

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**BRIEF ON BEHALF OF
APPELLANT**

v.

Docket No. ARMY 20230018

Captain (O-3)

TRAVIS J. SWAN,
United States Army,

Appellant

Tried at Fort Hood, Texas, on 16
September 2022, 9 January 2023, and
11 January 2023, before a general
court-martial appointed by the
Commander, Headquarters, III Corps
and Fort Hood, Colonel Maureen
Kohn, Military Judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignment of Error

**WHETHER THE UNITED STATES
DISCIPLINARY BARRACKS DENIAL OF
APPELLANT'S ABILITY TO SEE HIS CHILDREN
WARRANTS RELIEF¹**

Statement of the Case

On 11 January 2023, a military judge sitting as a general court-martial
convicted appellant, pursuant to his pleas, of seven specifications of sexual assault
of a child, three specifications of sexual abuse of a child, in violation of Article

¹ Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant respectfully requests this court consider the information provided in the Appendix.
PANEL 4

120b Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 920b (2012) and (2019), and one specification of indecent viewing in violation of Article 120c UCMJ 10 U.S.C. § 920c. (Statement of Trial Results; R. at 124). The military judge sentenced appellant to twenty-five years confinement and a dismissal. (Statement of Trial Results). On 25 January 2023, the convening authority approved eighteen years confinement in accordance with the pre-trial agreement, as well as the remaining sentence. (Action).

Facts Relevant to Assignment of Error

Denial of Visitation

On 5 February 2023 appellant was transferred from county jail in Texas to the United States Disciplinary Barracks, Fort Leavenworth Kansas (USDB). (Outline of Events).

Almost immediately after arriving, on 7 February 2023, appellant submitted a request for visitation with his two children aged fifteen and twelve who were not related in any way to his crimes. (Defense App. Ex A - Appellant Affidavit; Defense App. Ex C - 510, dated 7 February 2023). Over a month later, appellant finally received a response, which required he resubmit his request with his children's dates of birth and their addresses. (Defense App Ex. B - Outline of Events).

From February 2023, to the present—a period of roughly an entire year appellant continuously submitted requests to be allowed visitation with his biological children. (Defense App. Ex B Outline of Events). Appellant received various responses from USDB leadership. In April of 2023, appellant was first informed of the requirement that his ex-wife approve of the visit, which she did. (Defense App Ex. B Outline of Events).

Ultimately, the decision to allow or not allow appellant permission visitation with his children was delegated to his counselors. (Defense App Ex. D - Military Correctional Complex Standard Operating Procedure 310 (SOP 310)). From February 2023 to 31 May 2023, appellant's first counselor, [REDACTED], conducted no work toward processing appellant's request for visitation. (Defense App Ex. B).

Finally, on 31 May 2023, [REDACTED] the "Rehabilitation Chief" was assigned to conduct counseling with appellant and decide on the exception to policy and his visitation request. (Def App. Ex. B).

Appellant completed numerous treatment sessions and courses with [REDACTED], but still [REDACTED] believed, "it was her duty to protect the world form [appellant], [appellant's children from appellant], and to treat [appellant]." (Defense App Ex. B). [REDACTED] cited appellant continuing to pursue his appeal as evidence he was not sufficiently remorseful to warrant visitation with his children. (Defense App Ex. B).

Appellant was required to complete sex offender treatment, however due to limited availability, appellant could not attend. (Defense App Ex. A).

In September 2023, [REDACTED] noted that she had to check with the victim witness liaison to confirm appellant's children were not victims. (Defense App Ex. B).

Appellant's children are not victims and appellant was allowed to visit his children and his ex-wife right up until his guilty plea. (Defense App Ex. B).

After more requests to the administration, finally, in November 2023, [REDACTED] reached out to appellant's ex-wife for approval for appellant to have visitation. [REDACTED] received that paperwork in December 2023. (Defense App Ex. B). [REDACTED] still has not approved of appellant's visitation, and appellant has an open request to speak with the deputy commandant. (Defense App Ex. B).

R.C.M. 1106 Matters and Entry of Judgment

Appellant's trial defense counsel submitted his Rule for Courts-Martial 1106 matters six days after he was sentenced. The matters request deferral and waiver of automatic forfeitures so the money could go to appellant's two dependent children. (Post Trial Matters, dated 17 January 2023). These are the same children appellant seeks visitation rights with while confined at the USDB.

On 24 January 2023 the convening authority approved appellant's request to defer and waive automatic forfeitures. On 26 January 2023, the military judge entered

judgment noting the approval of the deferment and waiver of automatic forfeitures in the amount of \$1803 to be paid to appellant's ex-wife. (Entry of Judgment).

Post- Trial Processing Timeline

Despite appellant submitting his 1106 matters and judgment being entered in January of 2023, the record of trial was not completed and certified by the court reporter until 4 May 2023 –four months later. (Chronology Sheet). By the time the transcript was certified, appellant had already been denied visitation by the USDB.

Standard of Review

Under Article 66, UCMJ, Courts of Criminal Appeals (CCAs) have discretion to grant sentence appropriateness relief for post-trial confinement conditions not amounting to cruel and unusual punishment, but where nonetheless a legal deficiency in post-trial confinement conditions exists. *United States v. Gay*, 75 M.J. 264, 268 (C.A.A.F 2016); *See also United States v. Tardif*, 57 M.J. 219, 223 (C.A.A.F. 2002) (affirming a broad authority of CCAs to review and modify sentences under Article 66).

Law

Unconstitutional Prison Policy

In *Guinn*, appellant was found guilty of one specification of sexual abuse of a child in violation of Article 120b, UCMJ. *United States v. Guinn*, No. ARMY 20170500, 2021 CCA LEXIS 423, at *9 (Army. Ct. Crim. App. Aug. 20, 2021) (Mem Op. On Remand). Confinement facility policy barred him from having any contact with his biological children who were not victims of his crime without an exception to policy. *Id.* To receive the exception to policy, the confinement facility forced Guinn to complete a sex offender treatment program of indeterminate length and required him to accept responsibility for his crimes. *Id.*

This court found that to be a violation of his First Amendment free association rights. *Id.* at 11. In recognition of the violation of appellant's constitutional rights, this court disapproved eighteen months of Guinn's four year sentence. *Id.*

Supplement to the Record

In a footnote in *Guinn*, this court observed appellant was able to supplement the record with evidence of his visitation denial and the policies surrounding it because he raised the issue in his post-trial matters. *Id.* Fn 2. However, a “similarly situated appellant who, perhaps as a consequence of timing, could not

raise the confinement policy in his post-trial matters would be wholly unable to meet the ‘clear record’ requirement for sentence appropriateness relief.” *Id.* (citing, the preceding CAAF decision in *United States v. Guinn*, 81 M.J. 195, 203 (C.A.A.F. 2021)).

The decision by this court on remand in *Guinn* recognized a disconnect. On the one hand, the CCAs have a responsibility under Article 66 to determine whether the sentence imposed “should be approved.” When determining whether a sentence is “correct in law” and “should be approved,” this court is empowered to grant sentence relief for post-trial confinement conditions.² *United States v. Guinn*, 81 M.J. 195, 200 (C.A.A.F. 2021).

However, under the CAAF decisions in *Guinn* and in *Jessie*, CCA’s cannot consider evidence that was not contained in the “entire record.” Therefore, information not introduced during trial, or in appellant’s post-trial matters could not be considered by the CCAs. *United States v. Jessie*, 79 M.J. 437 (C.A.A.F. 2020)

² Article 66 has been amended. This court’s authority to determine what sentence should be approved is now Article 66(d).

The dissenting judges in *Jessie* lamented that such a strict reading of what is included in the record is “misguided” and prevented the CCA’s from using their sentence appropriateness power. *Jessie*, 79 M.J. at 446 (Ohlson, J dissenting).

Changes to Post-Trial Processing

Beginning in 2014, major changes to the post-trial processing timeline were made to Article 60, UCMJ, and to the related Rules for Courts-Martial (R.C.M. 1105, 1106, 1110, 1111). MILITARY JUSTICE REVIEW GROUP, REPORT OF THE MILITARY JUSTICE REVIEW GROUP, PART I: UCMJ RECOMMENDATIONS 514 (2015) [REDACTED]. For example, to better align with civilian practice, the Entry of Judgment was created to denote finality of the proceeding which would occur after convening authority action on the sentence. (REDACTED). In 2014, Congress began limiting the clemency authority retained by commanders to reduce sentences they deemed to be unjust. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113–66, § 1705(a)(1), (2)(A), 127 Stat. 672 (2013).

Until the changes made by the Military Justice Act of 2016 (MJA 2016), which went into effect for cases referred after 1 January 2019, the procedure required the trial counsel to serve a copy of the record of trial on the accused. The accused then still had the opportunity to submit matters to the convening authority

for consideration, even though the convening authorities' ability to act had been curtailed. (██████, Pg 558).

In practice, this meant confinement conditions which developed during the sometimes lengthy post-trial creation of the record of trial, could be included in the matters submitted by an accused to the convening authority. *See e.g. Guinn*, 2021 CCA LEXIS 423, at *9; *Jessie*, 79 M.J. at 437. This was the state of practice when both *Jessie* and *Guinn* were decided. Under *Jessie*, appellants had an *opportunity* to enter post-trial confinement issues into the record through their post-trial matters. *Id.*

After 2019, this practice changed. Now, post-trial matters are due within ten days of the announcement of sentence and the convening authority then takes action. R.C.M. 1106 (2019). There is now no opportunity to add post-trial confinement conditions claims to the post-trial matters compounded by the now very limited clemency authority held by convening authorities. Yet cases still languish with OSJA's while the record is created, and post-trial matters are already submitted, the appellant is left with no meaningful opportunity to supplement the record with the issues occurring during this time period. For example, this court granted relief sentencing relief in *Ponder* because, "most concerning, however, is the 99 days that elapsed between receipt of appellant's post-trial matters and the

convening authority's action, particularly given the convening authority's limited options for relief under Article 60, UCMJ. The government provided no explanation for the lengthy delays.” *United States v. Ponder*, No. ARMY 20180515, 2020 CCA LEXIS 38, at *3 (Army. Ct. Crim. App. Feb. 10, 2020) (Summary disposition).

While the convening authorities’ ability to reduce appellant’s sentence has repeatedly been limited, no such similar limitation has ever been placed on this court’s Article 66, UCMJ, sentence appropriateness power. This is so, even after changes were made to the court’s Article 66 findings appropriateness power. Article 66(d)(B) (2023).

In fact, the opposite is true, the “entire record rule,” which the Court of Appeals for the Armed Forces relied on to establish the narrow limitations in *Jessie*, has been abolished. In 2021, Congress effectively overruled *Jessie*. After the 2021 amendments to Article 66, UCMJ, which took effect in 2023, this court has the authority to supplement the record with “*any* information required by rule or *order* of the Court of Criminal Appeals.” Article 66(e)(2)(C) 10 U.S.C.S. § 866 (2023)³.

³ The 2021 amendment by National Defense Authorization Act For Fiscal Year 2021 P.L. 117-81, § 539E(d) deleted the former third sentence of (d)(1)(A), which

Exhaustion of Administrative Remedies

Before an appellant can have his claim considered, he must exhaust administrative remedies. *Id.* at 203. Generally, the appellant has been required to make requests for relief first to prison authority and then submit an Article 138, UCMJ complaint to the commander.⁴

United States v. Pullings, 83 M.J. 205, 211 (C.A.A.F. 2023).

Argument

United States v. Guinn

In nearly every respect, appellant's case and *Guinn* are identical. Appellant was convicted of the same crimes, and appellant was prohibited from seeing his non-victim biological children by the same policy at the USDB. Despite *Guinn* being decided by this court in 2021, the disciplinary barracks made no changes to their policy. (SOP 310). They still require an exception to policy for an appellant

read: "The Court may affirm only the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved."

⁴ The CAAF precedent requiring the use of an Article 138, UCMJ, complaint seems to be at odds with Army Regulation 27-10 which prohibits the use of Article 138, UCMJ, as a remedy in court-martial related matters. Compare Army Reg. 27-10, Legal Services: Military Justice, para. 19-11(c)(1) (20 Nov. 2020) [AR 27-10]. Further, appellant was not denied visitation with his children until after the convening authority had already acted on his case. This makes an Article 138 complaint useless in this case.

to see his children just as they did in *Guinn*. *United States v. Guinn*, No. ARMY 20170500, 2019 CCA LEXIS 143, at *4 (Army. Ct. Crim. App. Mar. 28, 2019) reversed and remanded by *Guinn*, 81 M.J. 195. Appellant has pursued this exception to policy since February 2023 (Defense App. Ex. B Outline of Events)

The USDB continues to require the appellant to complete a sex offender treatment program of indeterminate length. (Defense App Ex. B Outline of Events). Appellant has tried to enter this program, but the confinement facility does not have the resources to provide a spot for all inmates who are sex-offenders and appellant is still trying to get into the program. (Defense App Ex. B. Outline of Events).

Most troubling, the confinement facility still requires an appellant to admit guilt to the crimes before the exception to policy could be granted. In *Guinn*, this was at issue because Guinn did not plead guilty, he contested his case. Here appellant's ETP was set back because he was still pursuing his appeal, and therefore, in the eyes of the exception authority, he was not sufficiently accepting responsibility. (Defense App. Ex. A Appellant's Affidavit).

Appellant's confinement conditions are a violation of his First Amendment right to free association identical to *Guinn*.

Exhaustion of Administrative Remedies

Appellant first raised the issue of support to his biological, non-victim children when he sought deferment and waiver of automatic forfeitures in his post-trial matters. (Post-Trial Matters).

Since February of 2023, almost immediately after arriving at the USDB, appellant has made *repeated* requests for relief to the prison administration. Each request is answered by the administration without satisfaction. (Defense App Ex. C). Either, the prison administration simply acknowledges receipt of appellant's request without any substantive response, (Defense App. Ex. C) or they explain that he is working his way through the exception to policy process, and will one day be able to see his children, however that is a future date uncertain. (Defense App Ex. C).

Appellant sought relief in exactly the same way as *Guinn* and has exhausted his administrative remedies.

Supplement of the Record

Appellant has all the necessary documents to prove the confinement facility violated his First Amendment rights by denying him access to his non-victim biological children. The policy still exists despite this court's precedent finding it to be a constitutional violation. After *Jessie* "[a]ccording to the ACCA, an

amended policy went into effect in November 2018. The amended policy allows children to visit an inmate based on an individualized assessment of risk. The ACCA did not know whether Appellant's children could visit him under the new policy.” *Jessie*, 79 M.J. 437, 439 n.3. This court can rest assured the change to the policy has not obviated the issue.

Appellant must be allowed to move to attach these documents to the record. The limitations based on the “entire record rule” in *Jessie* and *Guinn* do not apply to appellant. Both were decided at a time when appellant received the record of trial *before* submitting post-trial matters. Appellants under that rule had the opportunity to raise the issue in post-trial matters and enter it into the record. Here, appellant’s post-trial matters were due before appellant even arrived at the Disciplinary Barracks, let alone realized that the facility would prevent him from visitation with his children.

Even if that rule still applied, it has been expressly overturned by Congress. Congress eliminated the “entire record” language from Article 66 and replaced it with a rule allowing this court to allow attachments to the record on its own order for cases beginning in December 2023. Article 66(d)(B) (2023). Congress apparently agreed with the dissent in *Jessie*—it is the CCA’s duty to ensure

appropriate sentences and will often need additions to the record to do so. *Jessie*, 79 M.J. at 446 (Ohlson, J dissenting).

This is the situation at issue—the *Jessie* rule which included the opportunity to expand the record via post-trial matters was no longer applicable after 2019 when the RCM regarding the timing of post-trial matters was moved up significantly, and the *Jessie* rule was officially put to rest in 2023 when Congress revised Article 66.

Appellant has made a record of his attempts to secure visitation which have been frustrated by the facilities unconstitutional policy.

Conclusion

In *Guinn* this court awarded eighteen months credit off his sentence for this illegal policy. *Guinn*, 2021 CCA LEXIS 423, at *11. Appellant should receive at a minimum the same relief. However, this court may wish to consider granting even greater relief, so that the confinement facility is *again* put on notice that their policy is illegal.



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APPENDIX

Appendix: Matters Submitted Pursuant to *United States v. Grostefon*

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the Appellant, through Appellate defense counsel, personally requests that this court consider the following matters:

1. Work Requirements

In April 2023, appellant was assigned a new work detail, “rations.” (Outline of Events) (Appellant’s Affidavit) (Work Schedules).

In this position, appellant and one other inmate were placed in charge of stocking and managing the DFAC facility. (Appellant’s Affidavit). The DFAC facility, unlike any other work detail is open seven days a week to feed inmates. (Appellant’s Affidavit). From April through December 2023, appellant worked every day of the week with no days off, despite other inmates receiving two days off. (Work Schedules).

Appellant even volunteered for additional duties in order to earn abatement days off of work detail. (Outline of Events)(Abatement Corrections memo dated 19 December 2023). Appellant has never received any abatement days off, and his requests for relief from the deputy commandant have all been unanswered.

(Outline of Events). Appellant deserves confinement credit for his working conditions which are much more onerous than any other inmate.

2. Appellant's Victim Has Not Suffered Long Term Harm

Appellant's wife, [REDACTED] daughter [REDACTED] was appellant's victim. According to [REDACTED], [REDACTED] has not suffered long term impacts from appellant's crimes. ([REDACTED] affidavit) [REDACTED] did well in high school, has a college scholarship and a long-term boyfriend. ([REDACTED] affidavit). Fortunately, [REDACTED] has also not been suffering suicidal ideations either. [REDACTED] affidavit).

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army
Court and Government Appellate Division on February 22, 2024.



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