IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee

v.

Eliud I. LOPEZ,
Machinery Technician
Third Class/E-4
U.S. Coast Guard,

Appellant

BRIEF ON BEHALF OF APPELLANT

Ct. Crim. App. Dkt. No. 1487

USCA Dkt. No. 24-0226/CG

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

Thad Pope
LCDR, USCG
Appellate Defense Counsel
1254 Charles Morris St., SE
Bldg. 58, Suite 100
Washington Navy Yard, DC 20374
Tel: (202) 845-5314
Thadeus.J.Pope@uscg.mil
C.A.A.F. Bar No. 37886

Schuyler B. Millham
LT, USCG
Appellate Defense Counsel
1254 Charles Morris St., SE
Bldg. 58, Suite 100
Washington Navy Yard, DC 20374
Tel: (240) 508-7060
Schuyler.B.Millham@uscg.mil
C.A.A.F. Bar No. 37737

Index of Brief

Table of Cases, Statutes, and Other Authorities

U.S. Air Force Court of Military Review

U.S. Army Court of Criminal Appeals

U.S. Army Court of Military Review

Statutes

Other

Issues Presented

I.

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

II.

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

III.

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

Statement of Statutory Jurisdiction

The Coast Guard Court of Criminal Appeals (CGCCA) had jurisdiction over this case under Article 66(b)(3), Uniform Code of Military Justice (UCMJ), because Appellant received a bad-conduct discharge.[1] Appellant invokes this Court's jurisdiction under Article 67(a)(3), UCMJ.[2]

[1] 10 U.S.C. § 866(b)(3) (2023).
[2] 10 U.S.C. § 867(a)(3) (2023).

Statement of the Case

On 2 November 2022, in accordance with his pleas, a special-court martial convicted Appellant of two specifications of indecent visual recording in violation of Article 120c, UCMJ.[3] The Military Judge sentenced Appellant to three months' confinement, reduction to E-1, and a bad-conduct discharge (BCD).[4] In response to Appellant's clemency request, the Convening Authority ordered the term of confinement reduced by one month, but the Government failed to execute this order, resulting in Appellant serving the full three months (less good-time credit).[5]

Before filing his brief with the lower court, Appellant moved for appellate discovery pursuant to *United States v. Campbell*[6] into the circumstances of the Government's failure to execute the Convening Authority's ordered clemency. He did so to obtain evidence and establish facts regarding his illegal confinement in support of his claims of prosecutorial misconduct leading to his illegal confinement and the unlawful command influence (UCI) that shielded these mistakes from full appellate review. The lower court mostly denied this request, only ordering the

---

[3] JA0018 (Statement of Trial Results at 2); 10 U.S.C. § 920c (2023).
[4] JA0017 (Statement of Trial Results at 1).
[5] JA0037 (Post-Trial Action at 2); *Compare* Statement of Trial Results at 1 and Post-Trial Action at 2 *with* Appendix (C) to Appellant's Supplement (U.S. Coast Guard Prisoner Accountability Log of 23Jan23).
[6] JA0020 (Appellant's Motion for Appellate Discovery, dated 2 August 2023); *United States v. Campbell*, 57 M.J. 134 (C.A.A.F. 2002).

production of a limited and narrow range of responsive matters.[7] When the Government failed to disclose any direct evidence of what happened in response to this order, Appellant filed a second motion on 1 September 2023 to compel additional discovery.[8] The lower court denied the motion on 8 September 2023, and then denied relief on direct appeal for this issue.[9]

On 11 July 2024, the lower court found the Government's failure to execute the clemency order violated due process and approved only so much of the sentence as provides for confinement for two months and a bad-conduct discharge while setting aside the reduction from E-4 to E-1.[10] The court concluded the illegal confinement was "a result of negligent failure to recognize the effect of clemency on appellant's release date," and that "the harm did not result from any bad faith or intentional desire to punish the appellant."[11] The court then ordered the Government

---

[7] JA0064 (CGCCA Order of 11 August 2023 partially granting Appellant's Motion for Appellate Discovery, where the lower court ordered "statements or evidence *submitted to* the IG by Coast Guard or Navy Department personnel in response to Complaint # C23-USCG-WFO09072, filed on 8 February 2023" (emphasis added)).
[8] JA0070 (Appellant's Second Motion to Compel Discovery, dated 1 September 2023).
[9] JA0126 (CGCCA's Order of 8 September 2023 denying Appellant's Second Motion to Compel Discovery); JA0193 (Appellant's Assignments of Error & Brief); JA0011-12 (*United States v. Lopez,* __ M.J. __, at 9-10 (C.G. Ct. Crim. App. 2024)).
[10] JA0014 (*Lopez*, slip op. at 12).
[11] JA0013 (*Lopez*, slip op. at 11 (citation omitted)).

to compensate Appellant with pay and allowances at the E-4 rate for the twenty-six days he had served in illegal post-trial confinement.[12]

Appellant timely petitioned this Court for review on 9 September 2024, which this Court granted on 16 December 2024. On 27 December 2024, Appellant moved for an extension of time within which to file his brief. On 30 December 2024, this Court granted that motion to 24 January 2025. Therefore, this brief is timely.

Statement of the Facts

On 2 November 2022, Appellant accepted responsibility and pleaded guilty to recording one shipmate in his underwear and another in the nude.[13] He entered a plea agreement that spared the victims from cross-examination and embarrassment.[14] As part of that agreement, he unconditionally waived his Article 32, UCMJ, hearing and agreed to various stipulations to expedite the court-martial proceedings. Appellant also waived the right to an administrative separation board and agreed to accept a discharge under other than honorable conditions if the sentence did not include a BCD.[15] The Military Judge sentenced Appellant to three months' confinement, reduction to E-1, and a bad-conduct discharge (BCD).[16]

---

[12] JA0014 (*Lopez*, slip op. at 12).
[13] JA0017 (Statement of Trial Results at 1).
[14] JA0380 (App. Ex. V (Plea Agreement)).
[15] *Id*. at 4-5 (Appellant elected to a trial and sentencing by military judge alone, agreed not to request witnesses nor object to evidentiary foundations, crime victim evidence, and he waived all waivable motions).
[16] JA0017 (Statement of Trial Results at 1).

On 23 November 2022, the Convening Authority granted clemency by ordering Appellant's confinement reduced by one month, intending for him to be released before Christmas.[17] However, the Government failed to execute the clemency order, resulting in Appellant serving twenty-six days of illegal post-trial confinement beyond his adjusted release date.[18]

When Appellate Defense Counsel began investigating the illegal confinement, they contacted the Deputy Staff Judge Advocate (DSJA) for the Convening Authority, the Ninth Coast Guard District (D9) located in Cleveland, Ohio.[19] The DSJA explained that the D9 Staff Judge Advocate (SJA) had emailed the clemency order to Supervisory Trial Counsel and Lead Trial Counsel,[20] located at the Legal Service Command in Norfolk, Virginia, but the necessary documents had not been forwarded to the confinement facility to effectuate Appellant's release.[21] Under

[17] JA0037 (Post-Trial Action at 2); JA0031 (Appellate Defense Counsel's Declaration of 21 July 2023).
[18] JA0146 (Trial Counsel's Transmittal of CA action to MJ, of 29 November 2022).
[19] JA0033 (Appellate Defense Counsel's Declaration of 21 July 2023).
[20] JA0030 (Appellate Defense Counsel's Declaration of 21 July 2023); JA0146 (Trial Counsel's Transmittal of CA action to MJ, of 29 November 2022); JA0135 (SJA's Transmittal of CA action to Trial Counsel, of 23 November 2022).
[21] *See* JA0030 (Appellate Defense Counsel's Declaration of 21 July 2023); JA0146 (Trial Counsel's Transmittal of CA action to MJ, of 29 November 2022).

Coast Guard policy, Trial Counsel were responsible for forwarding the order to the confinement facility to adjust Appellant's release date.[22]

On 20 January 2023, the DSJA realized that Appellant had not been released according to the clemency order.[23] She discussed the issue with Supervisory Trial Counsel and Assistant Trial Counsel over the phone, and then, dissatisfied with Supervisory Trial Counsel's appreciation of the seriousness of the issue, raised the matter with the Chief of the Military Justice Division (Division Chief) at the Legal Service Command, located in Alameda, California.[24] In their telephonic conversation, they "agreed *not to gather or hand over any files pertaining to this issue to the defense*, but would cooperate if asked for information about it in the future."[25]

When Appellate Defense Counsel requested a copy of an email the DSJA received from the Division Chief about the unlawful confinement, the DSJA refused to provide it, but orally summarized its contents.[26] The email contained the Division Chief's responses to inquiries from a Coast Guard Investigative Service (CGIS) agent regarding an Inspector General (IG) complaint, "C23-USCG-WFO09072,"

---

[22] U.S. Coast Guard Commandant Instr. Manual 5810.1h, Military Justice Manual, at 21.D.3, COMDTINST M5810.1H (July 2021), https://media.defense.gov/2021/Jul/14/2002762684/-1/-1/0/CIM_5810_1H.PDF.
[23] JA0033-34 (Appellate Defense Counsel's Declaration of 21 July 2023).
[24] *Id*.
[25] *Id*. (emphasis added).
[26] JA0054 (DSJA's Emails with Appellate Defense Counsel of 14 June 2023).

detailing the events surrounding Appellant's illegal confinement and clemency order.[27] The recipients of the email exchange also included the CGIS agent and the Deputy Judge Advocate General (DJAG) of the Coast Guard.[28]

On 3 March 2023, the Coast Guard's former Chief Trial Judge emailed the Judge Advocate General's Executive Assistant (a senior officer), in her capacity as the Coast Guard Legal Program's Professional Responsibility Program Manager, to voice his concerns regarding Appellant's illegal post-trial confinement. The former Chief Trial Judge attributed the matter to "inaction by a Coast Guard lawyer," cited to the Professional Responsibility Rule requiring the reporting of professional misconduct, and recommended an investigation be conducted as required by the Coast Guard's Legal Rules of Professional Conduct.[29]

Despite Appellant's efforts to obtain documents related to such an investigation, the Government refused to disclose them. Additionally, the lower court did not order the production of direct evidence, to include whether an

---

[27] JA0033 (Appellate Defense Counsel's Declaration of 21 July 2023).
[28] JA0034 (Appellate Defense Counsel's Declaration of 21 July 2023).
[29] JA0029 (Former Chief Trial Judge's Professional Responsibility investigation referral of 3 March 2023); *See generally* COMDTINST M5800.1, U.S. Coast Guard Legal Rules of Professional Conduct, and Rule 8.3 specifically at Enclosure (3) (https://media.defense.gov/2017/Mar/24/2001721518/-1/-1/0/CIM_5800_1.PDF).

investigation was completed or whether any remedial actions were taken consistent with the Rules of Professional Conduct.[30]

On 30 June 2023, Appellant submitted a discovery request for information related to his illegal confinement.[31] The Government denied the request, stating it would only produce relevant information if ordered by the lower court.[32] On 2 August 2023, Appellant moved the lower court to order the production of "all relevant statements, investigations, electronic communications, and records of telephonic and in-person communications regarding [Appellant's] unlawful confinement."[33] The Government opposed the motion.[34] On 11 August 2023, the court only granted Appellant's motion in part, ordering the Government to produce "any statements or evidence *submitted to* the [IG] by Coast Guard or Navy Department personnel *in response to* [the IG complaint identified above]."[35]

In response, the Government disclosed only a two-page email exchange between a CGIS agent and DJAG regarding the IG complaint.[36] DJAG

---

[30] JA0047 (Appellant's Discovery and Preservation Request of 30Jun23).
[31] *Id*.
[32] JA0050-53 (Appellee's Replies of 3 and 14 July 2023 to Appellant's Preservation Request of 30 June 2023).
[33] JA0010 (*Lopez*, slip op. at 8).
[34] JA0056 (Appellee's 9 August 2023 Opposition to Motion for Appellate Discovery).
[35] JA0064 (CGCCA's 11 August 2023 Order Partially Granting Appellant's Motion for Appellate Discovery (emphasis added)).
[36] JA0086-87 (DJAG's Email Summary to CGIS of 8 February 2023, subj: OIG Complaint C23-USCG-WFO-09072).

acknowledged the illegal confinement, attributing it to a "misunderstanding of responsibilities," and recommended "that CGIS *close this complaint*."[37] No other statements or direct evidence were produced. Nor was the IG complaint itself disclosed, although the CGIS agent's email stated that he was sending the IG complaint as an attachment, which identified "RADM JOHNSTON," the Convening Authority, as a named witness, and requested a response regarding any action taken.[38]

Appellant then renewed his discovery request for (1) the IG complaint and the direct statements and evidence related to it; (2) the Chief of the Military Justice Division's emails regarding the IG complaint, clemency action, or unlawful confinement; and (3) other related materials.[39] When the Government did not respond, Appellant filed a second motion on 1 September 2023 to compel discovery of that evidence.[40] The lower court denied the motion on 8 September 2023 and then denied relief on direct appeal.[41]

---

[37] *Id*. (emphasis added).
[38] *Id*.
[39] JA0070 (Appellant's Second Motion to Compel Discovery, dated 1 September 2023).
[40] *Id*.
[41] JA0126 (CGCCA's Order of 8 September 2023 denying Appellant's Second Motion to Compel Discovery); JA0011-12 (*Lopez*, slip op. at 9-10); JA0193 (Appellant's Assignments of Error & Brief).

In its opinion, the lower court acknowledged that "26 days of illegal post-trial confinement . . . is undoubtedly significant," but concluded the illegal confinement was "a result of negligent failure to recognize the effect of clemency on appellant's release date," not a result of bad faith or an intent to punish.[42] Finding it "generally known locally and not subject to reasonable dispute," the lower court also took "judicial notice under M.R.E. 201(b) that the DJAG is a retired member of a regular component of the armed forces and thus subject to the UCMJ under Article 2(a)(4), UCMJ," and therefore qualified as an individual who could have committed UCI.[43]

Summary of Argument

When this Court evaluates a decision of a court of criminal appeals on a request for appellate discovery, the standard of review is *de novo*.[44]

The lower court erred when it mostly denied Appellant's appellate discovery motions under *United States v. Campbell*[45] and related *DuBay*[46] hearing requests because it failed to order the disclosure of materials and information shown to exist that were critical to Appellant's prosecutorial misconduct and UCI assignments of error. This hindered his ability to fully assert those errors and limited the lower court's review of them, and any meaningful relief flowing therefrom.

---

[42] JA0011-12 (*Lopez*, slip op. at 9-10).
[43] *Id*. at 6.
[44] *See Campbell*, 57 M.J. 134.
[45] *Campbell*, 57 M.J. 134.
[46] *United States v. DuBay*, 17 C.M.A. 147 (1967).

Denial of Appellant's discovery motions also hindered the lower court's analysis of meaningful relief for the error it found, illegal post-trial confinement. Under *United States v. Suzuki*, the lower court was required to consider the egregiousness of the Government's actions when determining appropriate relief for this error, which its failure to order relevant discovery preventing it from doing.[47]

Finally, misinterpreting Article 75, UCMJ, the lower court also erred when it granted relief in the form of backpay for Appellant's illegal post-trial confinement. The court lacked authority to order this payment to Appellant, who was not entitled to pay during the relevant period.

Argument

I.

THE STANDARD OF REVIEW APPLICABLE TO A COURT OF CRIMINAL APPEALS' DECISION ON A REQUEST FOR APPELLATE DISCOVERY IS DE NOVO.

While this Court has not yet articulated the standard of review for appellate discovery issues, whether the lower court correctly applied the *United States v. Campbell*[48] test is a question of law. The Court should therefore apply *de novo* review, which it has repeatedly applied to the question of whether the Courts of Criminal Appeals (CCA) have correctly applied legal tests and principles in the

[47] *United States v. Suzuki*, 14 M.J. 491 (C.M.A. 1983).
[48] *Campbell*, 57 M.J. 134.

first instance.[49] Furthermore, when applying the *Campbell* factors, CCAs may need to apply the test this Court set forth in *United States v. Ginn*,[50] for which this Court has applied *de novo* review to the CCAs.[51] It therefore follows that *de novo* review applies to application of the *Campbell* factors as well, particularly given that a CCA's factfinding power under Article 66, UCMJ, is limited to an appellate capacity when not conducting a factual sufficiency review.[52]

An appellate discovery analysis starts with the two-part process this Court established in *Campbell* for CCAs to apply in resolving disputes over post-trial discovery requests. The first part, which is at issue here, requires the CCA to determine whether an appellant met his "threshold burden" of showing whether the CCA should intervene in the post-trial discovery dispute.[53] If an appellant has

---

[49] *See United States v. Harvey*, No. 23-0239, 2024 CAAF LEXIS 502, at*3, __ M.J. __ (C.A.A.F. Sept. 6, 2024) (reviewing *de novo* whether the CCA correctly applied the test for factual sufficiency); *United States v. Flores*, 84 M.J. 277 (C.A.A.F. 2024) (reviewing *de novo* whether the CCA correctly conducted sentence appropriateness review); *United States v. Pease*, 75 M.J. 180, 184 (C.A.A.F. 2016) (reviewing *de novo* whether the CCA correctly applied the test for factual sufficiency); *United States v. Fagan*, 59 M.J. 238, 241 (C.A.A.F. 2004) (reviewing *de novo* the issue of whether the CCA properly applied the *Ginn* principles in determining whether it was required to remand the case for a *DuBay* hearing to make factual determinations); *United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002) (same).

[50] *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997).

[51] *Fagan*, 59 M.J. at 241; *Sales*, 56 M.J. at 258.

[52] *Ginn*, 47 M.J. at 242.

[53] *Campbell*, 57 M.J. at 138.

overcome this threshold burden, then the CCA moves to the second part of the *Campbell* process—deciding how the evidence will be obtained.[54]

In evaluating the threshold burden, a CCA "should consider, among other things:"

> 1. Whether the defense has made a colorable showing that the evidence or information exists;
>
> 2. Whether the defense was, with due diligence, able to discover from the government the putative evidence;
>
> 3. Whether the putative information is relevant to appellant's asserted claims or defense; and
>
> 4. Whether there is a reasonable probability that the result of the proceeding would have been different if the putative information had been disclosed.[55]

The quantum of proof the movant must offer on the first part of the *Campbell* analysis "must be more than a bare allegation or mere speculation."[56] This quantum is also known as a "colorable claim," as it is offered

---

[54] *Id.*
[55] *Campbell*, 57 M.J. at 138.
[56] *United States v. Bess*, 80 M.J. 1, 13 (C.A.A.F. 2020) (quoting *United States v. Johnston*, 39 M.J. 242, 244 (C.M.A. 1994)); *see also United States v. Edmond*, 58 M.J. 237 (C.A.A.F. 2003) (summary disposition).

typically through affidavit or declaration under penalty of perjury.[57] The colorable claim standard applies because "[i]t is unreasonable to expect an appellant to produce *prima facie* proof . . . without the benefit of an evidentiary hearing or other fact-finding procedure where the evidence may be fully developed."[58]

The Court recognized in *Campbell*[59] that the appellant's threshold burden could lead to conflicting factual claims, in which case a CCA should be guided by *United States v. Ginn*[60] on whether to remand the record for a *DuBay*[61] hearing in answering the four considerations of the first part of the *Campbell* test.[62] While this Court declined to apply the *Ginn* standard to Airman Campbell's case,[63] it should do so here as "it can be readily used for resolving other requests for post-trial discovery."[64]

In *Ginn*, the Court provided principles for CCAs to apply when deciding whether it should order a post-trial evidentiary hearing following receipt of an affidavit from an appellant. Those principles are derived from the clear indication in Article 66 that a CCA's factfinding power is limited to an appellate capacity

---

[57] *United States v. Sonego*, 61 M.J. 1, 4 (C.A.A.F. 2005) (relying on *Campbell* for the standard of proof to resolve claims of member dishonesty during *voir dire*).
[58] *Sonego*, 61 M.J. at 4.
[59] *Campbell*, 57 M.J. 134.
[60] *Ginn*, 47 M.J. 236.
[61] *DuBay*, 17 C.M.A. 147.
[62] *Campbell*, 57 M.J. at 138.
[63] *Id.*, at 139.
[64] *Id.* (Sullivan, S.J., concurring).

when it is not conducting a factual sufficiency review.[65] Those principles provide several scenarios in which a CCA would not need to order a post-trial evidentiary hearing after considering an appellant's affidavit, such as: when the facts alleged would not result in relief; when the affidavit contains only speculative or conclusory observations; when the specific facts adequately state a claim and the Government does not dispute them; or when the facts in the affidavit are refuted by the record.[66]

Here, Appellant provided an affidavit that is factually adequate on its face to state a claim of error, the Government did not contest or refute the facts alleged, and the record does not contradict them. And this Court has held that where "[Appellant's] claim is post-trial, collateral, and affidavit based, *Ginn* is the appropriate threshold framework under which the claim needs to be evaluated."[67] Thus, *de novo* review applies to whether the lower court correctly applied the *Ginn* principles to the post-trial discovery requests.[68]

The lower court decided Appellant's discovery request on the legal issue of whether there is a reasonable probability that the result would have been different if the putative information had been disclosed.[69] Because Appellant's affidavit

---

[65] *Ginn*, 47 M.J. at 242.
[66] *Id.,* at 248.
[67] *Fagan*, 59 M.J. at 244.
[68] *Id.* at 241 (citing *United States v. Sales*, 56 M.J. 256, 258 (C.A.A.F. 2002)).
[69] *United States v. Lopez*, No. 1487, *10 (C.G. Ct. Crim. App. July 11, 2024).

sufficiently alleged facts under factors (1) and (2) of the *Campbell* analysis and those facts were not refuted by the Government nor contradicted by the record, this Court reviews *de novo* whether the lower court's conclusion of law is correct.[70]

II.

THE LOWER COURT ERRED WHEN IT MOSTLY DENIED APPELLANT'S MOTIONS FOR APPELLATE DISCOVERY REGARDING HIS ILLEGAL POST-TRIAL CONFINEMENT, AND THEN FOUND "SIMPLY NO EVIDENCE OF ANYTHING OTHER THAN NEGLIGENCE" REGARDING ITS CAUSE.

In *Campbell*, the appellant provided sufficient evidence that a report on prosecutorial misconduct might exist, prompting this Court to remand the case for an *in camera* review to determine its relevance to appellant's appeal, if such a report existed.[71] Similarly, in *United States v. Huberty*, this Court required *in camera* review of the credentials of a government psychologist to determine whether they contained relevant information supporting a petition for a new trial.[72]

In both cases, the Court acknowledged the necessity of investigating claims when the appellant demonstrates a reasonable likelihood that further inquiry could reveal relevant evidence. The present case parallels both *Campbell* and *Huberty*[73]

---

[70] *Fagan*, 59 M.J. at 241.
[71] *Campbell*, 57 M.J. at 137, 139.
[72] *United States v. Huberty*, 53 M.J. 369 (C.A.A.F. 2000).
[73] *Huberty*, 53 M.J. 369.

in that Appellant has shown far more than a speculative claim; he has shown both that the evidence exists and that it is directly relevant to his claims of prosecutorial misconduct and UCI. And since the lower court was also required to consider the egregiousness of the Government's actions when crafting meaningful relief under *Suzuki*,[74] the evidence and fact-finding it denied was directly relevant to the question of culpability.

A. The Lower Court Misapplied *Campbell* and Failed to Conduct a Full Inquiry.

The lower court's handling of the discovery requests in this case reveals a fundamental misapplication of *Campbell*.[75] Appellant identified and made multiple requests for documents, including the IG complaint, information resulting from the former Chief Trial Judge's Professional Responsibility Program referral, and related communications.[76] These materials would shed light on the circumstances surrounding Appellant's unlawful confinement, including the alleged prosecutorial misconduct that caused it, and the subsequent UCI that covered it up. The Government's refusal to disclose these materials, and the lower court's limited order for discovery and denial of fact-finding, deprived Appellant of the opportunity to fully substantiate his claims and demand for meaningful relief. This

[74] *Suzuki*, 14 M.J. at 493.
[75] *Campbell*, 57 M.J. 134.
[76] JA0020 (Appellant's Motion for Appellate Discovery; JA0070 (Appellant's Second Motion to Compel Appellate Discovery).

directly undermines *Campbell*'s principle that in the interests of justice, courts must pursue a full inquiry when a credible claim is made, especially when prosecutorial misconduct is at issue.[77]

In its opinion, the lower court correctly cited the standard for appellate discovery from *Campbell*, but then incorrectly framed the issues:

> [t]he error and its prejudice to Appellant are already established: Appellant was illegally confined for 26 days because the trial counsel, whose job it was, failed to provide the convening authority's action and entry of judgment to the brig. Appellant nonetheless posits that production of the requested items is necessary because they *could* show that the Government acted with more than simple negligence—with bad faith or intentionally—and that if so, such evidence could be relevant to the relief we grant (emphasis in original).[78]

The lower court conflated Appellant's first and second assignments of error, erroneously holding that its resolution of Issue I (illegal post-trial confinement) "moots Issue II, which frames the same error in a different way."[79] In so holding, the lower court erroneously failed to fully consider Appellant's second assignment of error—prosecutorial misconduct.

---

[77] *Campbell*, 57 M.J. at 138-39.
[78] JA0011 (*Lopez*, slip op. at 9).
[79] *Id*. at 2.

Although "a Court of Criminal Appeals need not specifically address all arguments raised by an appellant,"[80] the *Matias* Court noted that the lower court's opinion in that case found the other assigned errors "to be without merit."[81] The lower court here did not find Appellant's claim of prosecutorial misconduct to be without merit, but erroneously characterized it as the same error as Appellant's claimed violation of due process for illegal post-trial confinement, which it found meritorious. This error mirrors the flaw identified in *Campbell* where the court reached a conclusion without first conducting the necessary inquiry.[82]

B. The Court Employed Circular Reasoning in its Incomplete Application of *Campbell*.

The lower court's decision relied on flawed, circular reasoning. Its decision to restrict discovery was based on a premature conclusion that there was "no evidence" of bad faith or prosecutorial misconduct, when such evidence could only be found by conducting the very disclosures and inquiry it refused to order.

In *Campbell*, even the mere possibility of relevant evidence was sufficient to warrant a remand and *in camera* review.[83] Here, Appellant provided specific references, including the IG complaint number, a copy of a Professional

---

[80] *United States v. Reed*, 54 M.J. 37, 42 (C.A.A.F. 2000) (citing *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987)).
[81] *Matias*, 25 M.J. at 361.
[82] *Campbell*, 57 M.J. at 135.
[83] *Id*. at 139.

Responsibility referral from the former Chief Trial Judge, and references to a string of email exchanges between high-level officials discussing his illegal post-trial confinement, all of which Government attorneys admit exist. This far exceeds the threshold showing for discovery under *Campbell* and *Ginn* that is not "inherently incredible,"[84] and much more than a "scintilla" under *Bess* for a fact-finding hearing.[85] Yet the lower court dismissed these references, treating Appellant's requests as speculative.[86] There is substantial documentary evidence suggesting gross negligence, prosecutorial misconduct, and bad faith in the Government's handling of the clemency order, the aftermath of Appellant's illegal post-trial confinement, and its subsequent cover-up.

Regarding the requested discovery of materials related to Appellant's claim of UCI, the lower court reasoned, "[Appellant] fails to show that the DJAG's actions of inquiring into the administrative complaint informally, responding with an email summation, and recommending it be closed were 'unauthorized' within the meaning of Article 37(a)(3), UCMJ." [87] However, the lower court made this conclusion with no mention of how this one-day "investigation"—apparently featuring no statements and completed by the very organization accused of

---

[84] *Campbell*, 57 M.J. at 138 (quoting *Ginn*, 47 M.J. at 245).
[85] *United States v. Bess*, 80 M.J. 1, 13 (C.A.A.F. 2020).
[86] JA0012 (*Lopez*, slip op. at 10).
[87] *Id*.

malfeasance—complied with the requirements placed on all Coast Guard IG investigations to be thorough, impartial, objective, accurate, and based on complete documentation.[88] As a result, the court offered no analysis to rebut the inference that a deliberate failure to follow established investigation protocols was done to frustrate the appellate review of Appellant's case.

DJAG was aware that this case involved the illegal post-trial confinement of a criminal defendant,[89] triggering due process and constitutional considerations that go far beyond ordinary "administrative complaint[s]," as the lower court characterized this issue.[90] A retired military judge advocate, DJAG is intimately familiar with military justice and appellate processes, and a DJAG can commit UCI.[91] Here, DJAG's "actions of inquiring into the administrative complaint informally, responding with an email summation, and recommending it be closed were 'unauthorized' within the meaning of Art. 37(a)(3), UCMJ,"[92] because DJAG knew such action would adversely affect the information available for appellate

---

[88] *See* JA0306 (Appellant's 1 May 2024 Motion Requesting Judicial Notice); JA0370 (CGCCA's 21 May 2024 Order Granting Appellant's Motion for Judicial Notice).
[89] JA0086 (DJAG's Email Summary to CGIS of 8 February 2023, subj: OIG Complaint C23-USCG-WFO-09072).
[90] JA0012 (*Lopez*, slip op. at 10).
[91] *United States v. Barry*, 78 M.J. 70, 75 (C.A.A.F. 2018).
[92] JA0008 (*Lopez*, slip op. at 6).

review of this case by the lower court and this Court, and Appellant's right to due process.

The discovery requested by Appellant—of relevant materials from the IG investigation, the former Chief Trial Judge's Professional Responsibility referral, related emails, and further fact-finding—likely would have altered the outcome of Appellant's appeal. The lower court's denial of the request was therefore erroneous.

C. The Lower Court Failed to Apply *Campbell* Factors 1-3 and Erroneously Denied Appellate Discovery.

Appellant satisfied the first three *Campbell* factors.[93] First, he made a credible showing that the evidence exists. The Government confirmed the existence of IG complaint number C23-USCG-WFO-09072 when the DSJA spoke to Appellant's appellate counsel.[94] The DSJA told Appellant's counsel that "she was copied on an email from [the Military Justice Division Chief] who was responding to questions about an [OIG] complaint filed on 8 February 2023 regarding the clemency action taken in [Appellant's] case."[95]

The DSJA also said the complaint "contained a procedural timeline of the actions regarding clemency in [Appellant's] case and the fact that he was not

[93] *Campbell*, 57 M.J. at 138.
[94] JA0033 (Appellate Defense Counsel's Declaration of 21 July 2023).
[95] *Id*.

released from confinement in accordance with RADM Johnston's clemency action."[96] Further, the DSJA stated the email contained a string of emails on which DJAG and the CGIS agent were copied.[97] Despite initially expressing a willingness to "cooperate if asked for information about it in the future," the DSJA later refused to disclose it.[98]

Pursuant to the lower court's initial order, the Government disclosed only DJAG's email summary to CGIS,[99] not the email reply described above from the Military Justice Division Chief (presumably sent to DJAG, the IG, or CGIS). Apart from a line item from a CGIS IG case tracker, the Government also failed to disclose any other direct information related to the IG investigation, including but not limited to the complaint itself and the basis for DJAG's assertion that "due to a misunderstanding of responsibilities, Trial Counsel failed to notify the confinement facility that the convening authority had granted clemency."[100]

While DJAG's email contains a procedural timeline, it is largely devoid of the facts necessary for the lower court to assess the egregiousness of the

---

[96] *Id*.
[97] *Id*. at 4-5.
[98] JA0032-33 (Appellate Defense Counsel's Declaration of 21 July 2023).
[99] JA0086 (DJAG's Email Summary to CGIS of 8 February 2023, subj: OIG Complaint C23-USCG-WFO-09072).
[100] *Id*. at 2.

Government's failures under either *Suzuki*[101] or *Campbell*'s fourth factor,[102] discussed below. This lack of material fact appears consistent with the DSJA and the Military Justice Division Chief's initial agreement "*not to gather or hand over any files pertaining to this issue to the defense . . . .*"[103]

Second, the evidence was not previously discoverable. Appellant's appellate defense counsel made every effort to obtain these materials through multiple requests and motions for appellate discovery.[104] The Government informed Appellant that it would "respond to any motion you file" based on the requirements of *United States v. Campbell*.[105] It then refused to provide all the relevant documents requested by Appellant.[106]

Third, the requested evidence is directly relevant to the issue of prosecutorial misconduct, as it addresses the circumstances of the Government's failure to

---

[101] *Suzuki*, 14 M.J. at 493.
[102] *Campbell*, 57 M.J. at 138.
[103] JA0030 (Appellate Defense Counsel's Declaration of 21 July 2023 (emphasis added)).
[104] JA0047 (Appellant's Discovery and Preservation Request of 30Jun23); JA0020 (Appellant's Motion for Appellate Discovery, dated 2 August 2023); JA0070 (Appellant's Second Motion for Appellate Discovery dated 1 September 2023); JA0193 (Appellant's Assignments of Error & Brief).
[105] JA0052-53 (Appellee's email reply of 14 July 2023 to Appellant's Preservation Request of 30 June 2023).
[106] JA0085-87 (Gov. Production email of discovery dated 23 August 2023, with DJAG's email dated 8 February 2023); JA0066 (Appellee's 23 August 2023 Motion for Leave to File a Response); JA0069 (CGCCA's 24 August 2023 Order Granting Appellee's Motion for Leave to File a Response).

forward the clemency order to the brig. It also pertains to whether senior Government attorneys acted to cover up this misconduct, which could amount to additional prosecutorial misconduct or UCI, separate and distinct from the DJAG's participation and leadership in the efforts to cover-up this misconduct, preventing the information related to it from being used during the appellate review process.

The lower court's refusal to order further discovery or inquiry disregarded these factors and undermined the proper application of *Campbell*. Moreover, the lower court conflated Appellant's separate claims of illegal post-trial confinement and prosecutorial misconduct, treating them as though they were one and the same, when in fact they demand distinct judicial reviews and remedies. The lower court's failure to order discovery or further fact-finding and to consider each asserted claim with merit deprived Appellant of due process on appeal and limited the record on which the court based its review of the assigned errors and determination of meaningful relief.

D. The Lower Court Failed to Consider the Severity of the Government's Actions under *Suzuki*[107] and in its Fourth *Campbell* Factor Analysis.

Consistent with *Campbell*'s fourth factor, there is a reasonable probability that the result of Appellant's proceeding would have been different if the requested information had been disclosed. *Campbell* requires the potential impact and

[107] *Suzuki*, 14 M.J. at 493.

relevance of the undisclosed evidence to be considered, especially when the requested documents are directly relevant to the question of prosecutorial misconduct.[108] That was not done here.

Additionally, Appellant is entitled to meaningful relief under *United States v. Suzuki*[109] for his additional twenty-six days of illegal post-trial confinement.[110] In *Suzuki*, this Court's predecessor acknowledged the need to consider the severity of the Government's actions when determining meaningful relief.[111]

The lower court stated that it "considered all the circumstances in this case"[112] when concluding "that setting aside Appellant's bad-conduct discharge would be disproportionate," noting that "confinement and a punitive discharge are 'qualitatively different.'"[113] The court then found "simply no evidence of anything other than negligence"[114] without considering the most "egregious facts of this case," as it was required to consider under *Suzuki*.[115]

---

[108] *Campbell*, 57 M.J. at 139.
[109] *Suzuki*, 14 M.J. at 493.
[110] JA0231 (Appellee's Answer of 22 November 2023).
[111] *Suzuki*, 14 M.J. at 493; *see also*, *United States v. Hilt*, 18 M.J. 604 (A.F.C.M.R. 1984); *United States v. Keith*, 36 M.J. 518, 520 (A.C.M.R.1992); JA0174 - JA0178 (Appellant's Assignments of Error & Brief).
[112] JA0012 (*Lopez*, slip op. at 10).
[113] *Id*.
[114] *Id*. at 11.
[115] *Suzuki*, 14 M.J. at 493.

In other words, when the lower court failed to order the requested discovery and fact-finding, not only did it prevent a proper analysis of whether prosecutorial misconduct or UCI had occurred, but it also hindered its meaningful relief analysis for Appellant's due process claim for illegal post-trial confinement.[116] If *Campbell* stands for anything, it stands for the proposition that a CCA cannot create a Catch-22[117] by denying an appellant's discovery request for certain relevant evidence that has been shown to exist and then, having prevented the appellant from obtaining it, frame its opinion around the absence of such evidence.

Indeed, this missing discovery and fact-finding is also relevant to the Court's calculus for other relief necessary as a deterrent against future Government malfeasance. Similar cases, such as *United States v. Peterson* and *United States v. Globke*, involved setting aside the appellant's BCD in light of intentional or recurrent governmental overreach.[118] In those cases, the court recognized that meaningful relief required setting aside the BCD because the misconduct had

---

[116] While the lower court did grant relief for his illegal post-trial confinement, Appellant asserts in Issue III below that the relief granted was *ultra vires. See infra* at 32.

[117] A "problematic situation for which the only solution is denied by a circumstance inherent in the problem or by a rule." *United States v. Warner*, 62 M.J. 114, 122 n.39 (C.A.A.F. 2005) (quoting *Webster's Ninth New Collegiate Dictionary* 215 (9th ed. 1991)).

[118] *United States v. Peterson*, No. 201900144, 2020 WL 6887862 (N-M. Ct. Crim. App. Nov. 24, 2020); *United States v. Globke*, 59 M.J. 878 (N-M. Ct. Crim. App. 2004).

tainted the post-trial process.[119] Appellant's case presents a similarly compelling need for relief, given the nature of his claims of prosecutorial misconduct and UCI.

In *Globke*, the NMCCA found that based on "clearly erroneous advice of the SJA" the Convening Authority failed to comply with a pre-trial agreement and the military judge's ruling regarding *Pierce* credit.[120] When it set aside the bad-conduct discharge, the NMCCA observed that "[t]his case is but one more example of post-trial ineptitude, and in this case that ineptitude resulted in clear and obvious prejudice to the appellant."[121] The NMCCA also clarified that setting aside the BCD was not a "windfall" because it was the only meaningful relief available to the appellant against the adjudged sentence.[122]

Similarly, in *United States v. Peterson*, the NMCCA disapproved a bad-conduct discharge in a case where the appellant was illegally confined for eight days.[123] The *Peterson* case bears particular relevance to the present case for several reasons: (1) the trial counsel failed to notify the brig of a modified release date (in that case due to judicially-ordered confinement credit that the trial counsel failed to notify the brig about); (2) the court considered the fact that, as part of his pretrial

---

[119] *Id*.
[120] *Globke*, 59 M.J. at 884.
[121] *Id*.
[122] *Id*. (noting the appellant was already beyond his end-of-active-service date; therefore, he was not entitled to any pay).
[123] *Peterson*, No. 201900144, at *7.

agreement, the appellant had already "waived his right to an administrative discharge board," likely subjecting him to an OTH discharge; and (3) the court found that "reducing Appellant's period of confinement or the amount of his forfeitures would afford him no relief because he had already served the confinement, was already out of the Service, and was not entitled to pay and would not be entitled to back pay under the appropriate service regulations."[124]

Although the lower court's opinion made no mention of *Globke* or *Peterson*, the Government attempted to distinguish these cases in its Answer by arguing they "resulted from *deliberate governmental action* that the [NMCCA] found sufficiently contemptible to warrant relief beyond renumeration."[125] The Government further argued that *Globke* and *Peterson* are distinguishable because "the current case resulted from an *unfortunate misunderstanding*, *not repeated erroneous or defiant decisions by those in power*."[126] However, neither Appellant, nor the lower court, nor this Court can have any confidence in such assertions—which the lower court apparently adopted in its opinion—without access to the appellate discovery materials and/or a fact-finding hearing that Appellant requested under *Campbell*[127] on direct appeal.

---

[124] *Id*. at *4.
[125] JA0238-40 (Appellee's Answer of 22 November 2023).
[126] *Id*. at 16 (emphasis added).
[127] *Campbell*, 57 M.J. 134.

As Appellant argued to the lower court, the actions the Government characterized as an "unfortunate"[128] "misunderstanding of responsibilities"[129]—which resulted in Appellant serving twenty-six days of illegal confinement—was at the very least caused by a dereliction of duty by Trial Counsel.[130] Although CGIS "found no reason to suspect criminal conduct,"[131] dereliction of duty is a criminal violation of the UCMJ under Article 92.[132] Whether such misconduct by the prosecutors was willful or negligent was pertinent to both the internal Professional Responsibility investigation recommended by the former Chief Trial Judge, and the "independent" IG investigation conducted by CGIS. And Appellant's *Campbell* motions sought discovery of such materials and related information that were not only shown to exist but were directly relevant to both his assignments of error and the lower court's review.

E. Gaps in Judicial Inquiry and the Need for a Full Fact-Finding Hearing.

The lower court's denial of discovery and refusal to order a fact-finding hearing left significant gaps in the judicial inquiry. The court concluded that the Government's actions resulted from mere negligence without considering the

---

[128] *Id*.
[129] JA0086-87 (DJAG's Email Summary to CGIS of 8 February 2023, subj: OIG Complaint C23-USCG-WFO-09072).
[130] JA0177 (Appellant's Assignments of Error & Brief).
[131] JA0012 (*Lopez*, slip op. at 7 (citing JA0366 (SS/A Knaub's Declaration)).
[132] Article 92, UCMJ; 10 U.S.C. § 892 (2024).

possibility of bad faith or misconduct despite evidence to the contrary, and the undisclosed discovery bears precisely on those issues. Appellant's requests for additional discovery and a fact-finding hearing, consistent with *Campbell*[133] and *DuBay*,[134] would have allowed the court to determine the circumstances surrounding the prosecutorial misconduct that led to Appellant's illegal post-trial confinement, which should have been investigated and disclosed to Appellant but for the additional prosecutorial misconduct and/or UCI that shut down those inquiries.

The lower court concluded, "*there is not a scintilla of evidence of anything beyond negligence* in failing to notify the brig" about the Convening Authority's clemency action.[135] This phrasing mirrors language from *United States v. Bess*,[136] which addresses the threshold for ordering a *DuBay* hearing.[137] However, the evidence in this case far exceeds that standard, making the lower court's decision a significant departure from the accepted and usual course of judicial proceedings.

This case presents serious allegations of prosecutorial misconduct and unlawful command influence, which demand thorough appellate investigation, as

---

[133] *Campbell*, 57 M.J. 134.
[134] *See*, Article 66(f)(3), UCMJ; 10 U.S.C. § 866 (2023); *DuBay*, 17 C.M.A. 147.
[135] JA0012 (*Lopez*, slip op. at 10).
[136] *United States v. Bess*, 80 M.J. 1 (C.A.A.F. 2020).
[137] *DuBay*, 17 C.M.A. 147.

required by *Campbell*.[138] By preventing Appellant from obtaining critical evidence and consequently failing to fully explore his claims, the lower court undermined *Campbell*'s core requirements. Ordering the disclosure of direct evidence and a fact-finding hearing is warranted to address Appellant's claims of prosecutorial misconduct and UCI, as well as answer questions about the severity of the Government's actions (in accordance with *Suzuki* and *Campbell*), and those aimed at the lower court's meaningful relief and deterrence analyses. The lower court's failure to order this deeper fact-finding leaves critical questions unanswered, which adversely impacted its analysis and relief granted, prejudicing Appellant's appeal.

Conclusion

Accordingly, this Court should reverse the lower court's decisions as to the sentence and as to Appellant's appellate discovery motions, and order appellate discovery and an Article 66(f)(3) fact-finding hearing into the facts and circumstances of Appellant's illegal post-trial confinement and the prosecutorial misconduct and UCI that surrounded it. The case should then be remanded to the lower court to determine appropriate sentence relief under Article 66, UCMJ.

III.

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

[138] *Campbell*, 57 M.J. 134.

An appellate court's sentence reassessment is reviewed for obvious miscarriages of justice or abuses of discretion.[139] Whether an appellant is entitled to backpay under Article 75, UCMJ, is a question of law reviewed *de novo*.[140]

A. Because Appellant was in a non-pay status upon announcement of the sentence, he was not entitled to pay and allowances that could later be restored to him.

Appellant was involuntarily extended on active duty so he could be tried by court-martial.[141] Under Coast Guard regulation, Appellant's entitlement to pay and allowances ended upon announcement of the sentence.[142] Therefore, Appellant would not have been entitled to pay and allowances during any period of confinement.

The lower court erroneously concluded that its award of twenty-six days of pay and allowances was within its scope of authority, in part, under Article 75, UCMJ.[143] But Article 75 only restores to an appellant "property affected by an executed part of a court-martial sentence which has been set aside or

---

[139] *United States v. Williams*, 84 M.J. 362, 366 (C.A.A.F. 2024).
[140] *See United States v. Howell*, 75 M.J. 386, 391 (C.A.A.F. 2016) ("This is the sort of issue for which the military court ought not to defer to an Article III court's interpretation.").
[141] JA0293 (Appellant's Motion to Attach the Declaration of YN2 Lesko); JA0369 (CGCCA's 21 May 2024 Order partially granting Appellant's Motion to Attach).
[142] U.S. Coast Guard Commandant Instr. Manual 5810.1h, Military Justice Manual, art. 20.E.7.c. (July 9, 2021).
[143] JA0012 (*Lopez*, slip op. at 12).

disapproved."[144] Contrary to the lower court's understanding, Appellant is unable to be restored affected property under Article 75 because he entered a non-pay status upon announcement of his sentence and thus had no property affected by the set aside portion of the executed sentence of confinement.

B. Appellant also is not eligible for *Rosendahl* monetary credit for the same reason.

In *United States v. Rosendahl*, this Court held that then-Rule for Courts-Martial 305(k) (now 305(l)) should be considered at a rehearing when applying credits for punishment imposed at an earlier court-martial.[145] Using that rule at a rehearing, a military judge would calculate a credit based on an earlier-imposed sentence of confinement and apply it to the sentence imposed at the rehearing.[146] The credit is first applied to any confinement adjudged anew.[147] If no confinement is adjudged anew or the confinement adjudged anew is less than the credit to which the accused is entitled, the credit is further applied to punishments of hard labor without confinement, restriction, fine, and forfeiture of pay, in that order.[148] To restore forfeited pay and allowances, one day of confinement is equal to one day of

[144] 10 U.S.C. § 875(a) (2019).
[145] *United States v. Rosendahl,* 53 M.J. 344, 347 (C.A.A.F. 2000).
[146] *Id.*
[147] *Id.*
[148] *Id.*

total forfeiture.[149] The same order in which to apply the credit and punishment equivalency is found in the current rule.[150]

In this case, however, there are two problems with the way the lower court applied *Rosendahl* credit to Appellant. First, the lower court divorced the punishment equivalency endorsed in *Rosendahl* from the rest of the rule announced in that case. It did so by following the lead of two of its sister courts in *United States v. Sherman*[151] and *United States v. Hammond*.[152] In both cases, the service courts took the punishment equivalency found in then-R.C.M. 305(k) and awarded "compensation" to the appellants for excess confinement.[153] Neither court cited any authority other than then-R.C.M. 305(k)'s punishment equivalency for the proposition that it could compensate an appellant for excess confinement without first applying *Rosendahl* credit against the adjudged punishments in the order identified in that opinion. But the punishment equivalency is merely a formula for applying credit against punishment; it is not a stand-alone power to award compensation for excessive post-trial confinement. Providing compensation that is

---

[149] *Id.*
[150] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M 305(l) (2024).
[151] *United States v. Sherman,* 56 M.J. 900 (A.F. Ct. Crim. App. 2002).
[152] *United States v. Hammond,* 61 M.J. 676 (A. Ct. Crim. App. 2005).
[153] *Sherman*, 56 M.J. at 902-03; *Hammond*, 61 M.J. at 680.

not credited against a sentence of forfeitures is not a benefit that is within a CCA's Article 66 power to "modify the sentence to a lesser sentence."[154]

Second, the lower court did not follow the order in which the *Rosendahl* credit had to be applied. Assuming *Rosendahl* is the proper way to credit an appellant for serving excess post-trial confinement, the twenty-six days of wrongful confinement had to first be applied to his adjudged confinement. If any credit remained, it would then apply to any remaining adjudged hard labor without confinement, restriction, fine and forfeiture, in that order. But Appellant did not receive any of those punishments. He received confinement, a reduction to E-1, and a bad-conduct discharge. *Rosendahl* credit does not apply to reductions and punitive discharges.[155] Therefore, if *Rosendahl* credit applied at all to Appellant, it only applied to his adjudged sentence, which he fully served.

Conclusion

Accordingly, this Court should reverse and remand to the lower court to determine what other appropriate relief Appellant should receive as a remedy for the twenty-six days he served in illegal post-trial confinement.

DATE: January 24, 2025

---

[154] 10 U.S.C. § 866(f)(2)(A) (2024).
[155] *Rosendahl*, 53 M.J. at 348.

Respectfully Submitted,

POPE.THADEUS.JACKSON.1454277470 Digitally signed by POPE.THADEUS.JACKSON.1454277470 Date: 2025.01.24 14:37:16 -05'00'

Thad Pope
LCDR, USCG
Appellate Defense Counsel
1254 Charles Morris St., SE
Bldg. 58, Suite 100
Washington Navy Yard, DC 20374
Tel: (202) 845-5314
Thadeus.J.Pope@uscg.mil
C.A.A.F. Bar No. 37886

Schuyler B. Millham
LT, USCG
Appellate Defense Counsel
1254 Charles Morris St., SE
Bldg. 58, Suite 100
Washington Navy Yard, DC 20374
Tel: (240) 508-7060
Schuyler.B.Millham@uscg.mil
C.A.A.F. Bar No. 37737

Certificate of Filing and Service

I certify that the foregoing was filed electronically with this Court, and that copies were electronically delivered to U.S. Coast Guard Appellate Government Counsel and Special Victim's Counsel on January 24, 2025.

Certificate of Compliance with Rules 24(c) and 37

The undersigned counsel hereby certifies that: 1) This brief complies with the type-volume limitations of Rule 24(b) because it contains 8908 words, less than 13,000 words; and 2) this brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a proportional typeface using Microsoft Word with Times New Roman 14-point typeface.

POPE.THADEUS.JACKSON.1454277470
Digitally signed by POPE.THADEUS.JACKSON.1454277470
Date: 2025.01.24 14:37:44 -05'00'

Thadeus J. Pope
LCDR, USCG
Appellate Defense Counsel
1254 Charles Morris St., SE
Bldg. 58, Suite 100
Washington Navy Yard, DC 20374
Tel: (202) 845-5314
Thadeus.J.Pope@uscg.mil
C.A.A.F. Bar No. 37886