December 2, 2022

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

MELLODEE L. BEHUNIN,
Airman First Class (E-3), USAF
Appellant

Crim. App. No. S32684

USCA Dkt. No. 22-0276/AF

BRIEF ON BEHALF OF APPELLANT

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II.

APPELLANT AND CM FACED SEPARATE COURTS-MARTIAL FOR, *INTER ALIA*, JOINT USE OF CONTROLLED SUBSTANCES. UNLIKE APPELLANT, CM RECEIVED NO CONFINEMENT OR PUNITIVE DISCHARGE FOR ESSENTIALLY THE SAME MISCONDUCT. DID THE AIR FORCE COURT MISAPPLY *UNITED STATES V. LACY*, 50 M.J. 286 (C.A.A.F. 1999) WHEN IT HELD THAT CM'S AND APPELLANT'S CASES WERE NOT CLOSELY-RELATED CASES WHOSE SENTENCES REQUIRED COMPARISON?

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals ("Air Force Court") had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866. This Honorable Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867.

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[1] This brief will address the specified issue first because, if answered in the negative, it is dispositive of the case.

STATEMENT OF THE CASE

On January 14, 2021, at Dyess Air Force Base (AFB), Texas, a special court-martial composed of a military judge alone found Airman First Class (A1C) Mellodee L. Behunin guilty, consistent with her pleas, of the following: (1) one specification of fraudulent enlistment in violation of Article 83, UCMJ, 10 U.S.C. § 883; (2) one specification of false official statement in violation of Article 107, UCMJ, 10 U.S.C. § 907; and (3) two specifications of wrongful use of controlled substances (lysergic acid diethylamide (LSD) and cocaine) in violation of Article 112a, UCMJ, 10 U.S.C. § 912a.[2] (Joint Appendix (JA) at 51–52, 80, 126.) The military judge sentenced A1C Behunin to a reduction to E-1, forfeiture of $1,100.00 pay per month for four months, 110 days' confinement, and a bad-conduct discharge.[3] (JA at 185.) The convening

[2] References to Article 83 are to the *Manual for Court-Martial, United States* (2016 ed.) [2016 *MCM*]. Unless otherwise noted, all other references to the UCMJ are to the *Manual for Courts-Martial, United States* (2019 ed.) [2019 *MCM*].

[3] The military judge sentenced A1C Behunin to 110 days' confinement for the Specification of Charge I (fraudulent enlistment), 10 days' confinement for the Specification of Charge II (false official statement), 90 days' confinement for the Specification of Charge III (cocaine use), and 100 days' confinement for the Specification of the Additional Charge (LSD use). (JA at 185.) These sentences ran concurrently. (*Id.*)

authority took no action on the findings or sentence. (JA at 54.) The Air Force Court affirmed the findings and sentence. (JA at 23.) This Honorable Court granted review on November 2, 2022.

STATEMENT OF FACTS

Background

A1C Mellodee Behunin ("bɛ hæ næn") grew up in Oregon, where she was an honors student. (JA at 74.) Her parents divorced when she was eight years old, and her father passed away from a heart attack shortly thereafter. (*Id.*) After her mother remarried, her stepfather began making sexual advances towards A1C Behunin. (*Id.*) She knew she needed to leave home, so she applied and was accepted at Portland State University. (*Id.*) Despite that opportunity, A1C Behunin chose to enlist in the United States Air Force. (*Id.*) She felt lonely upon arrival at Dyess AFB, a problem magnified in the charged timeframe by remote work during the pandemic. (JA at 75.)

Drug Use and False Official Statement

A1C Behunin used LSD in May 2020 with Senior Airman (SrA) CM (CM), SrA SM (SM), and A1C MS (MS). (JA at 56, 120.) Weeks later, she used cocaine at MS's residence with the same three Airmen. (JA at 56–57, 108.) Another Airman reported their drug use, leading the Air

Force Office of Special Investigations (OSI) to interview A1C Behunin. (JA at 57.) Although she admitted her cocaine use, she told investigators this was her first time using cocaine, which was false. (JA at 57–58.) Additionally, when A1C Behunin enlisted in the Air Force, she misrepresented that she had not used cocaine prior to her enlistment, when in fact she had once before. (JA at 57–58, 64.) She pleaded guilty to each offense at a special court-martial. (JA at 80.)

Sentencing Proceedings

A1C Behunin gave an unsworn statement in which she accepted full responsibility for her actions. (JA at 74–75, 169–72.) She explained that after the offenses she did not give up, throwing herself into work with the booster club and other volunteering. (JA at 75.) She acknowledged that she should have sought help with her loneliness and isolation earlier, and that after her misconduct she finally began using mental health services. (JA at 171.) This helped her work through past trauma and learn positive coping mechanisms. (*Id.*)

Co-Actors' Courts-Martial and Clemency

Each of the four Airmen who used LSD and cocaine together faced special courts-martial. Their results, which the Air Force Court attached to the record of trial (JA at 186–87), follow:

- On October 30, 2020, MS pleaded guilty to a single specification of wrongful use of cocaine. (JA at 191.) The same military judge presided over MS's and A1C Behunin's courts-martial. (JA at 52, 191.) MS received 70 days' confinement, reduction to E-1, and forfeiture of $1,200.00 pay per month for three months. (JA at 191.)

- On December 2, 2020, SM pleaded guilty to wrongful use of drugs (the summary does not identify which). (JA at 196.) SM received 75 days' confinement, reduction to E-1, and forfeiture of $1,000 pay for two months. (*Id.*)

- On February 18, 2021, CM pleaded guilty before a panel of officer members to fraudulent enlistment, false official statement, wrongful use of cocaine and LSD, and wrongful distribution of cocaine and LSD, in violation of Articles 83, 107, and 112a, UCMJ, 10 USC § 883 (2016) and 10 U.S.C. §§ 907 and 912a (2019). (JA at 188–89.) CM's false official statement claimed that "he never saw or used any drugs" on the evening in question. (JA at 188.) The members adjudged forfeiture of $500 pay per month for three months, reduction to E-1, and three months' hard labor without confinement. (JA at 189.)

A1C Behunin could not raise CM's sentence in clemency because his court-martial had not occurred yet. (JA at 29, 188.) Instead, A1C Behunin asked the convening authority to reduce her confinement because of the COVID-19 risk at the local Texas jail where she would spend her confinement. (JA at 29–30.) The convening authority took no action. (JA at 54.)

The Air Force Court's Opinion

A1C Behunin asked the Air Force Court to find her sentence inappropriately severe in light of CM's sentence to no confinement or punitive discharge for essentially the same misconduct. (JA at 2.) The Air Force Court noted that, under *United States v. Lacy*,[4] an appellant bears the burden of demonstrating both that any cited comparison court-martial is "closely related" to their own and that the sentences are "highly disparate." (JA at 13–14.) The Air Force Court stated it *would* have found CM and A1C Behunin's cases closely related, but because their fraudulent enlistments and false official statements were committed separately, the cases were not closely related. (JA at 14–15.)

Although it concluded that A1C Behunin failed to meet the requirements under *Lacy*, the Air Force Court nonetheless decided to consider CM's court-martial in its review of whether A1C Behunin's sentence is "both relatively uniform and appropriate." (JA at 16 (quoting *United States v. Wacha*, 55 M.J. 266, 268 (C.A.A.F. 2001).) The lower court held that A1C Behunin's sentence was not uniform with CM's sentence, but declined to set aside the bad-conduct discharge because, it

[4] 50 M.J. 286, 288 (C.A.A.F. 1999).

reasoned, such relief would create sentence uniformity problems with MS and SM. (JA at 16–18.) Thus, it held the sentence appropriate and affirmed. (JA at 18, 23.)

With regard to Issue I, which this Honorable Court specified, the Air Force Court assumed—"but not without caution"—that, consistent with *United States v. Jessie*,[5] it could consider the results of courts-martial for CM, SM, and MS. (JA at 9–12.)

SUMMARY OF THE ARGUMENT

Congress intended Courts of Criminal Appeals (CCAs) to use their sentence appropriateness power to ensure sentence uniformity. For generations, appellants have raised the results of other courts-martial to argue that their own sentences were inappropriately severe. The specified question asks whether this long-established procedure allows appellants to raise other courts-martial sentences for the first time after docketing. This Court should answer in the affirmative for at least two reasons. First, this Court should hold that matters attached to the record in order to *supplement* an existing factual issue become part of the record. Second, stare decisis strongly supports upholding this time-honored

[5] 79 M.J. 437 (C.A.A.F. 2020).

practice, as sentence comparison has "effectively become part of the statutory scheme." *United States v. Blanks*, 77 M.J. 239, 243 & n.6 (C.A.A.F. 2018) (quoting *Kimble v. Marvel Ent., LLC*, 135 S. Ct. 2401, 2409, 192 L. Ed. 2d 463 (2015)).

This Court should then reach the merits of this case and address the glaring disparity between CM's and A1C Behunin's sentences. In *Lacy*, this Court clarified the sentence comparison process: appellants must demonstrate that their own case and the comparison case are "closely related" and that the resulting sentences are "highly disparate"; this shifts the burden to the Government to provide a rational basis for the disparity. Here, CM and A1C Behunin used controlled substances together, lied about drug use in the same investigation, and lied about their preservice drug use before enlisting. In addition, CM *distributed* controlled substances but A1C Behunin did not. Despite even greater punitive exposure, CM received no confinement or punitive discharge while A1C Behunin received both. The Air Force Court abused its discretion at the first step when it held these deeply intertwined cases were not "closely related" because two of the offenses—though very similar in nature—were committed separately.

But A1C Behunin and CM's cases are inextricably linked. The Air Force Court's error meant the burden never shifted to the Government to demonstrate a rational basis for the disparity, which it certainly could not. Their cases are closely-related, their sentences are highly disparate, and the record demonstrates no rational basis for such a disparity. This Court should hold accordingly and remand for the Air Force Court to provide sentence relief.

ARGUMENT

I.

DURING REVIEW UNDER ARTICLE 66, UCMJ, CCAs MAY CONSIDER RESULTS OF OTHER COURTS-MARTIAL THAT WERE NOT PART OF THE RECORD OF TRIAL AT THE TIME OF DOCKETING.

Standard of Review

"The scope and meaning of Article 66[d] is a matter of statutory interpretation, which, as a question of law, is reviewed de novo." *See United States v. Gay*, 75 M.J. 264, 267 (C.A.A.F. 2016) (citation omitted).

Law

Article 66, UCMJ

A CCA "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law

and fact and determines, on the basis of the entire record, should be approved." Article 66(d), UCMJ. This language is virtually unchanged since 1951. *See* 1951 *MCM*, ¶ 100. Because military commanders exercised broad discretion in disposing of cases, Congress gave the CCAs unique power. *Lacy*, 55 M.J. at 287. "Recognizing that the decentralized exercise of such broad discretion is likely to produce disparate results," it "provided the [CCAs] not only with the power to determine whether a sentence is correct in law and fact, but also with the highly discretionary power to determine whether a sentence 'should be approved.'" *Id.*

This Court has reviewed the legislative history and concluded that "Congress enacted Article 66[, UCMJ,] with the purpose of establishing uniformity of sentencing throughout the armed forces." *See United States v. Henry*, 42 M.J. 231, 234 (C.A.A.F. 1995) (approving the language from appellant's brief and citing H.R. Rep. No. 491, 81st Cong., 1st Sess. 32-33 (1949)). Many other courts have reached the same conclusion.[6]

[6] *See, e.g.*, *United States v. Olinger*, 12 M.J. 458, 460 (C.M.A. 1982) ("[Sentence appropriateness power] was granted to the Courts of Military Review in order to establish uniformity of sentences."); *United States v. Judd*, 28 C.M.R. 388, 393–94 (C.M.A. 1960) (Ferguson, J., concurring in the result); JA at 13 (collecting cases).

Uniformity means "relative uniformity," rather than mathematical equation of sentences. *Olinger*, 12 M.J. at 461 (citing *Judd*, 28 C.M.R. at 394 (Ferguson, J., concurring in the result)).

In *Lacy*, this Court clarified the contours of Article 66 sentence comparison review. 50 M.J. at 288. A CCA *may* consider the sentence in any other case that it sees fit. *Id.* This reflects the expectation that judges on the CCAs "would utilize the experience distilled from years of practice in military law to determine" sentence appropriateness. *Judd*, 28 C.M.R. at 394 (Ferguson, J., concurring in the result). This Court's predecessor explained, "[w]e have every confidence that this accumulated knowledge is an explicit or implicit factor in virtually every case in which a military judge imposes sentence or a court of military review assesses for sentence appropriateness." *Lacy*, 28 M.J. at 288 (quoting *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985)).

Lacy also held that CCAs *must* consider the sentences in "those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases." *Id.* The specific *Lacy* procedures are discussed in more detail in the second issue presented.

The "Entire Record"

In *Jessie*, this Court addressed whether CCAs could consider Eighth Amendment or Article 55, UCMJ, 10 U.S.C. § 855, claims that were outside the "entire record." 79 M.J. at 439–40. The "entire record" includes "the record of trial," "allied papers," and "the briefs and arguments [that counsel and the appellant] present" regarding those matters. *Id.* at 440–41.

Jessie reconciled three categories of precedents regarding the scope of the "entire record." *Id.* at 443–45. The first category "strictly follow[s]" Article 66 and provides no "opportunity for the accused and his counsel to supplement the 'record' after the convening authority has acted." *Id.* at 441 (citing *United States v. Fagnan*, 30 C.M.R. 192, 194 (C.M.A. 1961); *United States v. Healy*, 26 M.J. 394, 396 (C.M.A. 1988)). The second category allows CCAs to "accept affidavits or order[] hearings" when deciding issues raised by materials in the record. *Id.* at 442 (citing *United States v. Brennan*, 58 M.J. 351, 352 (C.A.A.F. 2003)). This Court "has concluded based on experience that 'extra-record fact determinations' may be 'necessary predicates to resolving appellate questions' that arise during Article 66 reviews." *Id.* at 442–43 (citing *United States v. Parker*,

36 M.J. 269, 272 (C.M.A. 1993)). The third category involved matters entirely outside the record, including Eighth Amendment and Article 55, UCMJ, violations that arose after clemency (or were not raised during clemency). *Id.* at 443.

Jessie did not mention sentence comparison. However, this Court explicitly noted that *Jessie* "does not overrule, call into question, or otherwise affect *Brennan* or any other decision in the second category of cases." *Id.* at 445. Indeed, this Court stated that this category "could not be easily cabined" because it applied in many contexts. *Id.* Those contexts have included ineffective assistance of counsel (IAC), the basis for a trial counsel's peremptory challenge, *ex parte* communications between trial counsel and a military judge, in-camera inspection of evidence, and determining whether privileged information was communicated to prosecutors, among others. *See Parker,* 36 M.J. at 272 (collecting cases). In the context of IAC, this Court has explained that "there are legitimate and salutary reasons for the now-[CCAs] to have the discretion to obtain evidence by affidavit, testimony, stipulation, or a factfinding hearing, as it deems appropriate." *See United States v.*

Boone, 49 M.J. 187, 193 (C.A.A.F. 1998) (citing *United States v. Lewis*, 42 M.J. 1, 6 (1995)).

Analysis

The results of other courts-martial, whether defined as "extra-record" or within the record, are proper for CCAs to consider in exercising their broad discretion during sentence appropriateness review. This accords with historical understanding of Article 66 and maintains a limited but important mechanism for an accused to bring closely-related cases to a CCA's attention.

1. CCAs have exercised sentence comparison power since the UCMJ's inception.

Lacy, *Olinger*, and many other cases recognize that Congress envisioned the CCAs would exercise sentence appropriateness review to maintain uniformity of sentences. *Lacy*, 50 M.J. at 288; *Henry*, 42 M.J. at 234; *Olinger*, 12 M.J. at 461. In a decentralized justice system, which lacks sentencing guidelines, this leveling power is indispensable to avoid miscarriages of justice. To some extent, this sentence comparison power transcends the "entire record." This Court and its predecessor have repeatedly recognized that appellate judges would draw on their

extensive experience to decide an appropriate sentence. *See, e.g.*, *Lacy*, 50 M.J. at 288 (citing *Ballard*, 20 M.J. at 283).

This Court has never suggested a temporal boundary on the cases a CCA considers when exercising its authority. Indeed, the case law is replete with examples of cases considering sentences that arose later. *United States v. Brock* illustrates the point. 46 M.J. 11 (C.A.A.F. 1997). In *Brock*, both the stipulation of fact and unsworn statement mentioned the appellant's co-actor. *Id.* at 12. On appeal, he moved the CCA to take judicial notice of the promulgating order from the co-actor's trial, as well as the co-actor's service record; the CCA denied the motion to admit the documents. *Id.* This Court held it was *error* for a CCA to "refuse[] to admit the evidence relating to [the co-actor's] sentence even though there was evidence in the record of appellant's involvement with [the co-actor]." *Id.* at 13.

One wrinkle in the case law is the practice of considering other sentences by way of "judicial notice," rather than a motion to attach. For instance, in *United States v. Perkins*, 40 C.M.R. 885, 888–89 (A.C.M.R. 1969), the Army Court of Military Review rejected the Government's effort to strike references from the appellant's brief to six related courts-

martial. The Government invoked *Fagnan*, among other authorities, to strike the references. *Id.* at 886. The court ultimately took judicial notice of all six sentences. *Id.* at 889. Whether cast as "judicial notice" or not, the point is CCAs have never had to blind themselves to the results of courts-martial, whether they come before or after the appellate process begins.

As this Court has recognized, judges on military appellate courts "have a solid feel for the range of punishments typically meted out in courts-martial. Indeed, by the time they receive such assignments, they can scarcely help it." *Ballard*, 20 M.J. at 286. "Thus, to hold that a trial or appellate court may not consider the sentences in other cases would be folly." *Id.*

In sum, this Court would make new law by imposing a temporal distinction on when a Court may consider sentences from other courts-martial. Instead, there are two mechanisms that support the CCAs continued ability to compare sentences without an artificial endpoint at the entry of judgment. First, the sentences can become part of the record itself by virtue of the motion to attach documents. The second is stare decisis.

2. A motion to attach that supplements an existing factual issue should become part of the "entire record."

The Joint Rules of Appellate Procedure, promulgated under Article 66(h), UCMJ, also provide a mechanism for making attachments part of the record. Joint Rule of Appellate Procedure 23(b) explicitly allows for attaching documents to the record for consideration. *See also United States v. Willman*, 81 M.J. 355, 361 (C.A.A.F. 2021) (Sparks, J., dissenting) (arguing the same). When the Air Force Court granted the motion to attach, the courts-martial summary and entries of judgment would, by rule, become part of the entire record. *Willman* rejected this argument for matters entirely outside the record. *See id.* at 360 (stating that because the "entire record" contains nothing about the post-trial confinement conditions, the briefs and arguments of counsel are not "allied papers" because they do not address a matter in the record of trial (citing *Jessie*, 79 M.J. at 440–41)). But this Court should make a distinction for matters that merely supplement the record.

3. Even if not in the entire record, stare decisis strongly supports preserving post-docketing sentence comparison.

If this Court disagrees, the traditional stare decisis factors strongly favor retaining the CCAs ability to consider matters outside the record for the limited purpose of sentence comparison. In a way, the stare

decisis analysis presents a challenge because there is no one case that holds that a CCA may consider other court-martial sentences brought to its attention after docketing. Rather, it is a constellation of cases that have done so, without questioning the ability to do so, that this Court would effectively overturn. *See, e.g.*, *Brock*, 46 M.J. at 11–13.

The stare decisis analysis will thus address the established practice of permitting consideration of sentences that are raised for the first time on appeal, which, consistent with the specified issue, this brief will call "post-docketing sentence comparison." This Court considers the following factors: "whether the prior decision is unworkable or poorly reasoned; any intervening events; the reasonable expectations of servicemembers; and the risk of undermining public confidence in the law." *Blanks*, 77 M.J. at 242 (citations and internal quotation marks omitted). As a starting point, stare decisis concerns are at their strongest when interpreting a statute. *Id.* (citations omitted).

A. Whether the Prior Decision is Unworkable or Poorly Reasoned

Post-docketing sentence comparison has proven workable. Hundreds of cases cite to *Lacy* to authorize sentence comparison, and yet this Court has not needed to alter *Lacy*'s test in the 23 years since it was

issued. Lower courts have consistently applied *Lacy*'s three-part test: "whether cases are closely related," whether the cases resulted in "highly disparate" sentences," and, if so, whether "there is a rational basis for the difference." *Lacy*, 50 M.J. at 288. Although the second issue presented here does involve a misapplication of *Lacy*, A1C Behunin petitioned this Court, in part, because the Air Force Court acted contrary to both other panels of the Air Force Court and another Court of Criminal Appeals. Supplement to Petition for Grant of Review at 13–14, Dkt. No. 22-0276, September 12, 2022. The *Lacy* framework has proven workable and makes no distinction between pre- and post-docketing sentence comparison.[7]

As to the continued workability of this structure, the issue will only diminish in importance. That is because, by the end of 2023, military judges will be responsible for all sentencing decisions.[8] Furthermore,

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[7] Counsel cannot determine how the sentence comparison information came before the CCA or this Court in *Lacy*. This Court recited the background facts of the two comparison cases, but the source is unclear. *Lacy*, 50 M.J. at 287.

[8] National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 539E, 135 Stat. 1541, 1700–06 (implementing sentencing parameters, military-judge sentencing for all courts-martial, and making

sentencing parameters will bring military sentencing into closer alignment with federal courts. *Id.* Thus, some of the uniformity concerns discussed in *Lacy* and other cases have limited applicability in a judge-only sentencing landscape. *Cf. United States v. Winckelmann*, 73 M.J. 11, 16 (C.A.A.F. 2013) (explaining that judges of the CCAs can be more certain of a military judge's sentence than that of members).

Nor are *Lacy* or other broadly sweeping sentence comparison cases poorly reasoned. Where Congress intended the CCAs to provide some degree of sentence uniformity, a mechanism was required to bring the matters to the CCAs' attention. Sometimes a comparison case will arise before the clemency window closes (though with changes to post-trial processing, the window has narrowed drastically). But in many cases this will not occur—such as this case, where CM's court-martial occurred after the clemency window closed for A1C Behunin. (*Compare* JA at 51 *with* JA at 188.) As such, in order to fulfill its Article 66, UCMJ, responsibilities, a CCA, by necessity, can consider the sentences of co-

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appropriate modifications to Article 66, UCMJ, all effective December 27, 2023).

actors mentioned in a court-martial even if the actual sentence arises later.

B. Intervening Events

No intervening events have fundamentally undermined the basis for post-docketing sentence comparison. As noted above, the relevant portion of Article 66, UCMJ, is virtually unchanged since the Code's inception. Congress had numerous opportunities to modify the statute to correct this Court's interpretation of sentence comparison under Article 66, or to specify whether such sentence comparison has a specific endpoint. *See Blanks*, 77 M.J. at 239 ("long congressional acquiescence has enhanced even the usual precedential force we accord to our interpretations of statutes" (quoting *Watson v. United States*, 552 U.S. 74, 82–83 (2007))). Congress last had the opportunity when it made minor revisions to Article 66 as part of the Military Justice Act of 2016; it chose not to make substantial changes.[9]

Arguably, this Court's opinions in *Jessie* and *Willman* are developments in the law that alter the calculus. Yet each spoke with

[9] National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5330, 130 Stat. 2000, 2932–34 (amending Article 66, UCMJ, but making no changes to sentence appropriateness review).

caution about modifying the second, *Brennan*-type precedent which allows CCAs to supplement the record to resolve factual questions arising within the record. In *Jessie*, this Court decreed that its decision "does not overrule, call into question, or otherwise affect *Brennan* or any other decision in the second category of cases," adding that those cases are "not easily cabined." 79 M.J. at 445. Then in *Willman*, this Court distinguished the *Brennan* category in its analysis. 81 M.J. at 359. While these cases represent developments in the scope of the entire record, they focus only on the third category—matters entirely outside the record raising Eighth Amendment or Article 55, UCMJ.

Additionally, it appears every lower court to address the issue of sentence comparison after *Jessie* has determined that it can review comparison cases presented for the first time on appeal.[10]

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[10] *United States v. Marable*, No. ACM 39954, 2021 CCA LEXIS 662, at *3–6, 23–30 (A.F. Ct. Crim. App. December 10, 2021) (unpublished) (JA at 214–15, 221–22) (considering co-actor sentence raised for the first time on appeal where the record demonstrated the co-actor's involvement), *rev. denied*, 2022 CAAF LEXIS 244 (C.A.A.F. March 29, 2022); *United States v. Finco*, No. ACM S32603 (f rev), 2021 CCA LEXIS 603, at *3–7 (A.F. Ct. Crim. App. November 16, 2021) (unpublished) (JA at 224–25) (refusing to consider other sentences because they appeared nowhere in the record), *rev. denied*, 2022 CAAF LEXIS 168 (C.A.A.F. March 3, 2022); *United States v. Daniel*, No. ACM S32654, 2021 CCA LEXIS 365, at *4–

Neither minor amendments to Article 66, nor this Court's decisions in *Jessie* and *Willman*, provide intervening events that justify overruling this category of precedent.

C. Reasonable Expectations of Servicemembers

As explained above, sentence uniformity was one of Congress's goals in creating Article 66, UCMJ. At that time, the CCAs' broad authority to determine sentence appropriateness—the power to "do justice"—operated in conjunction with the convening authority's power to grant "mercy." *See Boone*, 49 M.J. at 192. Changes in clemency have tightly constrained the convening authority's ability to modify a

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6 & n.4 (A.F. Ct. Crim. App. July 26, 2021) (unpublished) (JA at 230) (considering co-actors' sentences raised for the first time on appeal where co-actor involvement was described in stipulation of fact), *rev. denied*, 82 M.J. 99 (C.A.A.F. November 9, 2021); *United States v. Cruspero*, No. ACM S32595 (f rev), 2021 CCA LEXIS 208, at *7 n.2 (A.F. Ct. Crim. App. April 30, 2021) (unpublished) (JA at 235) (same), *rev. denied*, 82 M.J. 15 (C.A.A.F. September 8, 2021). *See also* JA at 9–12 (assuming other panels of the Air Force Court were correct and considering the attachments to the record in this case); *United States v. Varone*, No. ACM S32685, 2022 CCA LEXIS 426, at *9 n.5 (A.F. Ct. Crim. App. July 21, 2022) (unpublished) (JA at 240) (same); *United States v. Blow*, No. ACM S32631 (f rev), 2022 CCA LEXIS 495, at *36–37 (A.F. Ct. Crim. App. August. 23, 2022) (unpublished) (JA at 208) (considering co-actor sentence on appeal despite co-actor not being mentioned in the "entire record"), *rev. denied*, 2022 CAAF LEXIS 845 (C.A.A.F. November 22, 2022).

sentence. *Compare* Article 60, UCMJ, 10 U.S.C. § 860 (2012) *with* Article 60a, UCMJ, 10 U.S.C. § 860a (2019). Now, the convening authority cannot act on punitive discharges or confinement beyond six months. Article 60a(b), UCMJ (2019). Servicemembers have a reasonable expectation that sentences will not be wildly different in separate courts-martial. Where the convening authority often lacks the power to defend that expectation, the CCAs' sentence comparison power grows in importance.

Consider the result if appellants could no longer raise sentence comparison for the first time on appeal. The order of prosecution, even if arbitrary, would control who benefits from sentence comparison and who does not. The facts of this case demonstrate the problem. The Government prosecuted SM and MS first; it is unclear why, but for MS it was likely because she was given a grant of immunity to testify against A1C Behunin. (JA at 128.) Neither of those cases provide a firm basis for comparison because of the many differences in the charges. The Government prosecuted A1C Behunin third and CM fourth. CM's court-martial was not final until after the entry of judgment in A1C Behunin's case. (*Compare* JA at 51 *with* JA at 188.) Thus, A1C Behunin would be

precluded from comparing sentences, while CM would not. This arbitrary result contradicts the reasonable expectations of servicemembers.

D. Risk of Undermining Public Confidence

This arbitrariness also undermines public confidence in the law. Stripping CCAs of post-docketing sentence comparison power would, for many appellants, turn sentence comparison into a right without a remedy, thus hollowing out an important mechanism for leveling unjust sentences. Stated differently, selective access to rights undermines public confidence in the law.

This links to another major issue that has led this Court to recognize various exceptions in the *Brennan* vein: necessity. Meaningful Article 66 review may require CCAs to resolve factual questions raised in, but not answered by, the record of trial. *See Parker*, 36 M.J. at 272. If post-docketing sentence comparison falls, it draws into question the validity of other issues raised for the first time on appeal, most prominently IAC. Affidavits produced for IAC-related assignments of error have a "triggering" role in the *DuBay* process. *United States v. Ginn*, 47 M.J. 236, 243–44 (C.A.A.F. 1997) (citing *id.*). If the "entire

record" rule operates as a bar to post-docketing submission of other court-martial sentences, would it not also bar post-docketing affidavits supporting IAC claims? While IAC has a constitutional basis that sentence comparison lacks, the same rationale of necessity supports this Court's consistent approval of post-docketing submissions to resolve factual questions not resolved at trial. In striking down post-docketing sentence comparison, this Court would undermine the foundation for IAC.

4. Conclusion

CCAs have possessed sentence appropriateness power, with a related uniformity function, since the Code's inception. To exercise this power, CCAs have received post-docketing information about closely-related cases in order to exercise this function. Whether because these attachments become part of the record, or because of the powerful stare decisis justification for preserving post-docketing sentence comparison, it should remain permissible. This CCA function has "effectively become part of the statutory scheme." *Blanks*, 77 M.J. at 243 & n.6 (quoting *Kimble*, 135 S. Ct. at 2409).

WHEREFORE, A1C Behunin respectfully requests this Honorable Court continue to permit CCAs to consider comparison cases under *Lacy*, even if raised for the first time after docketing.

II.

APPELLANT AND CM FACED SEPARATE COURTS-MARTIAL FOR, *INTER ALIA*, JOINT USE OF CONTROLLED SUBSTANCES. UNLIKE APPELLANT, CM RECEIVED NO CONFINEMENT OR PUNITIVE DISCHARGE FOR ESSENTIALLY THE SAME MISCONDUCT. THE AIR FORCE COURT MISAPPLIED *UNITED STATES V. LACY*, 50 M.J. 286 (C.A.A.F. 1999) WHEN IT HELD CM'S AND APPELLANT'S CASES WERE NOT CLOSELY-RELATED CASES WHOSE SENTENCES REQUIRED COMPARISON.

Additional Facts

CM's role in A1C Behunin's offenses appears in the record numerous times. The stipulation of fact details how CM, SM, MS, and A1C Behunin procured and used cocaine and LSD. (JA at 55–57.) A1C Behunin's written statement to the OSI, admitted as an attachment to the stipulation of fact, describes CM's part in the misconduct. (JA at 67–68.) Her *Care* inquiry provides further details on CM's role, including that she was in a relationship with him at the time. (JA at 121–126.) MS, who testified under a grant of immunity, also

explained CM's role in the drug use. (JA at 129–33.) During A1C Behunin's unsworn statement, she mentioned her relationship with CM. (JA at 171.)

Standard of Review

This Court reviews a CCA's sentence appropriateness decision for an abuse of discretion. *See Gay*, 75 M.J. at 267 (citations omitted). An abuse of discretion occurs when findings of fact are clearly erroneous, a court's decision is influenced by an erroneous view of the law, or the decision is outside the range of reasonable choices based on the applicable facts and law. *See United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2017).

Law

CCAs have not only the power, but also the independent duty to consider sentence appropriateness. *See United States v. Baker*, 28 M.J. 121, 123 (C.M.A. 1989). A CCA may affirm only such findings and sentence as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. Article 66(d), UCMJ. The CCA's role in reviewing sentences under Article 66(d) is to "do justice," as

distinguished from the discretionary power of the convening authority to grant mercy. *See Boone*, 49 M.J. at 192.

This Court's authority is limited to reviewing matters of law and it lacks the same power to independently review sentence appropriateness. Article 67(c)(4), UCMJ, 10 U.S.C. § 867(c)(4). Still, it may review a CCA's exercise of this authority for abuse of discretion. *Lacy*, 50 M.J. at 288 (citing *United States v. Dukes*, 5 M.J. 71, 73 (C.M.A. 1978)).

"The power to review a case for sentence appropriateness, which reflects the unique history and attributes of the military justice system, includes but is not limited to considerations of uniformity and evenhandedness of sentencing decisions." *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001) (citation omitted). As part of sentence appropriateness review, CCAs must examine sentences in closely-related cases, and are permitted, but not required, to do so in other cases. *Wacha*, 55 M.J. at 267–68. To trigger required sentence comparison, "an appellant bears the burden of demonstrating that any cited cases are 'closely related' to his or her case and that the sentences are 'highly disparate.' If the appellant meets that burden . . . then the Government must show that there is a rational basis for the disparity." *See Lacy*, 50

M.J. at 288. Cases are "closely related" when, for example, they include "coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared." *Id.*

Analysis

A1C Behunin and CM faced court-martial for intertwined conduct involving the same, or highly similar, charges. They used drugs together, both lied to the OSI as part of the same investigation (though in a different way), and both lied about their pre-service drug use. (JA at 51–52, 188–89.) SrA CM, who outranked A1C Behunin, faced two additional specifications of *distribution* of LSD and cocaine *to* her. (JA at 188–89.) Despite the overlap in their offenses and CM's greater culpability, the higher-ranking Airman received 90 days of hard labor *without* confinement (while A1C Behunin was sentenced to serve 110 days' confinement), no punitive discharge, and significantly fewer forfeitures than A1C Behunin. Yet the Air Force Court would not classify CM and A1C Behunin as closely-related cases. This misunderstanding of *Lacy* warrants relief.

1. The Air Force Court misunderstood the scope of closely-related cases under Lacy.

While the CCAs have a "highly discretionary" sentence review function, in some cases "sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases." *Lacy*, 50 M.J. at 288 (citations omitted). *Lacy* explained that closely-related cases include "coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared." *Id.* This is just such a case.

Nevertheless, the Air Force Court held they were not closely related. It first concluded they were "not plainly co-actors involved in a common crime." (JA at 14.) But CM procured the LSD and helped procure the cocaine that he then used with A1C Behunin and others. They were thus, at minimum, co-actors in the wrongful use offenses. The Air Force Court did acknowledge that A1C Behunin and CM's misconduct "suggests the existence of a 'common or parallel scheme.'" (JA at 15.) However, because each separately lied about their preservice drug use, and separately lied to the AFOSI about drugs, they lacked a "direct nexus" that would mandate comparison under *Lacy*. (JA at 15.)

The Air Force Court misinterpreted *Lacy* when it held the cases were not closely related simply because of *some* differences in *some* of the offenses. This was not a case like *Wacha*, where co-actors were not closely-related cases because only 4 of 16 specifications overlapped. 55 M.J. at 268. Here, the gravamen of the case was wrongful use of controlled substances, which A1C Behunin and CM committed together with both LSD and cocaine. Their joint use of controlled substances triggered the OSI investigation that followed. (JA at 57.) They separately lied to the AFOSI as part of that same investigation, and they separately lied about their preservice drug use. The Air Force Court abused its discretion when it concluded that fraudulent enlistment and false official statement undermined the "direct nexus" required for mandatory sentence comparison, despite the similarity and overlap between these separately committed offenses.

As other courts have held, the fact that some charges differ does not undermine the closely-related status.[11] The necessity of comparison is

[11] *See, e.g.*, *Blow*, 2022 CCA LEXIS 495, at *37–39 (JA at 208) ("the CAAF has not held that convictions must be identical in order for the cases to be closely related for purposes of sentence comparison" (citing *Brock*, 46 M.J. at 11–13)); *United States v. Anne*, NMCCA 201900072, 2019 CCA

all the more evident in cases, like this one, where the separately-committed offenses are so similar. Here, CM and A1C Behunin both made false official statements to the OSI as part of the same investigation, they simply lied in a slightly different way—A1C Behunin lied about her preservice drug use while, CM lied about seeing drug use on one of the evenings in question. As for the fraudulent enlistment, they both lied to recruiters about their preservice drug use. The situation might be different if the two comparison cases contain some overlapping offenses and separate, much more serious offenses. But that is far from this situation.

2. The Air Force Court's erroneous conclusion that the cases were not closely-related shifted the burdens under the Lacy *framework.*

The Air Force Court's abuse of discretion may seem harmless at first blush because it did compare sentences using its general "relative

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LEXIS 506, at *2–3, 5–6 (N.M. Ct. Crim. App. December 18, 2019) (per curiam) (unpublished) (JA at 245–46) (concluding cases were closely related where numerous offenses overlapped but a co-actor committed larcenies that did not involve the appellant); *United States v. Quevedo*, NMCCA 201200288, 2012 CCA LEXIS 695, at *2–4 (N.M. Ct. Crim. App. October 31, 2012) (per curiam) (unpublished) (JA at 249–50) (comparing the sentences of two co-actors where they shared six common specifications but the appellant faced four additional specifications that were withdrawn in the co-actor's court-martial).

uniformity review." But manifold harm resulted from the court's error. First, and most importantly, the failure to compare sentences under *Lacy* stripped away the particular burdens that *Lacy* established. Specifically, the appellant bears the burden of demonstrating cases are closely related and that the sentences are highly disparate. This is met here: CM and A1C Behunin were co-actors, their offenses shared a direct nexus for comparison, and their sentences are highly disparate. With this burden satisfied, *Lacy* shifts the burden to the Government to provide a rational basis for the disparity. No such rational basis exists here; even if one did, it is not found in the record. But because the Air Force Court misapplied *Lacy*, the burden never shifted to the Government.

The difference between comparison of closely-related cases and "relative uniformity review" is critical. For instance, in *United States v. Gage*,[12] the Air Force Court addressed co-actor sentences where one appellant received a punitive discharge while the other did not. The *Gage* court found the cases closely related and the sentences highly disparate, thus it appropriately shifted the burden to the Government under *Lacy*.

[12] No. ACM S32052, 2013 CCA LEXIS 399, at *1–2 (A.F. Ct. Crim. App. May 13, 2013) (unpublished) (JA at 253).

Id. at *6–7 (JA at 254). Because the record did not support the Government's arguments for a rational basis for the disparity, the court granted relief and disapproved the bad-conduct discharge. *Id.* at *7–10 (JA at 254–55.) Had the Air Force Court here appropriately applied *Lacy*, A1C Behunin should have received similar relief.

In addition to burden shifting, the Air Force Court's abuse of discretion led to its unusual application of the "relative uniformity" power. It did not compare with similar cases, broadly speaking, but rather compared only with MS and SM. The Air Force Court held that providing relief to A1C Behunin would not promote sentence uniformity because MS and SM would then have similar sentences to A1C Behunin. (JA at 17–18.) Note the problem with the Air Force Court's analysis: having conceded the uniformity problem between CM and A1C Behunin's cases, the Air Force Court declined to provide relief because it would create different uniformity issues with different servicemembers who were not before that court.

Ultimately, A1C Behunin presented a meritorious claim to the Air Force Court and its rejection was an abuse of discretion.

3. A1C Behunin and CM received highly disparate sentences, and the record does not support a rational basis for the disparity.

The Air Force Court's *Lacy* analysis stopped at the first step, but A1C Behunin case satisfies the second and third steps as well.

First, she and CM received highly disparate sentences. While this Court has not had occasion to define "highly disparate," the plain language of that phrase is met here. She received a bad conduct discharge while he received none; she received 110 days of confinement while he received 3 months' hard labor without confinement; and she received more than twice the forfeitures per month for a longer period. (JA at 52, 189.) This contrasts sharply with *Lacy*, where this Court found the appellant's 18-month confinement was not highly disparate with his co-actors' 15- or 8-month confinement. 50 M.J. at 289.

Second, as to rational basis, the record demonstrates none. CM had greater culpability—he distributed both the LSD and cocaine *to* A1C Behunin. Distribution is indisputably a more serious crime than use. He was also senior in grade to her. The Government here cannot muster a rational basis to explain why CM received a light sentence and presumably returned to the Air Force, while A1C Behunin spent 110-days in a COVID-infested local Texas jail. (*See* JA at 29–30, 48–50.) In

Sothen, this Court found no abuse of discretion because the lower court explained the rational basis for a clear disparity. 54 M.J. at 296. This Court approvingly recited the lower court's analysis: the cases involved different sovereigns, the appellant had far more charges, the appellant litigated his offenses, and the co-actor agreed to testify against the appellant. *Id.* Such evidence is not found in the record here.

In sum, a full *Lacy* analysis demonstrates A1C Behunin is entitled to relief.

4. Conclusion and Remedy

A1C Behunin and CM used controlled substances together, lied about drug use in the same investigation, and lied about their preservice drug use upon enlistment. CM, unlike A1C Behunin, distributed controlled substances. And yet he received no confinement or punitive discharge while A1C Behunin received both. A1C Behunin asked the Air Force Court to apply *Lacy* and provide relief. The Air Force Court misinterpreted *Lacy* and rejected this properly-presented claim.

If this Court agrees, the question becomes one of remedy. As this Court stated in *Lacy*, the remaining questions—whether the sentences are highly disparate, and whether there is a rational basis for the

disparity—are legal questions this Court may answer. 50 M.J. at 288. Although the Air Force Court's resolution of this case did not answer the second and third *Lacy* questions, the Government has fully briefed those issues below and can do so again. Thus, this Court is positioned to answer these legal questions. However, it would then have to remand for the Air Force Court to provide sentencing relief under its Article 66 authority. At a minimum, this Honorable Court should hold CM's and A1C Behunin's cases are closely related and remand to the Air Force Court to apply the remainder of the *Lacy* analysis.

WHEREFORE, A1C Behunin respectfully requests this Honorable Court hold that she has met the *Lacy* test and remand for the Air Force Court to provide appropriate sentencing relief.

Respectfully submitted,

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I certify that an electronic copy of the foregoing was sent via electronic mail to the Court and served on the Government Appellate Division on December 2, 2022.

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