IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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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.

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
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Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c). This Court has jurisdiction over this matter under Article 67(a)(3) UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On September 21, 2017, an enlisted panel sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of sexual abuse of a child, in violation of Article 120b, UCMJ, 10 U.S.C. § 920b. (JA 78). The panel sentenced Appellant to a dishonorable discharge, four years of confinement, total forfeiture of all pay and allowances, and reduction to the grade of E-1. (JA 79). The Army Court issued a memorandum opinion affirming the findings and sentence on March 28, 2019. (JA 3). The Army Court granted reconsideration and adhered to its opinion on May 17, 2019. (JA 10). Appellant timely filed a Petition for Grant of Review and Supplement to the Petition presenting two issues.

This Court granted Appellant's petition for review with respect to both issues on September 24, 2019, but ordered no briefing. (JA 1). Then, on May 13, 2020, this Court ordered briefs pertaining to Issue I only. (JA 2).

Statement of Facts

Appellant licked the genitals of a six-year-old girl sleeping in his living room following his own daughter's birthday party. *United States v. Guinn*, No. ARMY 20170500, 2019 CCA LEXIS 143, *2–3 (A. Ct. Crim. App. Mar. 28, 2019) (mem. op.).

Appellant began serving his confinement at the Midwest Joint Regional Confinement Facility at Fort Leavenworth, Kansas in September 2017. *Id.* at *3–4. The facility's child sex-offender visitation policy in effect at the time—Military Correctional Complex Standard Operating Procedure 310 ("policy")—precluded all child sex-offenders from any contact with any children absent an exception to policy approved by the prison commander. *Id*. The policy required the inmate to accept responsibility for his offenses and to complete a sex offender treatment program as prerequisites for consideration of an exception to the policy. *Id*. As Appellant sexually abused a sleeping six-year-old, the policy applied to him.

Appellant submitted three assignments of error—including an allegation that the post-trial confinement conditions imposed by the policy violated the First, Fifth, and Eighth Amendments—as well as *Grostefon* matters relating to ineffective assistance of counsel and investigative failures to the Army Court. *Guinn*, 2019 CCA LEXIS 143, at *1. On March 28, 2019, the Army Court issued a two-part memorandum opinion. *Id*. Part I resolved Appellant's *Grostefon* issue,

Assignments of Error I and II, and whether the policy violated the Eighth Amendment or Article 55, UCMJ. *Id*. Part II declined to resolve Appellant's First and Fifth Amendment challenges to the policy, citing the rationale of the Army Court sitting en banc in *United States v. Jessie*, No. ARMY 20160187, 2018 CCA LEXIS 609 (A. Ct. Crim. App. Dec. 28 2018) (mem. op).[7] *Id*. at *10–11 (Mulligan, S.J., concurring). A November 2018 amendment to the policy ameliorated Appellant's complaints. (Appellant's Br. 17).

Summary of Argument

The Army Court conducted a valid Article 66 review in resolving Appellant's complaints because cruel and unusual punishment—as prohibited by the Eighth Amendment and Article 55, UCMJ—is distinct from a non-punitive, administrative prison policy. This Court has never held that administrative prison policies of general applicability, even if disfavored, relate to the correctness in law or appropriateness of an adjudged and approved sentence where no article of the UCMJ has been violated and the conditions imposed lack the character of punishment. Nor has this Court ever held that a prison policy violating a servicemember's First and/or Fifth Amendment rights constitutes a legal deficiency necessitating relief on Article 66 review. Correspondingly, whether

[7] "The Army Court, with ten judges sitting en banc, concluded that it had no obligation to review Appellant's constitutional challenges [when assessing his sentence] and that considering them would be inappropriate." *United States v. Jessie*, 79 M.J. 437, 438 (C.A.A.F. 2020).

requested or not, the only form of relief suited to Appellant's First and Fifth Amendment objections to the underlying prison policy is enjoinment of the condition, not sentencing relief under Article 66. Because the only courts empowered to grant injunctive relief are those constituted under Article III, Appellant seeks relief in the wrong forum. Further, a grant of sentencing relief under the particularized facts of Appellant's case would result in institutional confusion and a windfall of inequity between prisoners such as Appellant and those without minor children, as well as those inmates who only seek injunctive relief in the appropriate forum.

Standard of Review

"[T]he Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority." Article 66(c), UCMJ, 10 U.S.C. § 866(c). When reviewing sentence appropriateness, a service court "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." *Id*. This Court's review of post-trial confinement conditions on direct appeal is limited to the impact of such conditions on the findings and the sentence. *See* Article 67(c), UCMJ, 10 U.S.C. § 867(c); *United States v. Pena*, 64 M.J. 259, 264 (C.A.A.F. 2007). This Court reviews a

court of criminal appeals' sentence appropriateness determination for abuse of discretion. *United States v. Nerad*, 69 M.J. 138, 142 (C.A.A.F. 2010).

"The scope and meaning of Article 66(c) is a matter of statutory interpretation, which, as a question of law, is reviewed de novo." *United States v. Gay*, 75 M.J. 264, 267 (C.A.A.F. 2016) (citation omitted). "The language of Article 66(c) states that a CCA 'may' approve only that part of a sentence that it finds 'should be approved.' The statute clearly establishes a discretionary standard for sentence appropriateness relief awarded by the Courts of Criminal Appeals." *Id*. at 268 (citing *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999)) (recognizing that "the sentence review function of the Courts of Criminal Appeals is highly discretionary.").

Law and Argument

I. Eighth Amendment and Article 55, UCMJ, challenges are distinct from other complaints relating to post-trial confinement conditions.

A. Article 66(c) and this Court's precedent create a discretionary standard for service court review of confinement conditions not amounting to cruel and unusual punishment.

The authority Congress bestowed on the service courts in Article 66(c) has boundaries, and the "plain words of the statute" limit review to matters relating to the correctness in law of the findings and sentence of the court-martial. *United States v. Fagnan*, 12 U.S.C.M.A. 192, 195 (1961); *see also Jessie*, 79 M.J. at 438

("If a CCA's review authority is limitless, then much of the restrictive wording in Article 66(c), UCMJ, would be superfluous.").

The Eighth Amendment prohibits "cruel and unusual punishments." U.S. CONST. amend. VIII. The UCMJ expressly incorporates Eighth Amendment principles into Article 55, which prohibits cruel and unusual punishment in a military setting. *See* Article 55, UCMJ, 10 U.S.C. § 855; s*ee also United States v. Kinsch*, 54 M.J. 641, 646 (A. Ct. Crim. App. 2000) (holding the service courts' "congressional mandate" under Article 66(c) "includes the enforcement of the UCMJ's prohibition against the infliction of cruel and unusual punishment" as well as consideration of those "issues in the course of normal appellate review."). Congress has also expressly prohibited sentences to solitary confinement, as well as any treatment inconsistent with civilian penal standards. *See* Rule for Courts-Martial (R.C.M.) 1003(b)(7); Article 58(a), UCMJ, 10 U.S.C. § 858. This Court has specifically held that cruel and usual punishment creates a legal deficiency sufficient to trigger automatic Article 66(c) review and warrant potential sentence relief. *See Gay*, 75 M.J. at 264 (Eight Amendment challenge for arbitrary placement in solitary confinement); *Pena*, 64 M.J. at 260 (Eighth Amendment challenge for oppressive conditions of mandatory supervised release program)*;* *United States v. White*, 54 M.J. 469 (C.A.A.F. 2001) (Eighth Amendment challenge for prison guard harassment); *United States v. Erby*, 54 M.J. 476

(C.A.A.F. 2001) (same). By contrast, this Court has never held that prison policies impinging on First and/or Fifth Amendment rights constitute legal deficiencies.

In this case, the Army Court found that Appellant's confinement conditions did not rise to the level of cruel and unusual punishment under either the Eighth Amendment or Article 55, UCMJ. *See Guinn*, 2019 CCA LEXIS 143, at *9. Now, Appellant asks this Court to announce a novel mandate requiring service courts to consider whether time spent under an administrative prison policy possibly infringed on other liberties in a manner warranting sentencing credit. (Appellant's Br. 5). While this Court presently *permits* the service courts to review confinement conditions not amounting to cruel and unusual punishment under Article 66 within their discretion, it has never *mandated* that they do so with respect to any and all constitutional complaints, as Appellant suggests. *Gay*, 75 M.J. at 264; Appellant's Br. 10. In fact, this Court has never announced which, if any, conditions not amounting to cruel and unusual punishment must be reviewed by service courts.

The false premise of limitless jurisdiction in the field of constitutional prison complaints takes root in Appellant's overstated reliance on this Court's decision in *White*. In *White*, this Court summarized its limited history of asserting jurisdiction in Eighth Amendment and Article 55 challenges to post-trial confinement conditions and stated:

> We now expressly hold that we have jurisdiction under Article 67(c) to determine on direct appeal if the adjudged and approved sentence is being executed *in a manner that offends the Eighth Amendment and Article 55*. Our statutory authority is to act 'with respect to the findings and sentence.' This grant of authority encompasses more than authority merely to affirm or set aside a sentence. It also includes authority to 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.

54 M.J. at 472 (emphasis added).

Next, this Court conducted a thorough exposition on Supreme Court Eighth Amendment jurisprudence as well as the legislative history of Article 55. It adopted the Supreme Court's Eighth Amendment framework and interpreted Article 55 as a congressional effort to "prohibit or limit the imposition of certain punishments that would not necessarily violate the Eighth Amendment." *Id*. at 473. This Court determined that White's "complaints, if true, d[id] not amount to either a constitutional or statutory violation in derogation of the Eight Amendment or Article 55" and took care to point out that its "holding is limited to the question whether the facts asserted by [White] constitute a constitutional or statutory violation." *Id*. at 475. Accordingly, this Court concluded that any follow on resolution regarding White's alleged treatment was a "matter[] for consideration by

appropriate supervisory personnel." *Id*. This Court is not considering any Eighth Amendment claims in this case, rendering *White* inapposite.

Erby involved similar allegations of cruel and unusual punishment at the hands of prison guards who essentially hazed the appellant during his first 72 hours of confinement, which he spent in administrative segregation. 54 M.J. at 477. The service court stated that it "was *appalled* by the treatment alleged . . . [h]owever, it held that it had no authority to review [Erby]'s complaint because the mistreatment was not part of the approved sentence, nor was it raised in appellant's clemency request to the convening authority." *Id*. (internal quotations and citations omitted) (emphasis added). This Court granted review of whether the service court erred when it held that it lacked authority to consider allegations of cruel and unusual treatment as well as the underlying substantive issue. *Id*. at 476–77. Citing *White*, this Court in *Erby* stated that it had "expressly held that 'we have jurisdiction under Article 67(c) to determine on direct appeal if the adjudged and approved sentence is being executed *in a manner that offends the Eighth Amendment and Article 55*,'" and that this authority also "'includes authority to ensure that the severity of the adjudged and approved sentence has not been unlawfully increased by prison officials.'" *Id*. at 478 (emphasis added). Reasoning that such authority "was virtually identical" to the service courts' duty and authority to determine whether a "sentence is correct 'in law,'" this Court held that the service court erred

by concluding that it lacked jurisdiction to review claims of cruel and unusual punishment and remanded the case for further fact-finding on the merits of the allegation. *Id*. at 478–79 (quoting Article 66(c), UCMJ).

This Court also considered the possibility that a confinement-related condition "could be imposed in a manner that increases the punishment above the punishment adjudged by a court-martial." *Pena*, 64 M.J. at 266. Pena alleged cruel and unusual punishment based upon heavy restrictions associated with a mandatory supervised release program. *Id*. at 263. The service court held that Pena failed to make a facial showing of cruel and usual punishment or impermissible increase in punishment. *Id*. at 266–67. This Court, focusing on the fact that the record did not demonstrate that the program was administered in a manner that constituted actual "'punishment' within the meaning of the criminal law[,]" affirmed. *Id*. (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963) (evaluating whether government action is punitive or regulatory in nature).

In *Gay*, this Court held that the service court did not abuse its discretion when it reduced a sentence of confinement after finding that a servicemember's arbitrary placement in solitary confinement, while not cruel and unusual, unreasonably increased his punishment. *See* 75 M.J. at 269. The service court found Gay's extraordinary situation deserving of relief for several reasons: 1) no valid reason for placing him in solitary confinement was offered; 2) if the

placement was made solely to prevent commingling with a foreign national, such reason was unacceptable; 3) there was an unrebutted assertion that a military official was directly involved in his placement; and 4) he was easily transferred to another pod that did not contain foreign nationals as soon as unit leadership eventually complained. *United States v. Gay*, 74 M.J. 736, 743 (A.F. Ct. Crim. App. 2015). This Court, acknowledging the discretionary nature of the service courts' Article 66 review authority, crafted its holding carefully:

> In reaching this conclusion, *we do not recognize unlimited authority* of the Courts of Criminal Appeals to grant sentence appropriateness relief *for any conditions of post-trial confinement of which they disapprove*. Rather, we hold that the [service court's] *decision* to grant sentence appropriateness relief *in this case* was based on a legal deficiency in the post-trial process and, thus, was clearly authorized by Article 66(c).

Gay, 75 M.J. at 269 (emphasis added).

Appellant's conclusion that the service courts have a duty to ensure that otherwise lawful sentences are executed in harmony with all constitutional provisions relies on an overly-expansive reading of this Court's precedent which ignores the limited context and holdings of the cases cited.[8] In effect, as far as the service courts are concerned, this Court's precedent has created a "should we

[8] *White*, *Erby*, *Pena*, and *Gay* all relate to jurisdictional analysis of cruel and unusual punishment allegations. *See* 54 M.J. at 470; 54 M.J. at 477; 64 M.J. at 265; 75 M.J. at 265. While Appellant has also alleged that the policy violated the Eighth Amendment, that claim was resolved by the Army Court and is not before this Court. *See Guinn*, 2019 CCA LEXIS 143, at *9.

address this" and not a "must we address this" question with respect to confinement condition complaints not amounting to cruel and unusual punishment. *See Jessie*, 2018 CCA LEXIS 609, at *8; *Gay*, 75 M.J. at 269. In the past, while service courts have on occasion addressed situations short of cruel and unusual punishment without abusing their discretion, this Court has never obligated them to do so. *See Gay*, 75 M.J. at 269.[9]

The Army Court exercised its prerogative in *United States v. Jessie* when it interpreted its "discretionary sentence appropriateness authority," distinguished *Gay*, and declined to engage First and Fifth Amendment challenges to the prison's child access policy for child sex offenders as a matter of sentence appropriateness. 2018 CCA LEXIS 609, at *5 (quoting *Gay*, 75 M.J. at 269). This Court affirmed the Army Court's decision on a separate basis but presaged that larger issues

[9] *See also United States v. Verdejo-Ruiz*, ACM 37957, 2014 CCA LEXIS 607, *23–25 (A.F. Ct. Crim. App. Aug. 14 2014) (unpublished) (analyzing similar prison policy challenge under the Eighth Amendment and concluding it "is not an additional punishment or a method of enhancing the sentence already adjudged."); *United States v. Felicies*, NMCCA 9900206, 2005 CCA LEXIS 124, *36 (N-M. Ct. Crim. App. Apr. 27 2005) (unpublished) (disposing of Eighth Amendment challenge to custody classification as well as First Amendment challenge to foreign language communications policy); *United States v. Green*, 2007 CCA LEXIS 475, *6–7 (A.F. Ct. Crim. App. Oct. 12 2007) (unpublished) (disposing of Eighth Amendment challenge to similar prison policy, "[T]he constitutional rights that prisoners possess are more limited in scope than the constitutional rights held by individuals in society at large. In the First Amendment context, for instance, some rights are simply inconsistent with the status of a prisoner . . . and because courts are 'particularly ill-equipped' to deal with these problems, we generally have deferred to the judgments of prison officials in upholding these regulations against constitutional challenge.") (citing *Shaw v. Murphy*, 532 U.S. 223, 229 (2001)).

concerning subject matter jurisdiction continue to loom. *See Jessie*, 79 M.J. at 445 ("We think policy arguments should not guide our decision in this case because the text of Article 66(c), UCMJ, does not permit the CCAs to consider matters that are outside the entire record . . . policy arguments, of course, may guide Congress and the President in the future if they choose to revise Article 66(c), UCMJ."). *Id*. In this case—after analyzing and rejecting Appellant's identical challenges to the same administrative prison policy—the Army Court again declined to exercise its discretion to conduct an Article 66(c) review of the First and Fifth Amendment implications of the policy, pursuant to the reasoning in *Jessie*. *See Guinn*, 2019 CCA LEXIS 143, at *10–11 (Mulligan, S.J., concurring). This Court should affirm that decision for the same jurisdictional reasons cited in *Jessie*.

Appellant asks this Court to broadly expand the mandatory purview of Article 66(c) by requiring that any constitutionally-based administrative prison policy complaint be treated akin to an Eighth Amendment or Article 55, UCMJ, violation. (Appellant Br. 8). In other words, Appellant asks this Court to enhance the standing of such prison complaints from a discretionary review status to a mandatory review status. No authority supports such a sweeping change, and this Court should decline to create new authority that strips the service courts of their discretion and forces them to engage in policy reviews for which they have adamantly declared they are ill-suited. *See Bell v. Wolfish*, 441 U.S. 520, 531, 544

(1979) ("courts are ill equipped to deal with the increasingly urgent problems of prison administration" and "it would 'not [be] wise for [it] to second-guess the expert administrators on matters on which they are better informed.'") (citations omitted) (alterations in original); *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003) (Courts "accord substantial deference to the professional judgment of prison administrators."); *Beard v. Banks*, 548 U.S. 521, 536 (2006) ("Judicial scrutiny of prison regulations is an endeavor fraught with peril.") (Thomas, J., concurring); *Jessie*, 2018 CCA LEXIS 609, at *13–15 ("Our Article 66(c) sentence appropriateness power is a poor tool for such an endeavor . . . were we to act on Appellant's claim, we would be at the outer edge of our authorizing statute."); *Guinn*, 2019 CCA LEXIS 143, at *10 (Mulligan, S.J., concurring) ("[A]ppellant's First and Fifth Amendment claims—related to child visitation prior to completion of child sex offender treatment—'remain unsuitable for an Article 66 sentence appropriateness assessment.'").

Appellant's claim centers on an unsupported and expansive interpretation of *Gay* and other Eighth Amendment complaint cases. Moreover, while precedent exists among the service courts for the Article 66(c) review of administrative prison policies under a non-Eighth Amendment lens, there is no requirement that they do so. *See Gay* 79 M.J. at 269. As articulated in greater detail below, this Court should decide that such challenges are inappropriately lodged in the military

appellate system. Indeed Article 66 review of administrative prison policies that do not violate the Eighth Amendment or Article 55 is imprudent, unworkable, inequitable, and unwise.

B. Because the policy did not "punish" Appellant as contemplated by the Eighth Amendment and Article 55 the Army Court permissibly exercised its discretion to decline to entertain other complaints.

Although Appellant claims that the policy unlawfully increased his sentence, the Army Court determined that the policy did not "punish" him in either a constitutional or statutory sense. *See Guinn*, 2019 CCA LEXIS 143, *7–10.

> The question of whether a change in the form of punishment increases the severity of the punishment is contextual, requiring consideration of all the circumstances in a particular case. The foregoing considerations apply only to matters that constitute 'punishment' within the meaning of the criminal law. As a general matter, the collateral administrative consequences of a sentence, such as early release programs, do not constitute punishment for purposes of the criminal law.

Pena, 64 M.J. at 265 (citation omitted).

Service courts are not required to determine the appropriateness of a sentence merely based on a bald claim of legal deficiency and correctness in law in the context of the administration of the authorized sentence. Further, not every constitutionally-based confinement complaint renders the sentence incorrect in law. As aptly pointed out by the Army Court, "[a]ll manner of problems can be framed as a legal deficiency." *Jessie,* 2018 CCA LEXIS 609 at *7 n. 8 (citing

Marrie v. Nickels, 70 F. Supp. 2d 1252, 1255–56 (D. Kan. 1999) (denying relief to military prisoners seeking various forms of relief in federal district court for numerous conditions, including alleged First and Fifth Amendment violations).

The very nature of confinement necessarily deprives the confined of certain freedoms; however, jailors must never impose cruel and usual punishment. *See United States v. Avila*, 53 M.J. 99, 101–02 (C.A.A.F. 2000) (distinguishing a servicemember's entitlement to protections against cruel and unusual punishment from "routine conditions associated with punitive or administrative segregation . . . including restrictions or prohibitions on the opportunity to talk to other prisoners, exercise outside a cell, visitation privileges, telephone privileges, meal choices, and reading material") (citing *United States v. Matthews*, 16 M.J. 354, 368 (C.M.A. 1983)). Appellant's child access policy complaint does not properly sound in the Eighth Amendment or Article 55, UCMJ; while the policy may affect Appellant's other constitutional rights, it offends no provision of the UCMJ, does not serve to punish him, and therefore does not form a cognizable claim of legal deficiency of his sentence. As in *Avila*, Appellant complains of routine conditions associated with the strictures of confinement and not of a legal deficiency in his sentence. As in *Avila*, this court should not grant relief.

A service court's duty to ensure the correctness and appropriateness of the findings and sentences of a court-martial should not encompass the mandatory and

inapt evaluation of confinement conditions that are not part of the approved sentence, are not suggestive of cruel and usual punishment, and are in place by virtue of duly promulgated regulations. Simply put, the individualized impact of a particular confinement facility's administrative policies neither renders a court-martial sentence incorrect in law nor increases the punishment of a child sex-offender in any manner appropriate for Article 66 action. As such, the Army Court was not required to consider Appellant's First and Fifth Amendment complaints concerning his confinement conditions.

Not all deprivations experienced in prison have a bearing on punishment. A prisoner, by virtue of having been convicted and sentenced to incarceration, necessarily experiences limitations on his or her constitutional rights. *See e.g., Pell v. Procunier*, 417 U.S. 817, 822 (1974) ("We start with the familiar proposition that 'lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the consideration underlying our penal system.'") (citation omitted); *Marrie*, 70 F. Supp. 2d at 1255 (reduced privacy in cells, bathrooms and showers). The harsh realities of incarceration do not automatically entitle those who experience them to judicial intervention or relief. *See generally Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (stating "[t]he Constitution does not mandate comfortable prisons" in an Eighth Amendment suit for injunctive relief alleging failure to safeguard a transgender inmate).

In this case, Appellant—who used his children to gain access to his six-year-old victim—was temporarily deprived of contact with his children—instrumentalities of his crime—due to a policy governing child sex-offenders' access to minors during confinement. In no way did prison officials single out or mistreat Appellant. His hardships are those fundamentally incident to the circumstances of confinement for his particular offenses and, absent binding authority, not entitled to mandatory Article 66(c) review.

Notably—unlike here, where the Army Court was asked to scrutinize administrative policy equally applicable to all similarly situated inmates and adhered to by the facility—*Gay* involved: (1) an arbitrary deviation from prison procedures, which (2) directly impacted the physical execution of the sentence, and (3) directly contravened multiple provisions of the Manual for Courts-Martial. *See Gay*, 75 M.J. at 269.[10] Citing the various applicable justifications from the companion case, *Jessie*, the Army Court supported the exercise of its discretion not to engage Appellant's challenges to the policy. *See Guinn*, 2019 CCA LEXIS 143, at *10–11 (Mulligan, S.J., concurring).[11] Further, while *Gay* may permit, rather

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[10] This Court found multiple, bona fide legal deficiencies in *Gay's* treatment while in confinement. *See Gay*, 75 M.J. at 269 n.6 (citing Article 12, UCMJ, Article 58(a), UCMJ, and R.C.M. 1003(b)(7)).

[11] The Army Court in *Jessie*, after an exhaustive analysis of an identical challenge to the same policy, declined to review, citing among other reasons its lack of expertise in the area of prison administration and the futility of review given its inability to influence such situations. *See* 2018 CCA LEXIS 609, *13–14.

than direct, the service courts to grant sentencing relief for confinement conditions not amounting to cruel and usual punishment, they should only do so in "very rare circumstances." *United States v. Trebon*, 2017 CCA LEXIS 473, *8 (A.F. Ct. Crim. App. 14 July 2017); *Cf. Erby*, 54 M.J. 267 (where this Court directed additional fact-finding to determine whether the mistreatment alleged was sufficiently "appalling" to resemble impermissible punishment under Article 55).

In *Trebon*, the Air Force Court, relying on *Gay*, declined to exercise its Article 66 authority to grant sentence relief for post-trial confinement conditions not amounting to cruel and unusual punishment. *See* 2017 CCA LEXIS 473, at *8. As does Appellant in this case, Trebon misquoted *Gay* to support his claim for entitlement to Article 66(c) relief due to the deprivation of privileges during time spent in segregation from the general prison population. *Id*. The Air Force Court rejected Trebon's Article 66(c) arguments after exposing his misstatement of *Gay*:

> However, the CAAF noted that *Gay* involved *unique facts driven by legal errors in the post-trial process* that included both a violation of the Appellant's rights under Article 12, UCMJ, 10 U.S.C. § 812, and the ordering of solitary confinement by an Air Force official where an alternative solution was available. Significantly, the CAAF emphasized, "In reaching this conclusion, we do not recognize unlimited authority of the Courts of Criminal Appeals to grant sentence appropriateness relief for any conditions of post-trial confinement of which they disapprove."

Id. (citations omitted) (emphasis added).

Appellant's complaints are not entitled to mandatory review under Article 66(c) because they lack the color of punishment, let alone cruel and unusual punishment, contemplated by this Court's precedent. While Appellant attempts to wedge his personal plight into the scope of automatic review with comparisons to Eighth Amendment cases or other carve-out situations wherein prison officials *deviated from* a policy in order to single out an inmate in a manner resembling increased punishment, the individual impact of an administrative policy uniformly applied is beyond the mandatory domain of Article 66. This Court should not deviate from its precedent to make Article 66 even broader than it already is.

II. Military courts are the wrong forum for Appellant's complaints.

Military courts lack the ability to appropriately respond to each and every manner of prison complaints. To mandate the service courts to review conditions of confinement not rising to cruel and usual punishment under the lens of sentence appropriateness would not only conflict with this Court's precedent, it would be tantamount to an order for the lower courts to force square pegs into round holes as the remedy does not and would not correct the claimed injury. *See United States v. Haymaker*, 1997 CAAF LEXIS 177, *10, 46 M.J. 757, (A.F. Ct. Crim. App. 1997) (service court declined to consider a prisoner's request for sentence reassessment due to unsatisfactory medical care, beyond determining the absence of cruel and unusual punishment, reasoning that "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.").

To the extent Appellant believes the Army Court "miscasts" his claim as a request for injunctive relief, (Appellant's Br. 17), that is because such a form of relief—vested solely in Article III courts—is singularly suited to his challenge. *See* U.S. CONST., art. III, § 2, cl. 1 (extending civilian federal court jurisdiction to "all cases, in law and equity, arising under the Constitution"); *but see* Article 66(c), UCMJ (expressly limiting service court jurisdiction to act "only with respect to the findings and sentence as entered into the record"); Article 67(c), UCMJ (expressly limiting this Court's jurisdiction to act "only with respect to the findings and sentence set forth in the entry of judgment, as affirmed or set aside as incorrect in law by the [service courts]…"); *see also Walden v. Bartlett*, 840 F.2d 771, 774–75 (10th Cir. 1988) (Military prisoners are free to access Article III courts to seek injunctive or declaratory relief for oppressive prison conditions); *Chappell v. Wallace*, 462 U.S. 296, 304 (1983) ("This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service.") (citations omitted). That the need for injunctive relief is moot because the policy was amended is of no moment to the validity or invalidity of Appellant's quest to obtain relief from his lawfully adjudged sentence. Put simply, such relief was

never appropriately suited to his complaint. The service courts should not be made to conduct sentence appropriateness analysis for complaints stemming from administrative prison policies lacking the character of impermissible punishment. While the service courts alone possess this unique tool, it is not designed to fix every problem. To the extent the prison policy may have impermissibly infringed Appellant's freedom of association, the appropriate relief was never a decrease in his sentence, but relief from the policy's application. Therefore, as military courts lack the ability to enjoin such policies, they should not be required to review them.

This Court affords the service courts considerable discretion in the execution of their sentence appropriateness review. *See Gay*, 75 M.J. at 268. In this case, the Army Court, relying on its rationale in *Jessie*, correctly concluded that curtailment of Appellant's sentence was not an appropriate form of relief for the complained of condition. *See Guinn*, 2019 CCA LEXIS 143, at *10–11 (Mulligan, S.J., concurring). Among the many reasons provided for choosing not to consider these particular claims under Article 66 or to entertain the notion of granting sentence relief for them is the Army Court's conclusion that to do so would itself be inappropriate as the only appropriate remedy is one it cannot give. *See Jessie*, 2018 CCA LEXIS 609, at *6. The Army court observed that the courts in general—including Article III courts with their injunctive powers—"are ill-equipped" to "second-guess" prison administrators and should afford significant

deference. *Id*. (citing *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 128 (1977)) (citations omitted). It also recognized that Article I courts are particularly ill-equipped to address such endeavors because they "have no authority to direct change to the policies of a military confinement facility[,] . . . supervise the practice of military justice generally[,] . . . or order injunctive relief," *Id.* at *6. Lastly, the Army Court rightly noted that to grant relief under these circumstances would implicitly require it to say what the policy should be, something it could not rightly do. *Id.* at *13.

Appellant's suggestion that military courts are not only suited to the task of evaluating confinement facility policies, but built to do so, misunderstands the authority he cites. When citing *Burns v. Wilson*, 346 U.S. 137, 140–45 (1953), for the proposition that "the Army Court's decision constituted 'full and fair consideration'" and thus bars his claim in Article III courts, Appellant overlooks three critical facts. (Appellant's Br. 22). First, Appellant never pursued injunctive relief in federal district court while the policy applied to him, as would have been appropriate. Second, his assertion fails to take into account that the Army Court has expressly declined to give full and fair consideration to his claim. *See Guinn*, 2019 CCA LEXIS 143, at *10–11 (Mulligan, S.J., concurring). Third—as the Supreme Court indicated in *Burns*—full and fair consideration is a concept barring relief on collateral review of a conviction. *See Lips v. Commandant, U.S.*

Disciplinary Barracks, 997 F.2d 808, 810–11 (10th Cir. 1993). Simply put, full and fair review—or the lack thereof—has nothing to do with Appellant's ability to pursue injunctive relief from a prison policy.

In *Burns*, two servicemembers filed habeas petitions in federal district court after exhausting their appeals within the military system. Unlike this Appellant who seeks sentence credit, the servicemembers in *Burns* sought habeas relief, and alleged their confinement was illegal because of a corrupt prosecution under the Articles of War that purportedly denied them basic due process. *Id*. at 139. The Supreme Court ultimately upheld the lower Article III courts' dismissal of the habeas petitions on the basis that—upon review of their court-martial record and subsequent appeals in the military courts—the servicemembers received full and fair consideration of all issues. *Id*. In doing so, the Court made clear that because the petitioners' complaints so seriously alleged a fundamental breakdown of basic fairness in the trial process,[12] "had the military courts manifestly refused to

[12] "For the constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers – as well as civilians – from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts." *Burns*, 346 U.S. at 142–43.

consider those claims, the District Court [would have been] empowered to review them *de novo*."[13] *Id*. at 142.

In the case at bar, Appellant has simultaneously moved in federal district court, multiples times, seeking sentence credit and financial compensation – not for essential due process failures affecting his conviction or sentence, but rather based on serving a portion of his lawful sentence under what he views as an overly restrictive administrative prison policy of general applicability to all convicted child sex offenders. The United States District Court for the Eastern District of Virginia dismissed Appellant's most recent filing, re-styled as a habeas petition, because he failed, among other things, to allege wrongful confinement in violation of federal law. *Guinn v. McCarthy*, 2020 U.S. Dist. LEXIS 122703 *8 (E.D. Va. 13 Jul. 2020). Unlike *Burns*, *Lips*, or any case in which servicemembers seek relief from an Article III court, Appellant does not allege due process violations resulting in wrongful conviction nor does he seek release from said condition. Nor did Appellant ask for injunctive relief, particularly when the policy affected him and an injunction could have made a difference. Instead, Appellant has so far levied two unsuccessful yet "nearly identical" collateral attacks in federal court in search of sentence relief and money. *Id*. at *2.

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[13] Both *Burns* and *Lips* indicate that habeas relief hinges on "whether a military decision has dealt fully and fairly with *an allegation raised* in [a habeas petition]." *Lips*, 977 F. 2d at 811 (citing *Burns*, 346 U.S. at 142) (emphasis added).

Appellant misapprehends the government's reliance on *Burns* in the Eastern District of Virginia. (Appellant's Br. 18–22). Because Appellant requested from the Article III court the same relief that he asks the Army Court to provide (a decrease in his sentence and monetary damages), he has failed to exhaust his military appeals, and therefore his claim before the Article III court fails jurisdictional requirements. Had he petitioned for injunctive relief from an appropriate court, the response may have resulted in a different analytical framework. However, because Appellant demands relief in the form of sentence credit before both courts—theoretically a power that the Army Court could wield—his suit for the relief he requests in the Eastern District of Virginia is premature. It is true that Article III courts lack the sentence appropriateness tool uniquely possessed by the service courts pursuant to Article 66; but that fact does not affect the reality that, regardless of the forum, sentencing credit is not appropriate for the injury complained of here. Neither a reduction in the term of approved confinement for this dangerous child predator nor financial compensation for denying him access to children would be appropriate; enjoinment is the only proper remedy.[14]

While the jurisdictional confusion referenced in Appellant's brief can contribute to frustrating delay, his own pleadings are to blame in his case, and this

[14] To the extent that Appellant should have sought injunctive relief, the proper time to do so would have been when the policy actually affected him.

Court could break the procedural logjam by plainly stating that military courts are not in the business of evaluating administrative prison policies unrelated to cruel and unusual punishment. (Appellant's Br. 12). The government concurs with such an assertion and agrees with the reasoning of the Army Court in *Jessie*.

III. Granting Appellant sentence relief would create an absurd result.

Appellant's request is not actionable by military courts because it invites them to perform a legal review of an administrative prison policy, a task for which the Supreme Court has made abundantly clear the courts are unsuited. *See Shaw*, 532 U.S. at 229 (counseling deference to prison administrators because "the 'problems of prisons in America are complex and intractable,' and because courts are particularly "ill-equipped' to deal with these problems.") (citations omitted). The Army Court's *Jessie* concurrence goes on to extrapolate the Pandora's Box such precedent would open, inviting service courts to declare pronouncements of the Bureau of Prisons and various state agencies constitutionally invalid, all the while lacking the power to do anything about it. *See Jessie*, 2018 CCA LEXIS 609 at *21–23 (Febbo, J., concurring).

Appellant's proposed solution would result in a windfall because, if granted, it would not gain him merely the greater freedom of association with his minor children, it would regain him all of his freedoms—including the ability to access his children—by virtue of a shortened period of confinement. Appellant's

argument is silent with respect to the masses of childless child sex-offenders, past and present, who must serve their full sentences. They remain separated from all of their freedoms, while Appellant would get quicker access to future victims simply because the policy sought to protect children from predators like him, and he happened to have children—whom he used to gain access to his victim.

Not only would this create a disparity between child predators based on their parental status, it could also create disparity among identically-situated child predators based only on their branch of service. If service courts could speak to the manner in which confinement facilities implement their policies, a joint confinement facility—such as the one at issue in this appeal—would have to implement different standards for the child sexual predators depending upon the whims of that particular predator's service court. Therefore, if the Navy-Marine Court hypothetically found the policy did not violate the First and/or Fifth Amendments, prison officials could implement the policy for any sailor or marine regardless of whether they had children. However, if the Army Court found the policy constitutionally offensive, prison officials could not implement the policy with respect to a soldier with children, while prison officials could implement the policy against a soldier without children – just as they could with all sailors and marines. Prison officials should not have to determine whether a servicemember

who licks the vulva of a sleeping six-year-old, as Appellant did, should have access to children based on the offender's branch of service.

The Army Court relied on its previous en banc decision pointing out that it operates under no obligation to review Appellant's claims, the resolution of which it found itself "'poorly positioned to consider [. . .] and better entrusted to a determination by persons other than this Article I court.'" *Guinn*, 2019 CCA LEXIS 143, at *10–11 (Mulligan, S.J., concurring). This conclusion is not an abuse of its discretion. Rather, it is the very epitome of an exercise of sound discretion and good judgment.

Conclusion

Wherefore, the United States respectfully requests that this Honorable Court affirm the decision of the service court and deny Appellant's requested relief.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 8022 words.

2. This brief complies with the typeface and type style requirements of Rule 37. It has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins.

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on August 20, 2020.

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