10 September 2015

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellant,* v. Staff Sergeant (E-5) KEVIN GAY, USAF *Appellee.*	)))))))))	APPELLANT'S BRIEF IN SUPPORT OF THE ISSUE CERTIFIED Crim. App. No. 38525 USCA Dkt. No. 15-0750/AF

APPELLANT'S BRIEF IN SUPPORT OF THE ISSUE CERTIFIED

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IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellant,*	)	APPELLANT'S BRIEF IN SUPPORT OF THE ISSUE CERTIFIED
v.	)	
	)	Crim. App. No. 38525
Staff Sergeant (E-5) KEVIN GAY, USAF *Appellee.*	)	USCA Dkt. No. 15-0750/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 (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.

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(a)(2), UCMJ.

STATEMENT OF THE CASE

On 28-30 May 2013, Appellee was tried by a general court-martial composed of officer members. (J.A. at 26.) Appellee 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.) Appellee was acquitted of the remaining specifications. (Id.) The members sentenced Appellee 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 they expressly held that Appellee'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, Appellee's complaint did "not amount to a serious act or omission resulting in a denial of necessities, and [Appellee 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 Appellee's sentence inappropriately severe both on the basis of Appellee'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.**

STATEMENT OF FACTS

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

SUMMARY OF ARGUMENT

AFCCA's holding that Article 66(C), UCMJ, gives service courts the authority to grant sentence appropriateness relief for post-trial confinement conditions, even where those conditions do not amount to a violation of the Eighth Amendment or Article 55, UCMJ, constituted an abuse of discretion and

legal error. AFCCA's analysis should have ended after it expressly found that Appellee's post-trial confinement conditions did not amount to a violation of the Eighth Amendment or Article 55, UCMJ. In incorrectly granting sentence appropriateness relief for Appellee's post-trial confinement conditions despite finding no violation of the Eighth Amendment or Article 55, UCMJ, AFCCA's application of its Article 66(c), UCMJ, authority is devoid of the binding legal principles required by this Court. Moreover, AFCCA's holding is in direct contravention of this Court's binding precedent in United States v. Fagan, 59 M.J. 238 (C.A.A.F. 2004), which held that the Army Court of Criminal Appeals abused its discretion in granting sentence appropriateness relief absent a finding of a violation of the Eighth Amendment or Article 55, UCMJ.

ARGUMENT

THE AIR FORCE COURT OF CRIMINAL APPEALS (AFCCA) ABUSED ITS DISCRETION AND COMMITTED LEGAL ERROR BY REACHING ITS ERRONEOUS 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.

Standard of Review

This Court reviews a Court of Criminal Appeal's sentence appropriateness determination for an abuse of discretion.

United States v. Nerad, 69 M.J. 138, 142 (C.A.A.F. 2009) (citing United States v. Lacy, 50 M.J. 286, 287-89 (C.A.A.F. 1999)).

Law and Analysis

AFCCA correctly held that the conditions of Appellee'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. Appellee discussed his "placement in solitary confinement" at the Monmouth County Correctional Institution in his clemency submission. (J.A. at 57.) However, Appellee's self-serving statements in his clemency submission do not paint an accurate picture of his brief seven-day stay in segregated confinement. Appellee 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 Appellee initially raised these claims in clemency, the government investigated those claims. (J.A. at 91.) While Appellee was placed in segregated confinement for seven days, he was not subjected to overly harsh or unnecessary conditions. While in segregated confinement, contrary to Appellee'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 or required to be pleasant for an inmate. While Appellee 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 Appellee'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.) AFCCA's analysis did not end here.[1] 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 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).

[1] 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.

In United States v. Tardif, 57 M.J. 219 (C.A.A.F. 2002), the source from which AFCCA found its "broad" authority in this case, this Court determined that an appellant may be entitled to relief pursuant to a Court of Criminal Appeals Article 66(c) power "to grant relief for excessive post-trial delay without a showing of 'actual prejudice' . . . if it deems relief appropriate under the circumstances." Tardif, 57 M.J. at 224. Post-trial delay does not require that relief be given under these circumstances; rather, appellate courts are cautioned to "tailor an appropriate remedy, if any is warranted, to the circumstances of this case." Id. at 225.

Tardif recognized the broad powers of a service court to craft appropriate relief under Article 66(c) in those situations where the service court determines that no legal error occurred within the meaning of Article 59(a), UCMJ. Id. However, contrary to AFCCA's holding, it does not follow that such authority exists in the situation presented here, unless the Court of Criminal Appeals first determines that Appellee has met his burden of demonstrating a violation of the Eighth Amendment or Article 55, UCMJ.[2] The basis for the Tardif holding is this Court's recognition of the Court of Criminal Appeal's "broad power to moot claims of prejudice" under Article 66(c), UCMJ.

[2] The United States respectfully requests this Honorable Court expressly limit its holding in Tardif to situations involving excessive post-trial delay in order to preclude decisions like the one in this case.

Id. at 221; *see also* United States v. Wheelus, 49 M.J. 283, 288 (C.A.A.F. 1998). However, this Court has long recognized 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).[3] Therefore, under this Court's binding precedent in Fagan, AFCCA does not and did not possess the authority to grant sentence appropriateness relief where there is no violation of the Eighth Amendment or Article 55, UCMJ.

[3] Notably, AFCCA cited to Fagan as support for its position, yet ignored this Court's language as quoted above.

In many ways, this case represents the return of Nerad, another TJAG certified case involving an AFCCA Article 66(c) decision that was not permitted to stand. Although reversing AFCCA's decision to set aside findings under Article 66(c), this Court's analysis is particularly appropriate here. Specifically this Court noted, in discussing AFCCA's authority under Article 66(c):

> "We hold that while CCAs have broad authority under Article 66(c), UCMJ...that authority is not unfettered. It must be exercised in the context of legal -- not equitable -- standards, subject to appellate review...Relatedly, while Article 66(c), UCMJ, affords a CCA broad powers, when faced with a constitutional statute a CCA cannot, for example, override Congress' policy decision..."

United States v. Nerad, 69 M.J. at 140 (internal quotations and citations omitted). "There are even some places where the 'proverbial 800-pound gorilla' is not free to roam." United States v. Parker, 36 M.J. 269, 273 (C.M.A. 1993) (Wiss, J., concurring in part and in the result).

In granting sentence relief as a result of Appellee's post-trial confinement conditions, AFCCA punished the government despite there being no violation of Appellee's Eighth Amendment or Article 55 rights. Such a published holding sets a very dangerous and unworkable precedent. The Constitution and the UCMJ provide the parameters and instruction to the government concerning post-trial confinement conditions. AFCCA's holding,

absent a violation of Article 55 or the Eighth Amendment, will force the government, in future cases, to engage in *ex ante* speculation concerning the impact of Article 66(c) to post-trial confinement conditions.[4] Perhaps more importantly, such a holding would run the risk of becoming the exception that swallows the rule. This Court and AFCCA have provided detailed guidance on what an Appellant must show in order to establish a violation of Article 55, UCMJ. Granting relief pursuant to its Article 66(c) power for post-trial confinement conditions, apart from actual violations of Article 55 or the Eighth Amendment, allows appellants to be relieved of their burden of establishing a violation; the clearly established requirements of Article 55 and the Constitution would be eroded and eliminated.

In United States v. Pena, 61 M.J. 776 (A.F. Ct. Crim. App. 2005), decided after Tardif and Fagan, AFCCA recognized the limit of its Article 66(c) authority in relation to post-trial confinement conditions, and provided the roadmap for how service courts should view the interplay between Article 66(c) and an alleged Article 55 violation:

> Mindful of our precedent and limited authority, we do not reject the appellant's challenge simply

[4] In finding Appellee's sentence inappropriately severe, AFCCA appears to admonish the government for failing to provide a valid reason for placing Appellee in segregated confinement. (J.A. at 9-10.) This demonstrates the incongruity of AFCCA's position. In effect, AFCCA is punishing the government for not providing an explanation for Appellee's placement in confinement conditions that AFCCA found to be legal and permissible under the framework provided to the military by Congress.

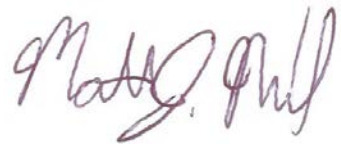
> because his complaint implicates the administration of his sentence. Under Article 66(c), UCMJ, we have the duty and authority to review sentence appropriateness and determine whether the sentence is correct in law. Therefore, we have the authority to assess the nature and general application of [post-trial confinement conditions] to satisfy ourselves that the severity of the adjudged and approved sentence has not been unlawfully increased by prison officials, and to ensure that the sentence is executed **in a manner consistent with Article 55, UCMJ, 10 U.S.C. § 855, and the Constitution**.

Pena, 61 M.J. at 778 (internal quotations and citations omitted) (emphasis added). As AFCCA appropriately recognized in Pena, the authority to grant sentence appropriateness relief under Article 66(c) for post-trial confinement conditions is dependent upon a service court first finding a violation of the Eighth Amendment or Article 55, UCMJ. Here, AFCCA correctly concluded that there was no such violation. In granting Appellee relief for his post-trial confinement conditions, despite expressly finding no violation of the Eighth Amendment or Article 55, UCMJ, AFCCA effectively overrode Congress' policy decision in enacting Article 55, UCMJ. Such a result cannot stand. Therefore, AFCCA's published holding constitutes an abuse of discretion and should be reversed.

CONCLUSION

WHEREFORE, the United States respectfully requests that this Honorable Court reverse the decision of the Air Force Court of Criminal Appeals and remand the case for a proper sentence

appropriateness determination.



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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 10 September 2015.

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