14 January 2016

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) KEVIN GAY, USAF *Appellant.*	))))))))	BRIEF ON BEHALF OF THE UNITED STATES ON THE SPECIFIED ISSUE Crim. App. No. 38525 USCA Dkt. No. 15-0742/AF

BRIEF ON BEHALF OF THE UNITED STATES ON THE SPECIFIED ISSUE

MATTHEW J. NEIL, Maj, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800
Court Bar No. 34156

GERALD R. BRUCE
Associate Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800
Court Bar No. 27428

KATHERINE E. OLER, Colonel, USAF
Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800
Court Bar No. 30753

INDEX

TABLE OF AUTHORITIES

CASES

COURT OF APPEALS FOR THE ARMED FORCES

COURTS OF CRIMINAL APPEALS

STATUTES

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IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellant,*	)	BRIEF ON BEHALF OF THE UNITED STATES ON THE SPECIFIED ISSUE
v.	)	
	)	Crim. App. No. 38525
Staff Sergeant (E-5) KEVIN GAY, USAF *Appellee.*	)	USCA Dkt. No. 15-0742/AF

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

ISSUE PRESENTED

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY FAILING TO REMAND APPELLANT'S CASE FOR A HEARING PURSUANT TO UNITED STATES v. DUBAY, 17 C.M.A. 147, 37 C.M.R. 411 (1967), TO DETERMINE THE FACTS SURROUNDING APPELLANT'S POST-TRIAL SOLITARY CONFINEMENT. SEE UNITED STATES v. GINN, 47 M.J. 236 (1997).

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66, UCMJ. This Honorable Court has jurisdiction to review this case under Article 67, UCMJ.

STATEMENT OF THE CASE

On 28-30 May 2013, Appellant was tried by a general court-martial composed of officer members. (J.A. at 26.) Appellant was convicted, contrary to his pleas, of two specifications of larceny, in violation of Article 121, UCMJ; two specifications of wrongful appropriation, in violation of Article 121, UCMJ; one specification of wire fraud, in violation of Article 134,

UCMJ; and one specification of identity theft, in violation of Article 134, UCMJ. (J.A. at 34-35.) Appellant was acquitted of the remaining specifications. (Id.) The members sentenced Appellant to be reduced to the grade of E-3, to forfeit all pay and allowances, six months confinement, and a bad conduct discharge. (J.A. at 32.) The convening authority approved only so much of the sentence as provided for reduction to the grade of E-3, five months and twenty-one days confinement, and a bad conduct discharge. (J.A. at 35.)

On 12 June 2015, AFCCA issued a published decision, in which AFCCA expressly held that Appellant's seven-day stay in segregated confinement during his post-trial confinement was not a violation of the Eighth Amendment or Article 55, UCMJ. United States v. Gay, 74 M.J. 736 (A.F. Ct. Crim. App. 2015) (J.A. at 7.). Specifically, Appellant's complaint did "not amount to a serious act or omission resulting in a denial of necessities, and [Appellant claimed] no infliction of pain on him." Id. (J.A. at 8.) Nevertheless, AFCCA held that Article 66(c), UCMJ granted service courts the authority to "consider post-trial confinement conditions as part of [their] overall sentence appropriateness determination, even where those allegations do not rise to the level of an Eighth Amendment or Article 55, UCMJ, violation." Id. (J.A. at 8-9.) Finding Appellant's sentence inappropriately severe both on the basis of Appellant's

post trial confinement conditions and the government's delay in forwarding the record of trial for AFCCA review, AFCCA approved only so much of the sentence as called for reduction to the grade of E-3, three months confinement, and a bad conduct discharge. Id. (J.A. at 12.) The Judge Advocate General, United States Air Force, certified the following issue under Article 67(a)(2), UCMJ:

> WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS (AFCCA) ABUSED ITS DISCRETION AND COMMITTED LEGAL ERROR BY REACHING ITS DECISION THAT ARTICLE 66, UCMJ, GRANTS IT THE AUTHORITY TO GRANT SENTENCE APPROPRIATENESS RELIEF FOR POST-TRIAL CONFINEMENT CONDITIONS EVEN THOUGH THERE WAS NO VIOLATION OF THE EIGHTH AMENDMENT OR ARTICLE 55, UCMJ, IN DIRECT CONTRAVENTION OF THIS COURT'S BINDING PRECEDENT.[1]

On 13 August 2015, Appellant filed a Supplement to Petition for Grant of Review, asking this Court to grant review on the following issue:

> WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS (AFCCA) ERRED WHEN IT ONLY AWARDED RELIEF TO APPELLANT UNDER ARTICLE 66(c), UNIFORM CODE OF MILITARY JUSTICE (UCMJ), *SEE UNITED STATES v. TARDIF*, 57 M.J. 219 (C.A.A.F. 2002) BUT FAILED TO AWARD RELIEF FOR THE GOVERNMENT'S VIOLATIONS OF ARTICLE 55, UCMJ, AND APPELLANT'S EIGHTH AMENDMENT RIGHTS.

On 24 November 2015, this Court granted review, but only on the following issue specified by the Court:

[1] The certified issue is currently pending before this Court.

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY FAILING TO REMAND APPELLANT'S CASE FOR A HEARING PURSUANT TO UNITED STATES v. DUBAY, 17 C.M.A. 147, 37 C.M.R. 411 (1967), TO DETERMINE THE FACTS SURROUNDING APPELLANT'S POST-TRIAL SOLITARY CONFINEMENT. SEE UNITED STATES v. GINN, 47 M.J. 236 (1997).

STATEMENT OF FACTS

The facts necessary to the disposition of the issue are set forth in the argument below.

SUMMARY OF ARGUMENT

Although AFCCA erred in granting Appellant relief despite finding no violation of Article 55, UCMJ, or the Eighth Amendment, AFCCA did not err in failing to order a post-trial fact-finding hearing. Even assuming the facts, as alleged by Appellant, were true, AFCCA correctly held that the conditions of Appellant's short post-trial stay in segregated confinement at the Monmouth County Correctional Institution did not constitute cruel and unusual punishment under either the Eighth Amendment or Article 55, UCMJ, and a DuBay hearing was not necessary. Morover, because AFCCA correctly determined that there was no violation of Appellant's Eighth Amendment or Article 55, UCMJ, rights and should have granted no relief. In nonetheless granting relief, AFCCA applied equitable, rather than legal, principles and therefore there was no legal framework to inform any ordered DuBay hearing. The Constitution

and the UCMJ provide the parameters and instruction to the government concerning post-trial confinement conditions, and it is those parameters that would ostensibly inform any ordered fact-finding pursuant to Dubay. Here, AFCCA correctly determined there was no violation of Appellant's Eighth Amendment or Article 55, UCMJ, rights and there was nothing on which further fact-finding was necessary or approrpriate.

ARGUMENT

THE AIR FORCE COURT OF CRIMINAL APPEALS DID NOT ERR IN FAILING TO REMAND APPELLANT'S CASE FOR A UNNECESSARY HEARING PURSUANT TO UNITED STATES v. DUBAY, 17 C.M.A. 147, 37 C.M.R. 411 (C.M.A. 1967).

Standard of Review

Whether a Court of Criminal Appeals correctly applied the principles laid out in United States v. Ginn, 47 M.J. 236 (C.A.A.F. 1997), is a question of law reviewed *de novo*. United States v. Fagan, 59 M.J. 238, 241 (C.A.A.F. 2004) (citing United States v. Sales, 56 M.J. 255, 258 (C.A.A.F. 2002)).

Law and Analysis

While the United States maintains that AFCCA erred in granting Appellant relief despite finding no violation of Article 55, UCMJ, or the Eighth Amendment, AFCCA did not err in failing to order a post-trial fact-finding hearing. *See* Ginn, 47 M.J. at 248 (noting post-trial evidentiary hearings are not required for all cases involving post-trial affidavits, and

articulating six principals to be applied by courts of criminal appeals when addressing such affidavit-based claims); *see also* United States v. DuBay, 37 C.M.R. 411 (C.M.A. 1967); Fagan, 59 M.J. at 241. The six principals set forth by this Court in Ginn are:

> First, if the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in appellant's favor, the claim may be rejected on that basis.
>
> Second, if the affidavit does not set forth specific facts but consists instead of speculative or conclusory observations, the claim may be rejected on that basis.
>
> Third, if the affidavit is factually adequate on its face to state a claim of legal error and the Government either does not contest the relevant facts or offers an affidavit that expressly agrees with those facts, the court can proceed to decide the legal issue on the basis of the uncontroverted facts.
>
> Fourth, if the affidavit is factually adequate on its face but the appellate filings and the record as a whole "compellingly demonstrate" the improbability of those facts, the court may discount those factual assertions and decide the legal issue.
>
> Fifth, when an appellate claim of ineffective representation contradicts a matter that is within the record of a guilty plea, an appellate court may decide the issue on the basis of the appellate file and record (including the admissions made in the plea inquiry at trial and appellant's expression of satisfaction with counsel at trial) unless the appellant sets forth facts that would rationally explain why he would have made such statements at trial but not upon appeal.

> Sixth, the Court of Criminal Appeals is required to order a fact-finding hearing only when the above-stated circumstances are not met. In such circumstances the court must remand the case to the trial level for a DuBay proceeding. During appellate review of the DuBay proceeding, the court may exercise its Article 66 fact-finding power and decide the legal issue.

Ginn, 47 M.J. at 248 (emphasis added.)

A. AFCCA did not err in failing to order an unnecessary Dubay hearing because the facts asserted did not amount to a violation of Article 55, UCMJ, or the Eighth Amendment and Appellant was entitled to no relief.

An appellate court need not remand a case for fact-finding if, under the principles in Ginn, 47 M.J. at 248, it can determine that the facts asserted, even if true, would not entitle appellant to relief. United States v. Lovett, 63 M.J. 211 (C.A.A.F. 2006). Here, that is certainly the case as Appellant's allegations established nothing more than that Appellant did not enjoy his short stay in segregated confinement. Even assuming the facts, as alleged by Appellant, were true, AFCCA correctly held that the conditions of Appellant's short post-trial stay in segregated confinement at the Monmouth County Correctional Institution did not constitute cruel and unusual punishment under either the Eighth Amendment or Article 55, UCMJ, and a DuBay hearing was not necessary.

Although Appellant and the United States are in agreement that a DuBay hearing was unnecessary, Appellant's claim that

"[t]he government has never disagreed that the facts as established in the record of trial occurred" (App. Br. at 9) is wholly inaccurate. The United States has always maintained and continues to maintain that while Appellant discussed his "placement in solitary confinement" at the Monmouth County Correctional Institution in his clemency submission (J.A. at 57.), Appellant's self-serving statements do not paint an accurate picture of his brief seven-day stay in segregated confinement. Appellant claimed he was "stripped, searched, placed in irons, put on 23 hour lockdown, denied phone calls and visitation and forced to use an open caged shower and bathroom." (J.A. at 57.) After Appellant initially raised these claims in clemency, the government investigated those claims. (J.A. at 91.) While Appellant was placed in segregated confinement for seven days, he was not subjected to overly harsh or unnecessary conditions. While in segregated confinement, contrary to Appellant's self-serving contentions, inmates at the Monmouth County Correctional Institution:

> are in their cells for 23 hours a day, but are not restrained by shackles or handcuffs while in the cell...[T]he only time an inmate is placed into shackles or handcuffs is during periods that the inmate is being moved from a cell to another location within the correctional facility...[T]he longest period an inmate is placed into shackles or handcuffs for movement is when the inmate is moved to the visiting area, which takes approximately five minutes...[W]hile the member is in the visiting area he is unshackled...[T]he

> standard practice [at the Monmouth County Correctional Institution] is to strip search inmates as they are placed into segregation, but no further strip searches are conducted solely due to an inmate's segregated status...[T]he shower and bathroom facility in the segregated area is covered with a curtain material and inmates enter clothed and then undress and dress behind the curtain material.

(Id.)

As AFCCA correctly recognized, confinement is not designed nor required to be pleasant for an inmate. While Appellant certainly did not enjoy his short stay in segregated confinement, even taking his alleged facts as true he failed to demonstrate that the conditions of his confinement amounted to an "objectively, sufficiently serious act or omission resulting in the denial of necessities." (*See* J.A. at 8.) As a result, AFCCA expressly held that that there was no violation of Appellant's Eighth Amendment or Article 55, UCMJ, rights and denied him relief for his claim of cruel and unusual punishment (J.A. at 7-8), and there was no need for a DuBay hearing to make this correct determination.

B. AFCCA did not err in failing to order an unnecessary Dubay hearing because AFCCA correctly determined that there was no violation of Appellant's Eighth Amendment or Article 55, UCMJ, rights and should have granted no relief. In nonetheless granting relief, AFCCA applied equitable, rather than legal, principles and therefore there was no legal framework to inform any ordered Dubay hearing.

AFCCA correctly held that the conditions of Appellant's short post-trial stay in segregated confinement at the Monmouth

County Correctional Institution did not constitute cruel and unusual punishment under either the Eighth Amendment or Article 55, UCMJ. This is where AFCCA's analysis should have ended.[2] However, after expressly finding no Eighth Amendment or Article 55, UCMJ, violation, AFCCA inexplicably concluded:

> This does not end our analysis of this issue, however. Under our broad Article 66(c), UCMJ, authority, we retain responsibility in each case we review to determine whether the adjudged and approved sentence is appropriate. Under Article 66(c), UCMJ, our sentence appropriateness authority is to be based on our review of the "entire record," which necessarily includes the appellant's allegation of the conditions of his post-trial confinement. *See United States v. Towns*, 52 M.J. 830, 833 (A.F. Ct. Crim. App. 2000) (noting that matters submitted to the convening authority for clemency purposes are available to this court to aid us in determining the appropriateness of a sentence). While we may not engage in acts of clemency, we hold that we may consider post-trial confinement conditions as part of our overall sentence appropriateness determination, even where those allegations do not rise to the level of an Eighth Amendment or Article 55, UCMJ, violation. Our superior court has specifically recognized that the courts of criminal appeals have broad discretion to grant or deny relief for unreasonable or unexplained post-trial delay, even where the delay does not rise to the level of a due process violation. *Tardif*, 57 M.J. at 224. It necessarily follows that we maintain similar discretion for post-trial confinement conditions that do not rise to the level of a constitutional or statutory violation. This fits easily within our broad

[2] Indeed, a cursory LEXIS search demonstrates that in the last five years AFCCA has addressed claims of cruel and unusual punishment under the Eighth Amendment and Article 55, UCMJ, approximately sixteen times. In each of those occasions, AFCCA found no violation of the Eighth Amendment or Article 55, UCMJ, and the analysis appropriately ended there, with the appellants entitled to no relief.

> charter to "do justice." *United States v. Claxton*, 32 M.J. 159, 162 (C.M.A. 1991).

Gay, 74 M.J. 736 (J.A. at 8-9).

In Fagan, the Army Court of Criminal Appeals (ACCA) was faced with an appellant's claims concerning the conditions of his post-trial confinement. Fagan, 59 M.J. at 240. ACCA was presented with conflicting affidavits that could not be resolved under the Ginn factors, yet rather than ordering a DuBay hearing, ACCA granted sentence appropriateness relief in lieu of ordering further fact-finding, without determining whether a violation of the Eighth Amendment or Article 55, UCMJ, had in fact occurred. Id. at 240-41. However, this Court held that the "broad power to moot claims of prejudice" under Article 66(c) does not grant service courts the authority to grant sentence relief for post-trial confinement conditions absent a violation of Article 55 or the Eighth Amendment:

> The exercise of the "broad power" referred to in *Wheelus* flowed from the **existence of an acknowledged legal error or deficiency in the post-trial review process**. It is not a "broad power to moot claims of prejudice" **in the absence of an acknowledged legal error or deficiency, nor is it a mechanism to "moot claims" as an alternative to ascertaining whether a legal error or deficiency exists in the first place**.
>
> In terms of Fagan's claim, he may be entitled to relief if he did in fact suffer a violation of the rights guaranteed him by the Eighth Amendment and Article 55. However "broad" it may be, the "power" referred to in *Wheelus* does not vest the Court of Criminal Appeals with authority to

> eliminate that determination and move directly to granting sentence relief to Fagan. Rather, a threshold determination of a proper factual and legal basis for Fagan's claim must be established before any entitlement to relief might arise.

Fagan, 59 M.J. at 244 (citing Wheelus, 49 M.J. 283) (emphasis added). As a result, this Court held that ACCA erred in granting sentence appropriateness relief in lieu of ordering a Dubay hearing. Fagan, 59 M.J. at 240. Here, however, AFCCA did not grant sentence appropriateness relief "in lieu" of further fact-finding. Instead, AFCCA properly applied the Ginn factors, correctly determined that a DuBay hearing was unnecessary, and expressly found that there was no violation of Appellant's Eighth Amendment or Article 55, UCMJ, rights.

In granting sentence relief as a result of Appellant's post-trial confinement conditions, AFCCA punished the government for punishment's sake, despite there being no violation of Appellant's Eighth Amendment or Article 55 rights. Such a published holding sets a very dangerous and unworkable precedent unguided by any legal principles or standards. Instead, AFCCA acted only in equity. The Constitution and the UCMJ provide the parameters and instruction to the government concerning post-trial confinement conditions, and it is those parameters that would ostensibly inform any ordered fact-finding pursuant to DuBay. Here, AFCCA correctly determined there was no violation of Appellant's Eighth Amendment or Article 55, UCMJ, rights.

Put simply, there was nothing on which further fact-finding was necessary or appropriate. Therefore, AFCCA did not err in failing to remand Appellant's case for a hearing pursuant to United States v. Dubay.

CONCLUSION

WHEREFORE, the United States maintained its position on the certified issue and respectfully requests that this Honorable Court find that the Air Force Court of Criminal Appeals did not err in failing to remand this case for a DuBay hearing.[3]

MATTHEW J. NEIL, Maj, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34156

[3] In his brief, Appellant asks this Court to "set aside the bad conduct discharge for the government's illegal imposition of punitive solitary confinement." (App. Br. at 10.) However, this Court did not grant review of Appellant's case on the issue of whether Appellant was entitled to additional relief than that granted by AFCCA. Therefore, the United States respectfully submits that this Court's opinion on the specified issue must be limited to whether or not AFCCA should have ordered a DuBay hearing.

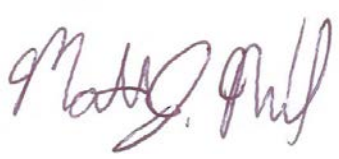
GERALD R. BRUCE
Associate Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 27428

For 

KATHERINE E. OLER, Colonel, USAF
Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Suite 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 30753

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, and to the Appellate Defense Division on 14 January 2016.



MATTHEW J. NEIL, Maj, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34156