IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

KALAB D. WILLMAN
Staff Sergeant (E-5), USAF
Appellant.

Crim. App. No. 39642

USCA Dkt. No. 21-0030/AF

REPLY BRIEF ON BEHALF OF APPELLANT

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Pursuant to Rules 19(a)(7)(B) and 34(a) of this Honorable Court's Rules of Practice and Procedure, Staff Sergeant (SSgt) Kalab D. Willman, the Appellant, hereby replies to the Government's Answer (Gov. Ans.), filed on February 24, 2021.

ARGUMENT

The Government's brief primarily advances two arguments: (1) a sentence appropriateness review under the facts of this case would eviscerate this Court's ruling in *United States v. Jessie*, 79 M.J. 437 (C.A.A.F. 2020); and (2) SSgt Willman's affidavit never became part of the entire record. Gov. Ans. at 17. Neither contention is accurate. The lower court had the authority to attach SSgt Willman's affidavit to the record of trial because it addressed a subject included within the scope of *Jessie*—an allegation of cruel and unusual punishment. Once this declaration became part of the "entire record," the lower court was not just permitted to consider it for sentence appropriateness purposes, it was required to do so pursuant to its obligation under Article 66(c), Uniform Code of Military Justice (UCMJ), to "affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved."

I. The Government's view of what constitutes "the entire record" of trial, and an appellate court's ability to supplement that record, is overly restrictive.

When the Air Force Court of Criminal Appeals (hereinafter Air Force Court) attached SSgt Willman's affidavit to the record of trial to analyze his cruel and unusual punishment claims, that affidavit became part of the "entire record" the lower court was obligated to consider pursuant to its statutorily-mandated sentence appropriateness review. *See* Appellant's Brief (App. Br.) at 11-12. The Government labels this contention "misguided," countering that SSgt Willman's affidavit *never* became part of the record. Gov. Ans. at 16-18. The Government then cites various authorities, ranging from R.C.M. 1103 to *United States v. Healy*, 26 M.J 394, 396 (C.M.A. 1988), as support for its assertion that Congress intended to limit the record of trial to only those materials included in the record prior to the convening authority's action or the entry of judgment. Gov. Ans. at 16-18. There are numerous flaws with the Government's position.

As a starting point, and as the Government acknowledges (Gov. Ans. at 10), this Court's decision in *Jessie* authorizes the Courts of Criminal Appeals (CCAs) to supplement the record of trial in two instances. 79 M.J. 437. First, a CCA may supplement the record to resolve issues previously raised in the record. *Id*. at 442, 445. Second, a CCA may supplement the record "in those tightly circumscribed instances where the appellant raises Eighth Amendment and Article 55, UCMJ, 10

U.S.C. § 866(c) (2012) claims." *Id*. at 445 (Ohlson, J., dissenting); *see also id*. at 443, 445. In either circumstance, and contrary to the Government's contentions, these two *Jessie* categories demonstrate the "record of trial" is not limited to matters attached to the record prior to action or entry of judgment.

The Government further errs in its interpretation of the Rules for Courts-Martial, as R.C.M. 1103(b)(2) and (3) do not provide an exhaustive list of matters that can be attached to the record of trial. Gov. Ans. at 16-17. Rather, these rules list what materials the Government "shall include" in the record. The Government's position, which seeks to limit record of trial contents to only those materials explicitly cited in R.C.M. 1103(b)(2) and (3), ignores how other matters can be added to the record. For example, pursuant to Article 38(c)(1), UCMJ, a trial defense counsel can forward a brief to attach to the record for consideration by reviewing authorities.[1] As the Rules for Courts-Martial cannot be contrary to or

[1] The closest R.C.M. 1103 comes to addressing Article 38(c)(1), UCMJ, is in R.C.M. 1103(b)(3)(C), R.C.M. 1103(b)(3)(H), and R.C.M. 1103(b)(3)(I). R.C.M. 1103(b)(3)(C) does not apply because it is restricted to matters submitted by an *accused* under R.C.M. 1105; Article 38(c)(1), UCMJ, refers to matters submitted by *defense counsel*. R.C.M. 1103(b)(3)(H) does not apply because it is limited to responses by defense counsel regarding *post-trial review*; Article 38(c)(1), UCMJ, extends to any matter that defense counsel "determines should be considered in behalf of the accused on review (including any objection to the contents of the record which he considers appropriate)." Finally, R.C.M. 1103(b)(3)(I) does not apply because it is limited to matters relative to clemency; Article 38(c)(1) extends to matters beyond clemency, which defense counsel desires to be considered by appellate authorities. *See*, *e.g.*, *McKinney v. Ivany*, 48 M.J. 908, 910 (A. Ct. Crim. App. 1998) (deeming Article 38(c)(1), UCMJ, to be part of the statutory appeal

inconsistent with the UCMJ, the Government's restrictive interpretation must fail. *See* Article 36(a), UCMJ; *accord United States v. Bartlett*, 66 M.J. 426, 428 (C.A.A.F. 2008) (citing *United States v. Jenkins*, 7 C.M.A. 261, 262-63 (1956)). Moreover, this Court concluded in *Jessie* that "the 'entire record' also includes briefs and arguments that government and defense counsel (and the appellant personally) might present regarding matters in the record of trial and 'allied papers.'" 79 M.J. at 440-41 (citing *Healy*, 26 M.J. at 396). Such arguments and briefs—like their Article 38(c)(1), UCMJ, counterparts—are notably absent from R.C.M. 1103(b)(2) and (3).

The Government next cites *Healy* to support its assertion that "Congress never intended to expand the 'record' to include additional information on sentencing matters after action by the convening authority." Gov. Ans. at 17-18. Although the Government's recitation of *Healy* is accurate insofar as this Court concluded that "Congress never intended that a Court of Military Review would be under any *duty* to receive additional information on sentencing after the convening authority has acted," this Court expressly declined to bar a CCA from using its discretion to

process under Article 69(a), UCMJ); *United States v. Luedtke*, 19 M.J. 548, 553 (N-M Ct. Crim. App. 1984) (distinguishing how a defense counsel can interject himself into appellate proceedings by (1) filing an Article 38(c)(1), UCMJ, brief on legal issues to be raised, (2) initiating clemency recommendations, and (3) challenging the accuracy of the record of trial.).

supplement the record. 26 M.J. at 396-97 (*emphasis added*). As this Court explained further in *Healy*:

> [W]e need not decide whether the Court of Military Review, *if it chooses*, may grant a motion to supplement the "record" by the filing of additional documents allegedly relevant to sentence appropriateness. The point is that the Court of Military Review *has no duty* to receive information or data that purports to be relevant only to clemency and that, after the convening authority has acted, the Code provides no way for bringing to the attention of the Court of Military Review information that purportedly bears even on sentence appropriateness.

Id. at 397 (*emphasis added*). *Healy* is thus far from the dispositive authority the Government believes it to be.

Taking *Healy* a step further, there is no provision in the UCMJ or the Rules for Courts-Martial that explicitly precludes an appellate court from using its discretion to attach materials to the record of trial after action or entry of judgment. The CCAs, as well as this Honorable Court, have long recognized their ability to supplement the record in their respective rules of practice and procedure. *See* Joint Courts of Criminal Appeals Rules of Practice and Procedure (pre-2019), Rule 23(b); United States Air Force Court of Criminal Appeals, Rules of Practice and Procedure (May 19, 2017), Rule 23.3(b); Rules of Practice and Procedure, United States Court of Appeals for the Armed Forces, Rule 30A; *see also Jessie*, 79 M.J. at 448 (Ohlson, J. dissenting). The CCAs may also expand the record of trial through a *DuBay*[2]

[2] *United States v. DuBay*, 17 C.M.A. 147 (1967).

hearing, which this Court has deemed "a well-accepted procedural tool for addressing a wide range of post-trial collateral issues." *United States v. Fagan*, 59 M.J. 238, 241 (C.A.A.F. 2004) (citing *United States v. Mack*, 58 M.J. 413, 415 (C.A.A.F. 2003); *United States v. Baker*, 58 M.J. 380, 387 (C.A.A.F. 2003); *United States v. Hurn*, 55 M.J. 450 (C.A.A.F. 2001)).

In sum, "this Court has frequently reviewed cases from the courts of criminal appeals in which the trial record has been supplemented on appeal." *Jessie*, 79 M.J. at 449 (Sparks, J., dissenting) (citing *United State v. Navarette*, 79 M.J. 123, 125-26 (C.A.A.F. 2019); *United States v. Datavs*, 71 M.J. 420, 423 (C.A.A.F. 2012)); *see also id*. at 448 n.3 (Ohlson, J., dissenting) (citing *United States v. Springer*, 79 M.J. 138 (2019) (summary disposition); *United States v. Barry*, 76 M.J. 407 (C.A.A.F. 2017) (summary disposition)). The Government's view that an appellate court cannot supplement the record after action or entry of judgment—even with *Jessie*'s limiting proscription—is contrary to this Court's long-standing precedent, and unsupported by statute or regulation.

II. The CCAs should remain the gatekeepers for the record of trial regarding Article 55, UCMJ, and Eighth Amendment claims.

The Government posits that SSgt Willman made his cruel and unusual punishment claim "as a way to get around the requirement that his matter be included in the record for a sentence review under Article 66(c) [UCMJ]." Gov. Ans. at 17.

The Government then argues that, if permitted, such conduct "would make this Court's ruling in *Jessie* obsolete." *Id*. First, SSgt Willman did not attempt to circumvent *Jessie,* which was decided after he submitted his Eighth Amendment and Article 55, UCMJ, claims at the Air Force Court. Second, implicit in the Government's contention is that a CCA cannot be trusted to discern whether an appellant raises a legitimate claim under the Eighth Amendment or Article 55, UCMJ, or whether that appellant is trying to shoehorn impermissible content into the record. For various reasons, this Court should reject the Government's pessimistic view of a CCA's judgment.

The Air Force Court, like its sister CCAs, has a rule pertaining to motions to attach. Specifically, Air Force Court Rule 23.3(b) requires that a party moving to attach documents to the record of trial provide a "title and summary of the proposed items to be attached and a statement as to their relevance and necessity to the case."[3] *Compare* A. Ct. Crim. App. R. 23.3(a); C.G. Crim. App. R. 23.3(b). Consequently, an appellant may not simply attach any document he desires to the record of his case; instead, he must first demonstrate that the document relates to and is necessary for his appeal, to include whether it is consistent with *Jessie*. Although the Air Force Court does not currently cite *Jessie* in its rules, a document that falls beyond that

[3] This rule became effective on December 23, 2020. The Air Force Court's prior rules, established on August 1, 2019 and applicable to SSgt Willman's appeal, contained an identical rule.

case's scope would be neither relevant nor necessary to a case, as it would exceed a CCA's statutory authorization to consider such materials. *Jessie*, 79 M.J. at 445; *compare* N. M. Ct. Crim. App. R. 23.4 (requiring an appellant to articulate how a document is consistent with *Jessie*). Given these predicate conditions, particularly when viewed in combination with how this Court has historically entrusted a CCA to expand the record of trial,[4] there is no reason to now view the lower courts as anything other than responsible stewards of the record.[5]

This is not to foreclose the possibility that a future appellant may endeavor to thwart *Jessie*'s proscriptions by labeling an assignment of error as pertaining to cruel and unusual punishment. However, a CCA should easily be able to ferret out such machinations. For example, an appellant would be hard-pressed to connect the Eighth Amendment and Article 55, UCMJ, to an unraised objection to an Article 32, UCMJ, preliminary hearing. But even assuming, *arguendo*, that a CCA fell victim to such a scheme, or intentionally sought to expand its review authorities beyond *Jessie*, the Government would not be left without options. It could seek *en banc*

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[4] *See* Section I *supra*.

[5] Notably, SSgt Willman initially attempted to attach his declaration to his opening brief by appending it as Appendix B without the requisite motion to attach. (Record (R.) at Motion to Strike, In Part, Appellant's Assignments of Error Brief, dtd September 18, 2019.). The Government subsequently moved to strike the brief in part, and the lower court granted the motion. (R. at Motion to Strike, In Part, Appellant's Assignments of Error Brief, dtd 18 September 2019 (with Air Force Court's September 27, 2019 grant.) SSgt Willman then had to comply with the Air Force Court's rules in order to attach his affidavit. JA at 55.

reconsideration from the CCA,[6] file a writ for extraordinary relief from this Court,[7] or later seek certification to this Court pursuant to Article 67(a)(2), UCMJ.

In any event, the present case does not involve an appellant attempting to sidestep *Jessie*. Rather, SSgt Willman suffered an injury while confined, was maltreated by Government officials thereafter, and raised a legitimate claim for relief under the Eighth Amendment and Article 55, UCMJ. That he correspondingly requested sentence appropriateness relief does not expand or eviscerate *Jessie* in any form. It instead allowed the Air Force Court to fulfill its statutory duty to determine whether his sentence was indeed appropriate after considering the "entire record," which appropriately included his affidavit detailing his cruel and unusual punishment allegation.

III. The Air Force Court is the appropriate forum to address SSgt Willman's inadequate medical treatment.

The Government asserts that Article I courts are the wrong forum for SSgt Willman's complaint. Gov. Ans. at 20-24. Instead, it argues that military prisoners should seek redress in Article III courts, "which have the ability to provide equitable relief." *Id*. at 22. However, the Government further acknowledges that "military prisoners are not necessarily afforded a civil remedy" under federal statute, including

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[6] *See*, *e.g.*, A.F. Ct. Crim. App. R. 27(b) and 31.

[7] *See* C.A.A.F. R. 27; *cf. United States v. Dowty*, 48 M.J. 102, 106-07 (C.A.A.F. 1998) (citations omitted) (discussing this Court's authority to exercise jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a)).

the Federal Tort Claims Act, 28 U.S.C. §§ 1346 and 2671. Gov. Ans. at 22. This is both true and problematic for appellants like SSgt Willman.

Pursuant to the *Feres* doctrine, a member of the military may not file tort claims against the United States for injuries suffered "incident to service." *Feres v. United States*, 340 U.S. 135, 146 (1950). The federal circuits have broadly interpreted this service-connected language, consistently concluding that *Feres* bars military prisoners from filing lawsuits regarding issues that arise during confinement. *See Jessie*, 79 M.J. at 447 n. 1 (Ohlson, J. dissenting) (citing *Schnitzer v. Harvey,* 389 F.3d 200, 203 (D.C. Cir. 2004)). Moreover, at least one federal circuit has determined that *Feres* applies even when a servicemember has transferred out of a military confinement facility and been fully discharged. *Ricks v. Nickels*, 295 F.3d 1124 (10th Cir. 2002). Given that these Article III courts will apply *Feres* in "[p]ractically any suit that implicates the military's judgments and decisions," it is dubious that a military inmate will ever receive compensatory damages for injuries resulting from the Government's cruel and unusual punishment.[8] *Id*. at 1128. This leaves an Article III court with just two options for military prisoners with meritorious claims: injunctive or declaratory relief. *Id*. Neither would benefit SSgt Willman or those similarly situated.

[8] The Federal Tort Claims act prohibits punitive damages against the United States. 28 U.S.C. § 2674.

Declaratory relief prospectively clarifies the rights of two parties without awarding damages or ordering any specific action—it does not apply to a military prisoner hurt by inadequate medical treatment in the past, as SSgt Willman was. *See* 28 U.S.C. § 2201(a); *see also Green v. Mansour*, 474 U.S. 64, 73 (1985) (declaratory judgment only available prospectively, not retrospectively); *Tarhuni v. Holder*, 8 F. Supp. 3d 1253, 1267–68 (D. Or. 2014) (citations omitted) ("A plaintiff whose injury lies wholly in the past without a reasonable likelihood of recurring in the future lacks the standing to seek a declaratory judgment.") Likewise, enjoining a military confinement facility from withholding critical medical care in the future would have no effect for an appellant like SSgt Willman, whose injuries only fully manifested after his release. JA at 57-58. Consequently, any relief available relief to SSgt Willman from an Article III court is illusory, at best.

While the Government correctly notes SSgt Willman could have referenced his injury in clemency, it ignores that SSgt Willman reasonably relied on diagnoses from government officials, and that his injury failed to heal and later worsened due to his inadequate medical care. *Compare* Gov. Ans. at 18-19 *with* App. Br. at 2-3 *and* JA at 57-58. SSgt Willman visited sick call several times while confined and, despite his continued suffering, received assurances that everything was normal and he would eventually heal. JA at 57-58. Nevertheless, the Government asks this Court to penalize SSgt Willman for initially trusting that government officials would

provide him sufficient care, and for failing to request clemency because he was unable to predict his injury would worsen in the future. For obvious reasons, this Court should decline the Government's invitation.

All the Government's proposed alternative avenues for relief are dead ends for SSgt Willman. This reality extends beyond the "policy considerations" this Court rejected in *Jessie*; it entirely curtails an appellant's ability to seek relief for confinement conditions that renders his sentences inappropriately severe. Sentence appropriateness review remains a CCA's obligation. Article 66(c), UCMJ; *see also United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005) (concluding that a CCA must "independently determine, in *every case* within [its] limited Article 66, UCMJ, jurisdiction, the sentence appropriateness of each case [it] affirm[s].") (emphasis added) (citation and internal quotations omitted). Relegating an appellant's complaints about inadequate medical treatment in military confinement frustrates that review.

WHEREFORE, This Honorable Court should reverse the Air Force Court of Criminal Appeals' decision and remand the case for reconsideration of sentence appropriateness under Article 66(c), UCMJ.

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 the Director, Air Force Government Trial and Appellate Counsel Division, on March 8, 2021.

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