IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellant,

v.

Staff Sergeant (E-5)
KEVIN GAY,
USAF,
Appellee.

USCA Dkt. No. 15-0750/AF

Crim. App. No. 38525

ANSWER TO CERTIFIED ISSUE

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UNITED STATES, *Appellant,*	)	ANSWER TO CERTIFIED ISSUE
v.	)	USCA Dkt. No. 15-0750/AF
Staff Sergeant (E-5) **KEVIN GAY,** USAF, *Appellee.*	)	Crim. App. No. 38525

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

Issue Certified

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS 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

Appellee concurs with the government's statement of statutory jurisdiction.

Statement of the Case

The government's statement of the case is generally accepted.

Statement of Facts

Appellee raised two assignments of error before the Air Force Court of Criminal Appeals. One assignment of error alleged a violation of Appellee's rights under Article 55, UCMJ, and the Eighth Amendment as a result of the conditions of his post-trial

confinement. The second assignment of error was based on the government's failure to meet post-trial processing standards as set forth in *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006).

The Air Force Court specified the issue of whether, regardless of a finding of a violation of Appellee's rights under Article 55, UCMJ, and the Eighth Amendment, the Court could grant sentence appropriateness relief under Article 66(c), UCMJ. Although the Air Force Court did not agree that the post-trial confinement conditions rose to the level of a violation of Article 55, UCMJ, or the Eighth Amendment, they found in Appellee's favor on both of the other issues, and granted Appellee relief by reducing his sentence to confinement, and setting aside his forfeitures of all pay and allowances. The issue certified by the judge advocate general only addresses the Air Force Court's decision to grant Appellee relief for the conditions of his post-trial confinement.

The Air Force Court found that Appellee's post-trial confinement conditions did not violate Article 55, UCMJ, nor did they amount to cruel and unusual punishment in violation of the Eighth Amendment. The Air Force Court then continued its analysis as follows:

> 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).

United States v. Gay, 74 M.J. 736 (A.F. Ct. Crim. App. 2015); J.A. at 7. The Air Force Court then proceeded to analyze *United States v. Fagan*, 59 M.J. 238, 241 (C.A.A.F. 2004), and found that under the unique facts and circumstances of this case it was appropriate to grant Appellee sentence relief for the conditions of his post-trial confinement. *Id.*

Summary of Argument

The Air Force Court's decision to award Appellee sentence appropriateness relief for the intolerable post-trial confinement conditions was not arbitrary, capricious, or unreasonable, as a

matter of law. The Air Force Court correctly analyzed and applied *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002), *United States v. Nerad*, 69 M.J. 138, 155 (C.A.A.F. 2010), and *United States v. Fagan*, 59 M.J. 238 (C.A.A.F. 2004). These cases support the Air Force Court's determination that Article 66(c), UCMJ, granted the court broad authority to provide sentence appropriateness relief when it found that such relief was required to "do justice".

Argument

THE AIR FORCE COURT DID NOT ABUSE ITS DISCRETION BY GRANTING APPELLEE SENTENCE APPROPRIATENESS RELIEF UNDER ARTICLE 66(C), UCMJ, FOR POST-TRIAL CONFINEMENT CONDITIONS IT FOUND DID NOT VIOLATE ARTICLE 55, UCMJ, OR THE EIGHTH AMENDMENT.

Standard of Review

This Court reviews the Air Force Court's exercise of its Article 66(c) powers for an abuse of discretion. *Nerad*, 69 M.J. at 155. The Courts of Criminal Appeal (CCA) only abuse their discretion under Article 66(c) if their decision is 'arbitrary, capricious, or unreasonable, as a matter of law.' *Id.* This Court will only disturb a CCAs sentence reassessment "in order to prevent obvious miscarriages of justice or abuses of discretion." *United States v. Jones*, 39 M.J. 315, 317 (C.M.A. 1994).

Law and Analysis

"The legislative history of Article 66 reflects congressional intent to vest broad power in the Courts of Criminal Appeals. The legislative history also reflects a

congressional distinction between review of the lawfulness of a sentence and its appropriateness." *United States v. Tardif*, 57 M.J. 219, 223 (C.A.A.F. 2002); *see also* S. Rep. No. 98-486, at 28 (1949) ("The Board may set aside, on the basis of the record, any part of a sentence, either because it is illegal or because it is inappropriate."). Congress' intent with Article 66 was to give the CCAs the power to affirm only so much of the sentence that they determined was "justified by the whole record." *Id., citing, Jackson v. Taylor*, 353 U.S. 569, 576-577 (1957). As noted in *Tardif,* this Court and its predecessor have consistently found the purpose of the CCAs is the "do justice." *See United States v. Claxton*, 32 M.J. 159, 162 (C.M.A. 1991); *United States v. Healy*, 26 M.J. 394, 395-396 (C.M.A. 1988).

In *Tardif,* this Court held that under Article 66(c) the CCAs have the authority "to grant relief . . . without a showing of 'actual prejudice' within the meaning of Article 59(a), if it deems relief appropriate under the circumstances." *Tardif*, 57 M.J. at 224 (quoting, *United States v. Collazo*, 53 M.J. 721 (A.C.C.A. 2000)). In other words, "appellate courts are not limited to either tolerating the intolerable or giving an appellant a windfall... [they] have authority under Article 66(c) to ... tailor an appropriate remedy, if any is warranted, to the circumstances of the case." *Id.* at 225.

Although *Tardif* was a case about post-trial delay, the principle extends to all cases reviewed under Article 66(c).[1] As the Air Force Court stated in its opinion, "[i]t necessarily follows that [the CCAs] maintain similar discretion for post-trial confinement conditions that do not rise to the level of a constitutional or statutory violation." J.A. at 9.

The government relies on *Fagan* in their brief to support its argument that the CCA is not authorized to give relief under Article 66(c), UCMJ, where they do not find a violation of Article 55, UCMJ or the Eighth Amendment. They argue that the CCAs do not have the power to "moot claims" without first determining "whether a legal error or deficiency exists in the first place." Govt. Brief at 9, quoting, *Fagan*, 59 M.J. at 244. Their reliance on *Fagan* is misplaced and taken out of context. As the Air Force Court explained, the issue in *Fagan* concerned whether the CCA had erred by not applying the *Ginn* factors before moving to grant sentence appropriateness relief. *Fagan*, 59 M.J. at 240-41; *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997); *see also* J.A. at 9.

Contrary to the government's assertion, *Fagan* did not hold, "that the service courts are prohibited from granting sentence

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[1] The government in their brief expressly asks this Court to limit the holding in *Tardif* to situations involving excessive post-trial delay. Appellee opposes this position because it falls outside the scope of the certified issue. Moreover *Tardif* was correctly decided and properly allows the use of Article 66(c), UCMJ, in this context. This Court recognized the reach of Article 66(c), UCMJ, in its holding in *Tardif*, and it has been properly applied through many other cases including *Fagan.* The ruling in *Tardif* was correct and this Court should follow the established precedent therein.

appropriateness relief rising from complaints of post-trial conditions." *Id.* Rather, *Fagan* held that the CCAs cannot grant sentence relief prior to employing the *Ginn* factors to resolve factual disputes. *Fagan,* 59 M.J. at 244. As such, *Fagan* is inapplicable to this case, as the Air Force Court did analyze the *Ginn* factors. If anything, *Fagan* supports the Air Force Court's opinion.

Like *Fagan*, the government's reliance on *Pena* is based on a misreading of the holding in the case. *United States v. Pena*, 61 M.J. 776 (A.F. Ct. Crim. App. 2005), *aff'd*, 64 M.J. 259 (C.A.A.F. 2007). In the first instance, *Pena* is inapplicable because the complaint in *Pena* focused on conditions of Mandatory Supervisory Relief (MSR). Both this Court and the Air Force Court concluded that MSR is not punishment, and therefore the conditions were not subject to relief via the sentence appropriateness power of the CCA. In fact, this Court specifically stated "the collateral administrative consequences of a sentence, such as early release programs, do not constitute punishment for purposes of the criminal law." *Pena*, 64 M.J. 259, 266. However, both courts made clear that when a sentence is increased by prison officials (or Air Force officials) the CCA has the authority to review it and provide relief under Article 66(c), UCMJ. *Pena*, 64 M.J. at 266; *Pena*, 61 M.J. 776, 778.

To the extent *Pena* is applicable, it supports the Air Force Court's decision. The government argues *Pena* stands for the

proposition that the CCAs may not grant sentence relief for the conditions of post-trial confinement unless the CCA finds the conditions violated Article 55, UCMJ, or amounted to cruel and unusual punishment in violation of the Eighth Amendment. Govt. Brief at 11. The government's citation to *Pena* does not support their position. In fact, the critical language from *Pena* is:

> 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 784 (internal quotations and citations omitted) (emphasis added).

The government focuses on the second portion of this quotation, but they ignore the applicable portion in which the Air Force Court recognized they have an obligation under Article 66(c), UCMJ, to ensure that a sentence has not been increased. If they find a sentence has been unlawfully increased as a result of the conditions of the confinement or is simply inappropriate, they have the authority under Article 66(c), UCMJ, to formulate an appropriate remedy.

The CCAs "are not limited to either *tolerating the intolerable* or giving an appellant a windfall... [they] have authority under Article 66(c) to ... tailor an appropriate remedy, if any is warranted, to the circumstances of the case." *Tardif*,

57 M.J. at 225 (emphasis added). The Air Force Court based its decision on well-established case law and legal principles to support its determinations that it had the authority to grant sentence appropriateness relief as a result of the post-trial confinement conditions under Article 66(c), UCMJ. The Air Force Court did not abuse its discretion.

Conclusions

This Honorable Court should affirm the Air Force Court's ruling because it was not arbitrary, capricious, or unreasonable. To the contrary, the Air Force Court's ruling was based on a well-reasoned and proper analysis of applicable case law.

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on 7 October 2015.

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