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

BRIEF ON BEHALF OF APPELLANT

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Issue Presented

WHETHER THE LOWER COURT ERRED WHEN IT RULED THAT IT COULD NOT CONSIDER EVIDENCE OUTSIDE THE RECORD TO DETERMINE SENTENCE APPROPRIATENESS UNDER ARTICLE 66(c).

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (hereinafter AFCCA) reviewed this case pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c) (2012).[1] This Honorable Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On November 6, 2018, the Appellant, SSgt Kalab D. Willman, was tried by a general court-martial composed of a military judge alone. Consistent with SSgt Willman's pleas, the military judge convicted him of one specification of indecent recording in violation of Article 120c, UCMJ, 10 U.S.C. §920c. (JA at 3.) The military judge sentenced SSgt Willman to confinement for one year, reduction to E-4, and a dishonorable discharge. (JA at 3.)

On February 28, 2019, the convening authority approved the sentence as adjudged and, except for the dishonorable discharge, ordered it executed. (JA at 68-69.)

[1] Unless otherwise indicated, all references to the Manual for Courts-Martial are to the 2016 version.

On September 2, 2020, the AFCCA affirmed the findings and sentence. (JA at 15.)

This Court granted review on December 21, 2020. *United States v. Willman,* 2020 CAAF LEXIS 692 (C.A.A.F. December 21, 2020).

Statement of Facts

SSgt Willman's Injury and the Government's Response

Near the end of December 2018, while in confinement at the Navy Consolidated Brig in Charleston, South Carolina (hereinafter Brig), SSgt Willman was injured during a game of flag football. (JA at 57.) Another inmate stepped on SSgt Willman's left foot, significantly bruising his left big toe and toenail. (*Id*.) Over the next two to three weeks, the toenail worsened. (*Id*.) It varied in color, swelled, discharged pus, became increasingly sensitive to pressure and temperature, and started to detach from the nail bed. (*Id.*)

In January 2019, SSgt Willman reported to the Brig's sick call to have his foot examined. (JA at 57.) A staff member evaluated SSgt Willman's toe and concluded that it did not need any treatment. (*Id*.) SSgt Willman requested that medical staff remove the nail and report his condition to the section supervisor. (*Id*.) This supervisor refused to remove the nail, conducted a Betadine soak instead, and instructed SSgt Willman to return to sick call should his injury

worsen.[2] (*Id.*) Later that evening, the affected nail detached entirely from the nail bed when SSgt Willman removed his boots and socks. (*Id.*)

Three weeks later, SSgt Willman returned to sick call to have the injury re-evaluated because the nail was re-growing over the exposed nail bed in an unusual manner and with significant discoloration. (JA at 57.) This caused pain due to increased sensitivity when he put on his socks and boots each morning. (JA at 58.) The Brig's medical personnel once again told SSgt Willman that he did not need treatment but instructed him to report back to sick call if any additional symptoms or issues developed. (*Id.*) Although no additional symptoms developed, SSgt Willman could not don socks or shoes without slow or methodical effort. (*Id.*)[3] As of September 3, 2019, SSgt Willman's toenail had yet to regenerate fully and remained an unusual color and form. (JA at 58.)

SSgt Willman's Post-Trial Actions

SSgt Willman never filed a formal complaint about his toe. (JA at 62.) SSgt Willman also did not raise the matter in clemency; rather, he waived his right to submit matters on February 27, 2019. (JA at 66.) SSgt Willman remained confined at the Brig until August 11, 2019. (JA at 62.)

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[2] Betadine is a non-alcoholic, topical antiseptic.

[3] *See also* JA at 62 (affidavit from the Brig's legal officer indicating that medical personnel estimated "months to years for the nail to fully grow out," and advised SSgt Willman to wear "a band aid to help prevent the nail catching onto his socks.")

Less than a month after his release, SSgt Willman completed an affidavit attesting to the injury he suffered while confined, the treatment he received from Brig officials, and how he had yet to heal. (JA at 57-58.) He then asked the AFCCA to attach his affidavit to the record in support of his allegation that the Government's failure to provide proper medical care constituted cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and Article 55 of the UCMJ.[4] (JA at 3, 55.) SSgt Willman further contended that his confinement conditions rendered his sentence inappropriately severe, warranting relief under Article 66(c), UCMJ. (JA at 3.) The AFCCA granted SSgt Willman's motion to attach. (JA at 55.) The Government subsequently moved to attach a declaration from a confinement official. (JA at 60.) The AFCCA granted that motion as well. (*Id.*)

The AFCCA's Decision & Corresponding Cases

The AFCCA considered the appellate attachments from SSgt Willman and the Government to analyze his Eighth Amendment and Article 55, UCMJ, allegations. (JA at 8-13.) Ultimately, the AFCCA concluded that these claims did not warrant relief and pronounced his sentence correct in law. (JA at 13.)

[4] SSgt Willman raised this assignment of error pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). (JA at 3.)

The AFCCA then turned to whether it should approve SSgt Willman's sentence based on his confinement conditions. Citing *United States v. Jessie*, 79 M.J. 437 (C.A.A.F. 2020), the AFCCA found that it could not consider the appellate attachments because "the entire record contains no information about the conditions of Appellant's post-trial confinement." (JA at 14.) The AFCCA acknowledged it was "incongruous to consider outside-the-record matters to evaluate Appellant's Article 55 and Eighth Amendment claims, and then not consider those matters in this court's sentence appropriateness review under Article 66(c)." (*Id*.) Nevertheless, the Court concluded that *Jessie* precluded such consideration, regardless of whether the issues involved constitutional or statutory claims. (*Id*.)

Judge Meginley concurred that SSgt Willman was not entitled to relief for cruel and unusual confinement conditions.[5] (JA at 15.) However, citing Chief Judge Johnson's observations in *United States v. Matthews*, Judge Meginley disagreed that the AFCCA was "precluded from considering the appropriateness of Appellant's sentence pursuant to Article 66, UCMJ, 10 U.S.C. § 866, in a case such as this where Appellant raises his Eighth Amendment and Article 55, UCMJ,

[5] The Eighth Amendment prohibits cruel *and* unusual punishment, whereas Article 55, UCMJ, prohibits cruel *or* unusual punishment. Any references to cruel and unusual punishment in this brief apply to both the constitutional and statutory prohibitions, the difference in language notwithstanding.

claims for the first time on appeal, and supports his claim with material that is outside of the original record of trial." (JA at 15-16 (citing *Matthews*, No. ACM 39593, 2020 AFCCA LEXIS 193, at *17-28 (A.F. Ct. Crim. App. June 2, 2020) (unpub. op.) (J. Johnson, C.J., concurring in the result)).[6] Judge Meginley also questioned the establishment of a "hard-line rule" that precluded the Courts of Criminal Appeals from considering matters outside the record for anything other than Eighth Amendment or Article 55, UCMJ, claims, noting the vast changes to military confinement facilities, post-trial processing, and the composition of appellants since the foundational case law for *Jessie—United States v. Fagnan*, 12 C.M.A. 192 (C.M.A. 1961)—was decided. (JA at 15-16.) Judge Meginley further highlighted how "the time to include post-trial matters in the record is nearly irrelevant," as an "entry of judgment can take place in a matter of days." (JA at 16.)

For his part, Chief Judge Johnson opined in *Matthews* that *Jessie* did not preclude sentence appropriateness review where an appellant "raises his Eighth Amendment or Article 55, UCMJ, claims for the first time on appeal and bases them on material outside the original record of trial." (JA at 27.) Noting that the AFCCA had previously held it possessed the authority to grant sentence appropriateness relief in such circumstances (*id*. (citation omitted)), Chief Judge

[6] *Matthews* is also included in the Joint Appendix. (*See* JA at 18-28.)

Johnson referenced—without endorsing—the Navy-Marine Court of Criminal Appeals' (NMCCA) similar determination in *United States v. Jacinto*, 79 M.J. 870, 890 (N.M. Ct. Crim. App. 2020).[7] (*Id*.) Chief Judge Johnson then added:

> It does seem incongruous (to borrow the majority's term) to find that, under *Jessie*, we have jurisdiction to review alleged violations of the Eighth Amendment and Article 55, UCMJ, based on material outside the original record of trial, but to find we lack jurisdiction to consider such materials for the purpose of "affirm[ing] only such findings of guilty and the sentence . . . as [we] find correct in law and fact and determine, on the basis of the entire record, should be approved"—which is our fundamental charge and mandate in accordance with the text of Article 66 itself.

(*Id*.)

Finally, and as observed by Chief Judge Johnson, the NMCCA in *Jacinto* determined that *Jessie* provided it with "clear authority to consider 'material outside the record' when it comes to Article 55, UCMJ, and Eighth Amendment claims." 79 M.J. at 890. Consequently, the NMCCA concluded:

> If an appellant desires to attach records demonstrating such an allegation and the remedies sought, we surely have the authority to attach those documents to the record and use them in considering whether a violation occurred and whether the sentence continues to be "appropriate." In the face of brig policies that violate a post-conviction prisoner's Article 55, UCMJ, and Eighth Amendment rights, we have the authority to affirm only so much of a sentence that is correct in law and that is appropriate.

Id.

[7] At the time of Chief Judge Johnson's concurrence, *Jacinto* was pending publication; accordingly, he cites to the then-unpublished version (i.e., 2020 AFCCA LEXIS 136). This brief utilizes the published citation.

Summary of Argument

Jessie established the general rule that a Court of Criminal Appeals (CCA) may not consider matters outside the record during its Article 66(c), UCMJ, review. However, this Court explicitly declined to extend this rule to Eighth Amendment and Article 55, UCMJ, claims. Thus, consistent with *Jessie*, the AFCCA attached SSgt Willman's appellate affidavit to the record because it supported his cruel and unusual punishment allegations. SSgt Willman's appellate affidavit consequently became part of the *entire record* under Article 66, UCMJ, and the AFCCA erred by concluding that it could not consider these matters during its sentence appropriateness review.

The AFCCA further erred when it concluded that it could use outside-the-record materials only to determine whether SSgt Willman's sentence was correct in law under the Eighth Amendment and Article 55, UCMJ; not for whether it should approve the sentence. Article 66(c), UCMJ, compels the CCAs to "affirm only such findings of guilty and the sentence . . . as [they] find[] correct in law and fact and determine[], on the basis of the entire record, should be approved." Reading Article 66(c) in conjunction with *Jessie*, the AFCCA was authorized to consider SSgt Willman's appellate affidavit in its review of his cruel and unusual punishment claims and then statutorily obligated to affirm only so much of his sentence that it determined was correct in law *and* appropriate. More simply,

because the AFCCA could determine whether SSgt Willman's claims transformed his sentence into one that was incorrect in law, it was also required to determine whether his claims rendered his sentence inappropriate.

Finally, in the event this Court concurs with the AFCCA's rationale, SSgt Willman should nevertheless benefit from the binding precedent of this Court and the AFCCA—all of which was in effect at the time his clemency matters were due and when he later raised his issues before the AFCCA. This precedent authorized the CCAs to consider Eighth Amendment and Article 55, UCMJ, claims raised for the first time on appeal and supported by material outside the original record of trial, to determine whether to affirm a sentence. SSgt Willman duly submitted his appellate affidavit for this purpose. He should not be penalized by a change in the legal landscape, particularly where the predicate for such change conflicted with more recent precedent.

Argument

THE LOWER COURT ERRED WHEN IT DECIDED IT COULD NOT CONSIDER EVIDENCE OUTSIDE THE RECORD FOR ITS SENTENCE APPROPRIATENESS REVIEW.

Standard of Review

Whether Article 66, UCMJ, allows military courts of appeal to consider matters outside the entire record of proceedings is a question of law reviewed de novo. *Jessie,* 79 M.J. at 439-40.

This Court reviews questions of statutory construction de novo. *United States v. Atchak*, 75 M.J. 193, 195 (C.A.A.F. 2016).

Law and Analysis

Through Article 66, UCMJ, Congress provided the Courts of Criminal Appeals "'with plenary, *de novo* power of review' and the ability to 'determine[], on the basis of the [entire] record' which findings and sentence should be approved.'" *United States v. Roach*, 66 M.J. 410, 413 (C.A.A.F. 2008) (quoting *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)). Although *Jessie* constrains the CCAs' review to those matters in the "entire record," the application of such a limitation in the present case is misplaced. 79 M.J. at 445.

I. By attaching SSgt Willman's affidavit to the record of trial, the AFCCA made his confinement conditions part of the entire record. The AFCCA should have considered this affidavit in its sentence appropriateness review and erred by concluding it could not.

In his assignment of errors before the AFCCA, SSgt Willman alleged that his post-trial confinement conditions violated the Eighth Amendment and Article 55, UCMJ, and rendered his sentence inappropriately severe. (JA at 003.) To support his contentions, SSgt Willman moved the AFCCA to attach to the record of trial his sworn affidavit attesting to facts associated with his post-trial confinement conditions. (JA at 55.) The AFCCA subsequently granted this request (*id*.) and then considered the information contained in the affidavit in its review of SSgt Willman's cruel and unusual punishment claims. (JA at 10.) Citing *Jessie*, however, the AFCCA declined to consider this affidavit in its sentence appropriateness review, concluding it was not "part of the entire record" of the case. (JA at 13.) This was error.

Jessie precludes a CCA from considering materials from outside the record of trial, except for information relating to Eighth Amendment and Article 55, UCMJ, claims. 79 M.J. at 445. But *Jessie* does not prohibit sentence appropriateness reviews emanating from cruel and unusual punishment allegations raised for the first time on appeal. *Matthews*, 2020 AFCCA LEXIS 193, at *16-17 (J. Johnson, C.J., concurring in the result). Nor does it authorize a

CCA to decline to consider matters properly attached to the record of trial. Nevertheless, that is what the AFCCA did.

Having attached SSgt Willman's affidavit to the record of trial in accordance with *Jessie*, the AFCCA was obligated to consider it in its sentence appropriateness review. *See United States v. Bodkins*, 60 M.J. 322, 324 (C.A.A.F. 2004) ("In performing its affirmative obligation to consider sentence appropriateness, [a CCA] must take into account all facts and circumstances reflected in the record. . .") (citation and internal quotations omitted). Instead, the AFCCA improperly limited its review of the now-attached record for just one purpose, thereby expanding *Jessie*'s holding to a position inconsistent with the AFCCA's statutory mandate. An appropriate application of *Jessie* would have resembled the NMCCA's treatment in *Jacinto*, wherein the lower court recognized its duty to determine sentence appropriateness and held that where "an appellant desires to attach records demonstrating such an allegation and the remedies sought, [it] surely ha[s] the authority to attach those documents to the record and use them in considering whether a violation occurred and whether the sentence continues to be 'appropriate.'" 79 M.J. at 890.[8]

[8] *See also United States v. Lawler*, No. ACM 39699, 2020 CCA LEXIS 186, at *12 n.6 (A.F. Ct. Crim. App. May 28, 2020) (unpub. op.) (assuming that the AFCCA "may consider the same declarations [it] considered to resolve Appellant's claim under the Eighth Amendment and Article 55, UCMJ, to

II. Under *Jessie*, a CCA has the authority to consider outside-the-record matters to determine whether a violation of the Eighth Amendment or Article 55, UCMJ, converts a lawful sentence into one that is unlawful. Due to the unique nature of cruel and unusual punishment allegations, the appellate courts' prior treatment of such claims, and the statutory mandate of Article 66(c), UCMJ, a CCA should be similarly able to consider outside-the-record matters to determine whether a confinement condition that does not qualify as cruel and unusual nevertheless renders the sentence inappropriately severe.

As this Court noted in *Jessie*, its prior decisions on post-trial confinement conditions have not "clearly delineated the difference between the 'correct in law' and sentence appropriateness determinations" of a CCA's mandate under Article 66(c), UCMJ. 79 M.J. at 443 n. 8. This Court also explicitly declined to determine "whether post-trial confinement conditions fall under one or both provisions." *Id*. at 444 n. 10. This Court should now hold that due to the unique nature of cruel and unusual punishment allegations, in conjunction with the requirements of Article 66(c), UCMJ, a CCA may continue to review outside-the-record matters to determine whether a sentence is correct in law and fact, and appropriate.

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determine whether Appellant's sentence is inappropriately severe.") (citing *United States v. McGriff*, No. ACM 39306, 2018 CCA LEXIS 567, at *24-25 (A.F. Ct. Crim. App. 11 Dec. 2018) (unpub. op.), *rev. denied*, 78 M.J. 487 (C.A.A.F. 2019); *accord United States v. DeFalco*, No. ACM 39607, 2020 CCA LEXIS 164, at *13 n. 10 (A.F. Ct. Crim. App. 21 May 2020) (unpub. op.); *but see United States v. Johnson*, No. ACM 39676, 2020 CCA LEXIS 364, at *56 n. 12 (A.F. Ct. Crim. App. October 16, 2020) (unpub. op.) (citing *Jessie* as its rationale to not consider outside-the-record matters for sentence appropriateness).

a. Where CCAs consider matters outside the record to review Eighth Amendment and Article 55, UCMJ, claims, they must consider whether those claims make the sentence inappropriate, as well.

A CCA's review of Eighth Amendment and Article 55, UCMJ, allegations stems from its authority under Article 66(c), UCMJ, to "ensure that the severity of the adjudged and approved sentence has not been unlawfully increased by prison officials." *Jacinto*, 79 M.J. at 889 (quoting *United States v. White*, 54 M.J. 469, 472 (C.A.A.F. 2001)). In other words, to ensure that the sentence is correct in law. *Jessie*, 79 M.J. at 440 (citing *United States v. Erby*, 54 M.J. 476, 478 (C.A.A.F. 2001)). However, a CCA's statutory mandate extends beyond determinations of legality.

Article 66(c), UCMJ, requires a CCA to review sentences and determine not only whether they are correct in law and fact, but appropriate. Indeed, while a CCA's duty to review a sentence's legality is distinguishable from its sentence appropriateness authority, both reviews are obligatory. *Id*. This is evidenced by the statutory language itself, which connects the CCA's correctness and appropriateness reviews with the conjunctive "and." Article 66(c), UCMJ. This Court has further concluded 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]." *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005) (emphasis added) (citation and internal quotations omitted).

Thus, even where a sentence is correct in law, a CCA may provide sentence appropriateness relief. *United States v. Nerad*, 69 M.J. 138, 142 (C.A.A.F. 2010). Correspondingly, even when an appellant cannot demonstrate actual prejudice related to a particular claim, a CCA may not affirm unless it is satisfied that the sentence is appropriate. *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002).

Given the CCAs' attendant statutory obligations and authorities, if it obtains the ability to review a particular sentence's legality, it must also review the appropriateness of that sentence. *Baier*, 60 M.J. at 384. A CCA cannot separate one duty from the other, regardless of the circumstances. Yet that is what happened here when the AFCCA considered SSgt Willman's affidavit for its sentence legality review but declined to consider those same materials for its sentence appropriateness determination. (JA at 12.) This is the jurisdictional incongruity highlighted—without additional justification other than a cite to *Jessie*—by the lower court's majority in the present case (JA at 14) and questioned by Chief Judge Johnson in *Matthews*. (JA at 27.)

As Chief Judge Johnson notes, it is a CCA's "fundamental mandate and charge" to affirm only those sentences it finds correct in law and fact, and which should be approved. (*Id.*) Accordingly, it is indeed "incongruous" to find that a CCA can consider certain matters when reviewing a sentence's legality but find

that Article 66(c), UCMJ, precludes it from utilizing those same matters to determine sentence appropriateness. (*Id*.) The NMCCA essentially acknowledged the same in *Jacinto*, concluding that if it had the "clear authority" to consider materials outside the record to decide the appellant's Eighth Amendment and Article 55, UCMJ claims, it could "use them in considering whether a violation occurred and whether the sentence continues to be 'appropriate.'" 79 M.J. at 890.

This Court should adopt *Jacinto*'s reasoning and reaffirm that where a CCA obtains jurisdiction to review a particular matter for sentence legality, it can also consider that matter for sentence appropriateness. *Baier*, 60 M.J. at 384.

b. The CCAs have frequently considered whether post-trial confinement conditions warrant sentence appropriateness relief; a practice affirmed by this Court.

In *Jessie*, this Court exempted claims relating to cruel and unusual punishment from its prohibition against outside-the-record matters. 79 M.J. at 444-45 (citing *Erby*, 54 M.J. 476; *United States v. Pena,* 64 M.J. 259 (C.A.A.F. 2007)). However, this Court did not distinguish whether such claims were limited to sentence legality determinations or if they also covered sentence appropriateness. *Id*. This omission appears to be intentional, as this Court concluded that the "entire record" restriction in Article 66(c), UCMJ, applies "equally whether the CCA is reviewing a sentence's correctness in law, reviewing

a sentence's correctness in fact, or determining whether a sentence should be approved." *Id*. at 444. Consequently, by declining to differentiate these authorities in regard to the cruel and unusual punishment exception, one could argue that this Court acknowledged, *sub silentio*, the NMCCA's rationale in *Jacinto*: that where a CCA can consider outside-the-record matters to determine whether an Eighth Amendment or Article 55, UCMJ, violation occurred, it can consider those same matters to determine sentence appropriateness. 79 M.J. at 890. But even if this was not the Court's intention, it is instructive that the CCA's have consistently reviewed cruel and unusual punishment claims for both sentence legality and sentence appropriateness.

In the seminal case of *United States v. Gay*, for example, the AFCCA held that it "may consider post-trial confinement conditions as part of [its] overall sentence appropriateness determination, even where those allegations do not rise to the level of an Eighth Amendment or Article 55, UCMJ, violation." 74 M.J. 736, 742 (A.F. Ct. Crim. App. 2015). The lower court rooted its rationale in its "broad Article 66(c), UCMJ, authority" and concomitant duty to "do justice." *Id*. (quoting *United States v. Claxton*, 32 M.J. 159, 162 (C.M.A. 1991)). This Court subsequently affirmed, concluding that—based upon the case's unique circumstances—the AFCCA's decision to grant sentence appropriateness relief

was "clearly authorized" by Article 66(c), UCMJ. 75 M.J. 264, 269 (C.A.A.F. 2016).

Since *Gay*, the lower courts have frequently considered appellants' cruel and unusual punishment claims for both sentence legality and appropriateness. *See*, *e.g.*, *United States v. Haggart*, No. ACM 39601, 2020 CCA LEXIS 212, at *21-23 (A.F. Ct. Crim. App. June 24, 2020) (unpub. op.); *United States v. Macaluso*, No. ACM S32556, 2020 CCA LEXIS 171, at * 8-10 (A.F. Ct. Crim. App. May 27, 2020) (unpub. op.); *McGriff,* 2018 CCA LEXIS 567, at *24–25; *United States v. Milner*, No. ACM S32338, 2017 CCA LEXIS 84, at *13-14 (A.F. Ct. Crim. App. February 7, 2017) (unpub. op.); *United States v. Ferrando*, 77 M.J. 506, 517 (A.F. Ct. Crim. App. 2017). And while a CCA will rarely grant relief in such circumstances,[9] its consistent consideration of the issue nevertheless highlights how the lower courts view their Article 66(c), UCMJ, responsibilities regarding post-trial confinement claims, and how they have established—with this Court's approval—precedent on how to review such claims. Of course, this is not to say that this Court is bound by the determinations or practices of the lower courts. However, the opinions of military appellate judges "reflect years

[9] *See Ferrando*, 77 M.J. at 517 ("Only in very rare circumstances do we anticipate granting sentence relief when there is no violation of the Eighth Amendment or Article 55, UCMJ.")

and years of experience [and] knowledge,"[10] and their broad analyses of cruel and unusual punishment claims lend further support to the proposition that where a CCA is permitted to consider a matter for sentence legality, it should likewise review whether that matter affects sentence appropriateness. *Jacinto*, 79 M.J. at 890.

> *c. The unique nature of post-trial confinement claims, in conjunction with the various changes to the military's post-trial process, warrant treating such claims as "aberrations" to the general restriction against outside-the-record matters.*

In *Jessie*, this Court stated that it might revisit whether cruel and unusual punishment claims should be excepted from the general prohibition against considering outside-the-record materials. 79 M.J. 445. Such a reexamination might include determining whether the predicate holdings for the exception—*Erby*, 54 M.J. 476, and *Pena*, 64 M.J. 249—should be "allowed to stand as 'aberration[s]' that are 'fully entitled to the benefit of stare decisis' because they have become established." 79 M.J. at 445. In his dissenting opinion, Judge Sparks opined that the line of cases from *Erby* and *Pena* should not be considered "aberrations," noting how they "raised serious questions of sentence appropriateness rather than just clemency." 79 M.J. at 448-49 (Sparks, J., dissenting). SSgt Willman respectfully shares Judge Sparks' views, as well as

[10] *United States v. Johnson*, 42 M.J. 443, 447 (C.A.A.F. 1995) (Cox, J., concurring in the result).

those of Judge Meginley in his concurrence at the lower court, both of which highlight how "sentencing issues could arise or ripen or come to defense counsel's attention only after the convening authority has acted." *Id.*; *see also* JA at 16. Nevertheless, to the extent this Court will indeed only consider such cases as aberrations, it is important to note how the precedent establishing a CCA's authority to review an appellant's post-trial confinement conditions is significantly threatened by the myriad changes to the military's post-trial process.

As a starting point, Judge Meginley is correct in his observations regarding the decreased time allotted to an appellant to raise matters to the convening authority:

> [T]he time to include post-trial matters in the record is nearly irrelevant; gone are the days when an appellant could be in confinement for months before action. Now, depending on how quickly a legal office can process a record, entry of judgment can take place in a matter of days.

(JA at 16.) Accordingly, there is now an even greater chance that certain sentencing issues will not arise until after the convening authority has acted. But the potential problems do not end there.

The Rules for Courts-Martial no longer permit a convening authority to modify a punitive discharge or a sentence to confinement in many cases. *See* R.C.M. 1107 (2016); R.C.M. 1109 (2019). Moreover, a convening authority need not even take action on the findings or sentence for courts-martial. R.C.M. 1110

(2019). Consequently, not only does an appellant have less time to submit his matters to a convening authority, he may be less inclined to do so—even in cases where he alleges cruel and unusual punishment—because of the convening authority's limited authority and responsibility to act.

The unique nature of certain confinement issues is further troublesome, as evidenced by the present case. SSgt Willman sought medical treatment following his injury in confinement, was instructed by Government officials that nothing else could be done, and trusted their guidance. (JA at 57.) When his injury worsened, SSgt Willman returned for medical treatment, only to once again receive guidance that he did not need treatment. (JA at 58.) What is more, Government officials explicitly instructed him not to return unless *additional* symptoms or issues developed. (*Id*.) Although still in considerable pain, SSgt Willman thus did not return for medical care or otherwise complain because he was duly following his medical providers' instructions. He then endured months of pain and did not understand his injury's full severity, nor the true deprivation of his medical needs, until significantly after clemency. Consequently, SSgt Willman's post-trial confinement issues are distinguishable from those raised in *Jessie*, wherein the appellant would have been aware of the confinement facility's rules on visitation when he was first confined and could have raised that issue during clemency. 70 M.J. at 438.

All told, the changes to the military's post-trial processing and the unique nature of cruel and unusual punishment claims warrant continued disparate treatment from *Jessie*'s general outside-the-record restrictions. To hold otherwise would significantly curtail the line of precedent that allows a CCA to review such claims for sentence legality and appropriateness.

III. SSgt Willman should get the benefit of this Court's earlier treatment of post-trial confinement claims.

To the extent this Court concludes that *Jessie*'s cruel and unusual punishment exception to the outside-the-record restriction does not apply to sentence appropriateness determinations, SSgt Willman respectfully requests that this Court apply its decision prospectively rather than retroactively. During his period for clemency and when he filed his appeal, SSgt Willman reasonably relied on *Erby's* and *Pena'*s more recent precedents regarding his ability to raise confinement matters for the first time on appeal. As Judge Ohlson noted in his dissent in *Jessie*, even if *Fagnan*—which is more than sixty years old—conflicts with *Erby* and *Pena*, "[this Court] generally follow[s] the most recent decision." 79 M.J. at 447 (Ohlson, J., dissenting) (brackets in original) (quoting *United States v. Hardy*, 77 M.J. 438, 441 n. 5 (C.A.A.F. 2018). When viewed in combination with the AFCCA's consistent treatment of analyzing cruel and unusual punishment claims for both sentence legality and appropriateness, SSgt Willman could not have foreseen that his clemency waiver would forever preclude him

from having the AFCCA review whether his confinement conditions rendered his sentence inappropriate.

The Constitution "neither prohibits nor requires retrospective effect for decisions expounding new rules affecting criminal trials." *United States v. Harrell,* 5 M.J. 604, 606 (C.M.A. 1978). Consequently, a change in decisional law affecting the rules that apply to courts-martial may be applied either prospectively or retroactively. To determine which, this Court conducts an equity analysis, balancing the purpose served by the new standard against the reliance of the "military justice community" on this new standard. *United States v. Jackson,* 3 M.J. 101, 102 (C.M.A. 1977.) Relatedly, the doctrine of *stare decisis* provides that adherence to earlier precedent is generally the preferred course, in part because it "fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee,* 501 U.S. 808, 827 (1991).

In *United States v. Bright*, the Army Court of Criminal Appeals (ACCA) confronted a scenario similar to this case. It abrogated earlier precedent that an appellant did not have to exhaust his administrative remedies before bringing a claim of cruel or unusual punishment before the court. 63 M.J. 683, 689 (A. Ct. Crim. App. 2006). However, the lower court chose to apply its ruling prospectively, stating:

> [I]nmates suffering similar situations may have foregone the opportunity to avail themselves of administrative remedies, choosing instead to seek redress through the court system. To ensure that such inmates have not relied on our previous holding to their detriment, we will apply our holding prospectively.

Id. This Court should utilize similar reasoning and apply its holding prospectively, which would ensure SSgt Willman and others similarly situated are not unduly prejudiced by reliance on previously binding precedent.

Conclusion

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 Jan 25, 2021.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitation of 24(c) because it contains 5,332 words.

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