's claims.

This Court has repeatedly made clear Article 66(c), UCMJ, establishes mandatory requirements for the CCAs. *See*, *e.g.*, *United States v. Kelly*, 77 M.J. 404, 406 (C.A.A.F. 2018) ("it is a 'settled premise' that in exercising this statutory mandate, a CCA has discretion to approve *only* that part of a sentence that it finds 'should be approved,' even if the sentence is 'correct' as a matter of law") (emphasis added); *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005) ("Article 66(c) *requires* that the members of the Courts of Criminal Appeals independently determine…the sentence appropriateness of each case they affirm"); *Parker*, 36 M.J. at 271 (the CCA's are the "proverbial 800-pound gorilla when it comes to their ability to *protect the accused*") (emphasis added); *United States v. Claxton*, 32 M.J. 159, 162 (C.M.A. 1991) ("A clearer *carte blanche* to do justice would be difficult to express"); *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990) ("In point of fact, Article 66 *requires* the [Court of Criminal Appeals] to use its judgment to 'determine[], on the basis of the entire record' which findings and sentence should be approved").

These broad precedents are wholly consistent with the narrower holdings that control this case, wherein this Court held CCAs have the duty to resolve claims alleging legal error in post-trial confinement conditions. For example, in

White and *Erby*, this Court rejected the Air Force Court's conclusion that it lacked jurisdiction to hear complaints about confinement conditions. 54 M.J. 469, 472 (C.A.A.F. 2001); 54 M.J. 476, 478 (C.A.A.F. 2001). The CCA's not only had jurisdiction to consider these errors, Article 66(c) mandated that they "ensure that the severity of the adjudged and approved sentence has not been unlawfully increased by prison officials, and to ensure that the sentence is executed in a manner consistent with Article 55 and the Constitution." *White*, 54 M.J. at 472; *see also Erby*, 54 M.J. at 478.

And lest there have been any further confusion about its holding, this Court "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); *see Erby*, 54 M.J. at 478 (CCAs have "the *duty and the authority* under Article 66(c) to determine whether the sentence is 'correct in law'"); *see also United States v. Pena*, 64 M.J. 259 (C.A.A.F. 2007) (considering whether conditions of the government's supervised release program violated Article 55, UCMJ, or the Eighth Amendment); *United States v. Brennan*, 588 M.J. 351 (C.A.A.F. 2003) (finding post-trial confinement conditions including rampant sexual harassment by facility staff constituted a violation of the Eighth Amendment).

In sum, this Court has an august and lengthy history of ensuring that unlawful confinement conditions do not transmute an otherwise lawful sentence into a legally incorrect and inappropriate one. After all, when an appellant is sentenced to a term of confinement, it is inherently required to be imposed in a manner consonant with law and the Constitution. When it is not, this Court makes clear the CCA has the duty to consider and resolve an appellant's claims. The Army Court failed to do so here.

c. This failure implicates <u>both</u> requirements that ensure appellant's sentence was "correct in law" and that it was "appropriate."

This Court recently recognized its "prior decisions have not clearly delineated the difference between the 'correct in law' and sentence appropriateness determinations, nor specified under which provision post-trial confinement condition claims fall." *Jessie*, 79 M.J. at 443, n. 8. *White* and *Erby* identified the CCA's failure to address the alleged errors as rooted in the failure to ensure the sentence was "correct in law." 54 M.J. at 472; 54 M.J. at 478; *see also Brennan*, 58 M.J. at 355 (C.A.A.F. 2003) (describing post-trial confinement claims as "a legal error rather than the provision of clemency"). But this Court has also suggested post-trial confinement conditions go to sentence appropriateness. *See United States v. Gay*, 75 M.J. 264, 267 (C.A.A.F. 2016).

Upon close reading, these two lines of cases are readily reconcilable and, read together, suggest such claims actually fall under both clauses. On the one hand, when a sentence "is being unlawfully increased by prison officials[,]" the sentence is no longer "correct in law." *White*, 54 M.J. at 475 (Sullivan, J., concurring) (emphasis added). *Gay*, in turn, holds that a CCA must base its sentence appropriateness analysis (when based on confinement conditions) on a legal error or deficiency in the post-trial process. 75 M.J. at 269. Together, these cases reflect a two-step process by which the Court assures itself the sentence is "correct in law" given the confinement conditions and, if not, it must then determine whether the sentence nevertheless remains appropriate under the facts of that particular case.[2]

In this instance, however, the Army Court did neither. First, the Army Court failed to resolve the initial question of whether the sentence was "correct in law." Having failed to do that, the Army Court had no way to meaningfully determine that appellant's sentence "should be approved." Accordingly, the Army Court erred on both fronts.

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[2] There also exists a separate and distinct form of sentence appropriateness wherein "a CCA has discretion to approve only that part of a sentence that it finds 'should be approved,' even if the sentence is 'correct' as a matter of law." *Kelly*, 77 M.J. at 406 (C.A.A.F. 2018). However, appellant respectfully suggests these two lines of sentence appropriateness doctrine should be considered analytically distinct to avoid the confusion referenced in its *Jessie* footnote. *Jessie*, 79 M.J. at 443, n. 8.

d. Even if this error goes solely to sentence appropriateness, the Army Court misunderstood its duty to determine whether a sentence "should be approved."

At a fundamental level, the Army Court mistook the discretionary nature of its sentence appropriateness authority. 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*. And by failing to consider the appropriateness of appellant's sentence in light of the post-trial confinement conditions, the Army Court failed to meaningfully determine that the sentence "should be approved." Art. 66(c), UCMJ.

The CCAs have significant discretion in *how* they resolve sentence appropriateness claims, but they have a duty to do so one way or another. The Army Court may call balls and strikes, but it may not decide it no longer wants to umpire the game. This Court has long held the CCAs have an "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). And the Army Court 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). But without determining whether appellant's sentence is being unlawfully increased by prison officials, the Army Court cannot meaningfully fulfill this obligation.

Any suggestion that this Court's decision in *Healy* is relevant to appellant's case is erroneous. *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 address the underlying claim itself. And in *Healy*, 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 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 they must do so.

The Army Court's opinion in *Jessie*, however, read *Gay* as authority for the proposition it had the discretion to consider appellant's claim that a legal deficiency in his confinement conditions rendered his sentence inappropriate. *Jessie*, 2018 CCA LEXIS 609, at *10. Specifically, the Army Court interpreted *Gay* to mean, "[T]he issue for us is not whether we 'must' or 'must not' consider appellant's post-trial confinement conditions when determining appellant's sentence appropriateness, the question is whether we *should*." *Id*. (emphasis in original). This reading overlooks a key component of *Gay*, and makes the opinion not only internally inconsistent, but also inconsistent with this Court's sentence appropriateness jurisprudence.

First, in *Gay*, the lower Court stated, "Under our Broad Article 66(c), UCMJ, authority, we retain *responsibility* in each case we review to determine whether the adjudged and approved sentence is appropriate…which necessarily includes the appellant's allegation of the conditions of his post-trial confinement." *United States v. Gay*, 74 M.J. 736, 743 (A.F. Ct. Crim. App. 2015). This Court expressly cited this very language in ultimately affirming the Air Force CCA's rationale. *Gay*, 75 M.J. at 266.

Second, this Court's opinion in *Gay* cited *Fagan*, where this Court held 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." *Gay*, 75

M.J. at 267–68 (citing *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 cannot decline to resolve a claimed constitutional error by granting an appellant relief, they surely may not do so in order to deny him appropriate relief.

Finally, the Army Court's interpretation makes *Gay* squarely inconsistent with *Baier*, 60 M.J. 382.[3] In *Baier*, this Court 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 whether the sentence "should be approved" but have "sound discretion" in whatever conclusion they come to.

[3] Along with the host of cases already discussed at length *supra*.

2. Even if the Army Court had the discretion to decline to resolve appellant's constitutional claims, it abused its discretion by relying on erroneous legal conclusions.

In declining to address the merits of appellant's claims, the Army Court observed that its decision is informed by the fact that "to the extent appellant's claims are meritorious, there exists a court that has the authority to order actual (*i.e.*, injunctive) relief[]" and "there is another court that is better positioned to address appellant's complaints." *Guinn*, 29 CCA LEXIS 143, at *11 (Mulligan, S.J., concurring) (citing *Jessie*, 2018 CCA LEXIS 609, at *18–19).

This conclusion is simply wrong. Appellant is not asking for injunctive relief, nor has he done so at any stage in the proceeding. More importantly, both parties agree appellant is barred from seeking the relief he is requesting in the Article III court system. (Def. App. Ex. BC). As such, the Army Court clearly erred when it exercised its "discretion" to decline to resolve appellant's claims based on erroneous legal conclusions.

a. The Army Court miscasts appellant's claim as a request for injunctive relief.

First, the Army Court's suggestion that what appellant is *actually* seeking is injunctive relief is incorrect. But as the Army Court itself noted, the confinement facility changed its policy in November 2018 to implement an individualized risk assessment and no longer required admission of guilt before participation in treatment. *Jessie*, 2018 CCA LEXIS 609, at *7. When it did so, any claim for

injunctive relief based on the absence of an individualized assessment was rendered moot.

By miscasting this case as a request for injunctive relief, the Army Court reviewed 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.

b. The Army Court failed to consider the abstention and exhaustion doctrines.

Appellant has consistently argued that the Army Court failed to consider abstention and exhaustion doctrines in its analysis. *See Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975); *see also 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 such, until the military courts resolve appellant's claims one way or another, these claims are barred from further consideration before an Article III tribunal.

The Army Court cited one line of cases implicating these notions, but drew the wrong conclusion from it. *Jessie*, 2018 CCA LEXIS 609, at *19 n. 12 (citing *Gray v. Belcher*, No. 5:08-cv-03289-JTM, 2016 U.S. Dist. LEXIS 149574 (D. Kan. Oct. 26, 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 they had not so done. *Gray*, No. 5:08-cv-03289-JTM, 2016 U.S. Dist. LEXIS 149574, at *3. If the Gray litigation can be said to stand for anything, it stands for the proposition that a 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 servicemember's constitutional rights" on its head and presumes, instead, that the Article III courts will address the issue. Not only is this conclusion wrong, it is one that both parties, and this Court, have rejected.

c. Both parties, and this Court, recognize Article III courts are unavailable to vindicate appellant's constitutional rights and provide meaningful relief.

The absence of meaningful relief before the Article III courts has long been recognized by this Court. In *White*, this Court observed in another confinement conditions case, "Unlike civilians, military prisoners have no civil remedy for alleged constitutional violations." 54 M.J. at 472. Two decades later, Judge Ohlson reiterated this point, emphasizing that an appeal to the district court "offers false hope given that the *Feres* doctrine prohibits lawsuits by military prisoners against the federal government." *Jessie*, 79 M.J. at 447, n. 1 (Ohlson, J., dissenting).

It would appear the government also believes that Article III courts cannot provide relief. The government's brief, filed in the Eastern District of Virginia, argues federal courts are not appropriate, and not available, to vindicate the claims presently before this Court. (Def. App. Ex. BC). This has been the appellant's position before this Court all along. Accordingly, the parties seemingly agree that the Army Court erred when it declined to fulfill its statutory mandate based on its conclusion an Article III court was better situated to resolve appellant's present claims.

In the government's brief to the district court, it asserts several reasons the district court should dismiss appellant's petition for extraordinary relief, but a few

are particularly relevant to this case. As an initial matter, the government echoes appellant's argument that Article III courts are barred from considering appellant's claims because the Army Court's decision constituted "full and fair consideration" pursuant to *Burns*, 346 U.S. at 140–45 (1953). (Def. App. Ex. BC, p. 9–10, n. 4, 7).

Moreover, the government argues the district court cannot provide relief for several reasons. First, according to the government, the alleged condition has already been remedied, a fact in the government's view "dooms" appellant's petition in the district court under 28 U.S.C. § 2241(c)(3). (Def. App. Ex. BC, p. 11). Second, the government acknowledges there is "no authority [in Article III courts] for the notion that interference with child-visitation rights should somehow lead to a sentence reduction" and "the alleged right and the requested relief are completely untethered from one another." (Def. App. Ex. BC, p. 11).

The government also claims appellant does not have standing in federal court, thus any further "civil rights action would be futile" because appellant "would lack standing to present any non-habeas claim for injunctive relief, because he has no present injury…." (Def. App. Ex. BC, p. 11 n. 8). Finally, the government confirms Judge Ohlson's assertion that "[m]onetary damages are not available under habeas" and even if they were, his claim would be "flatly barred by the *Feres* doctrine." (Def. App. Ex. BC, p. 12–13).

In short, the parties seemingly agree Article III courts are barred by the "full and fair consideration" doctrine, the only court with statutory authority to reduce appellant's sentence is the military, and any other form of relief has either been mooted or is barred by the *Feres* doctrine. In light of these facts, the Army Court's finding that Article III courts are "better positioned" to resolve appellant's constitutional violations is plainly wrong. And because this was the stated basis for the Army Court's decision to decline to resolve appellant's claims, it clearly abused its discretion.

d. The Army Court's conclusion that it is ill-suited to address appellant's claims is belied by its sister-service CCAs disposition of similarly situated claims.

The Army Court also concluded it was too difficult for the court to decide the merits and craft relief. 2018 CCA LEXIS 609, at *12–15. But this is belied by the fact other CCAs have resolved similar claims by simply relying on factors laid out in *Turner v. Safley*, 482 U.S. 78 (1987). *See*, *e.g.*, *United States v. Green,* 2007 CCA LEXIS 475, at *6-12 (A.F. Ct. Crim. App. Oct, 12, 2007); *United States v. Felicies*, 2005 CCA LEXIS 124, at *36-41 (N-M. Ct. Crim. App. Apr. 27, 2005). "Simply put, we have the test. We need only apply it." *Jessie*, 2018 CCA LEXIS 609, at *42 (Hagler, J., dissenting).

Moreover, the other service courts resolved the merits of similar claims without the luxury of a well-developed factual record that was presented to the

Army Court in this case. As Judge Hagler observed, "I recognize the majority's apparent concern with flooding the appellate process with complaints of post-trial confinement conditions, but I cannot accept it as a justification for inaction in this case." *Jessie*, 2018 CCA LEXIS 609, at *42–43 (Hagler, J., dissenting). He added:

> It is a sad day for justice when this court is presented with strong evidence of a constitutional infringement yet declines to address it—not because we find no prejudice or lack authority to grant meaningful relief—but because we fear the consequences. Even if such consequences do come to pass, I would still fulfill our statutory duty. *Fiat Justitia Ruat Caelum*.

Jessie, 2018 CCA LEXIS 609, at *43 (Hagler, J., dissenting)

e. The Army Court's rationale in Jessie does not apply to appellant's case.

Finally, the Army Court erred in one final and fundamental way. Despite basing its decision in this case on "many of the reasons outlined…in *Jessie*," the reasoning the Army Court employed in *Jessie* rested on facts that are irrelevant to this case. *Guinn*, 2019 CCA 143, at *11 (Mulligan, S.J., concurring). In *Jessie*, the Court held that its "understanding of *Gay* is shaped by a couple of other considerations." *Jessie*, 2018 CCA LEXIS 609, at *9. First, in *Gay* the appellant had raised the issue to the convening authority in his clemency petition. *Id*. Second, it cited *Healy* as a limiting principle for considering matters related to issues not previously raised to the convening authority. *Id*. Finally, it emphasized

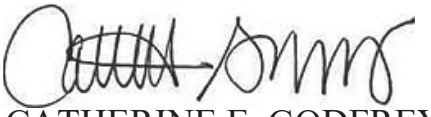
that *Jessie* did not involve a claim pursuant to Article 55 or the Eighth Amendment and, as such, cases like *White* and *Erby* did not control. *Id*. at *11–12.

In this case, appellant did raise the confinement conditions to the convening authority in his matters raised pursuant to R.C.M. 1105. And here, appellant did raise the same confinement conditions as both a violation of the Eighth Amendment, and his First and Fifth Amendment rights. This was not lost on the dissent in *Guinn*. "I see no viable reason why we should consider appellant's Eighth Amendment and Article 55 claim, but then decline to consider his First and Fifth Amendment claims." *Guinn*, 2019 CCA LEXIS 143, at *12 (Schasberger, J., dissenting). "Furthermore, unlike *Jessie*, appellant *did* raise this issue to the convening authority." *Id*. (Schasberger, J., dissenting).

In short, the Army Court did not have "many . . . reasons" to decline to review the appellant's case. In fact, the only remaining justification that survives analysis is the Army Court's determination that the district court is "better positioned to address appellant's complaints[.]" *Guinn*, 2019 CCA LEXIS 143, at *11 (Mulligan, S.J., concurring). As demonstrated above, however, this too is incorrect. And because the Court exercised its ostensible "discretion" based on flawed reasoning throughout its review of this case, the Army Court plainly abused its discretion.

CONCLUSION

WHEREFORE, SSG Guinn respectfully requests this honorable Court set aside the lower court's opinion and remand this case to the Army Court for proper review under Article 66(c), UCMJ.



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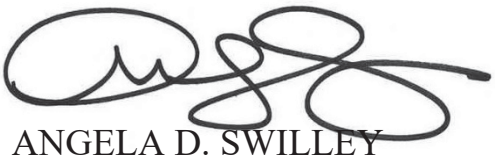

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Guinn*, Army Dkt. No. 20170500, USCA Dkt. No. 19-0384/AR, was electronically filed with the Court and Government Appellate Division on July 22, 2020.

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