No. 21-920

In the Supreme Court of the United States

KALAB D. WILLMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Article 66(c) of the Uniform Code of Military Justice, 10 U.S.C. 866(c) (2012)—which provided that a military court of criminal appeals "may act only with respect to the findings and sentence as approved by the convening authority" and "may 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," *ibid.*—authorized a military court of criminal appeals to consider evidence, submitted after the convening authority had approved the sentence, when reviewing that sentence for appropriateness.

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OPINIONS BELOW

The opinion and orders of the Court of Appeals for the Armed Forces (Pet. App. 4a-20a, 52a, 118a, 171a) are reported at 81 M.J. 355, 81 M.J. 452, 81 M.J. 451, and 81 M.J. 450. The opinions of the Air Force Court of Criminal Appeals (Pet. App. 23a-51a, 55a-117a, 121a-170a, 174a-243a) are not published in the Military Justice Reporter but are available at 2020 WL 5269775, 2020 WL 6817746, 2020 WL 6949503, and 2021 WL 955908.

JURISDICTION

The judgments of the court of appeals were entered on July 21, 2021, and on August 10, 2021. On October 12, 2021, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 18, 2021. The petition for a writ of certiorari was filed on December 17, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following a guilty plea and trials at general courts-martial, petitioners, enlisted members of the United States Air Force, were convicted of various sexual or assault offenses in violation of provisions of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 801 *et seq*. Each petitioner's approved sentence included a term of confinement. Pet. App. 24a, 56a, 122a, 175a. The United States Air Force Court of Criminal Appeals (AFCCA) affirmed in each case in relevant part. *Id*. at 23a-51a, 55a-117a, 121a-170a, 174a-243a. The United States Court of Appeals for the Armed Forces (CAAF) affirmed in relevant part. *Id*. at 4a-20a, 52a, 118a, 171a.

1. Under the UCMJ, general courts-martial are "convened" by a particular authority, such as a relevant "commanding officer." 10 U.S.C. 822. In most cases, the ensuing proceedings include review by that "convening authority" of any sentence by the military judge, which the convening authority has the power to modify prior to the entry of judgment. See 10 U.S.C. 860a-860c.

At all times relevant here, Article 66(c) provided in pertinent part that:

> [T]he Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may 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.

10 U.S.C. 866(c) (2012).[1]

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[1] In 2016, Congress amended the UCMJ by "striking" Article 66(c) and enacting a new parallel provision in Article 66(d)(1). See Military Justice Act of 2016, Pub. L. No. 114-328, Div. E, § 5330, 130

Based on Article 66(c)'s direction that a court of criminal appeals may affirm a sentence only if the court (1) "finds [it] correct in law and fact" and (2) "determines" that it "should be approved," 10 U.S.C. 866(c) (2012); see 50 U.S.C. 653(c) (1952) (same), the CAAF and its predecessor (the Court of Military Appeals) have long construed Article 66(c) to vest the reviewing court with "with broad discretionary power to review sentence appropriateness" and to reduce the sentence approved by the convening authority if the court finds it inappropriate, "even if the sentence is 'correct' as a matter of law." *United States* v. *Kelly*, 77 M.J. 404, 405-406 (C.A.A.F. 2018) (citing, *e.g.*, *United States* v. *Atkins*, 8 C.M.A. 77, 79 (1957)); accord *United States* v. *Jessie*, 79 M.J. 437, 440 (C.A.A.F. 2020). Under those

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Stat. 2932-2934; see also Pet. 4 & n.2. Those 2016 amendments became effective for cases in which "charges [we]re referred to trial by court-martial" on or after January 1, 2019. Military Justice Act of 2016 § 5542(a) and (c)(2), 130 Stat. 2967; see Exec. Order No. 13,825, § 3(a), 3 C.F.R. 326 (2018 Comp.) (10 U.S.C. 801 note). Because the charges in each of petitioners' cases were referred before 2019, the pre-2016 version of Article 66(c) applies here. See Pet. App. 5a n.1, 104a, 186a; Turner C.A. Supp. to Pet. for Grant of Review 1 n.2 (Jan. 19, 2021).

In December 2021, shortly after petitioners filed their certiorari petition, Congress again amended Article 66 by striking the language that, as amended in 2016, provided that a court of criminal appeals "may affirm only * * * 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," 10 U.S.C. 866(d)(1) (2018). See National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 539E(d)(1), 135 Stat. 1703. Article 66 as amended thus no longer includes the words "entire record." Congress instead revised text in Article 66(e)(2) that defines what constitutes "the record on appeal." *Id.* § 539E(d)(2), 135 Stat. 1703 (amending 10 U.S.C. 866(e)(2)). Those 2021 amendments will take effect in December 2023. *Id.* § 539E(f), 135 Stat. 1706.

decisions, a sentence is "appropriate[]" if it is a "'fair and just punishment.'" *Atkins*, 8 C.M.A. at 79 (citation omitted); see *United States* v. *Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005).

The CAAF and its predecessor court have also determined that Article 66(c)'s requirement that such review occur "on the basis of the entire record," 10 U.S.C. 866(c) (2012), limits appellate review of the "appropriateness of [a] sentence[]" to matters shown on the record when the convening authority approved the sentence, and does not include information that "theretofore formed no part of the record." *United States* v. *Fagnan*, 12 C.M.A. 192, 195 (1961). They have accordingly instructed that Article 66(c) precludes appellate consideration of information about matters occurring "after the convening authority acted upon the sentence and forwarded the record of trial" because such information "is not a part of the record subject to review under Article 66." *Id.* at 193; see *Jessie*, 79 M.J. at 441 (discussing *Fagnan* as the "leading case" on the issue).

2. Petitioners are servicemembers, convicted of offenses under the UCMJ, who did not argue to the convening authority that conditions of their confinement warranted sentencing relief and did not develop a court-martial record on that subject.

a. Petitioner Willman made sexually explicit recordings of a 16-year-old minor, BM, after meeting her on an Internet chat forum. Pet. App. 26a. Their conversations became sexual in nature, and during online video sessions, Willman and BM would show each other their bodies and sometimes masturbate. *Ibid.* On 14 occasions, without BM's knowledge or consent, Willman recorded BM masturbating, lasciviously exhibiting her genitals, and engaging in other sexually explicit

conduct. *Ibid.* Following his guilty plea, Willman was convicted on one specification of indecent recording, in violation of Article 120c of the UCMJ, 10 U.S.C. 920c. See Pet. App. 24a. Willman was sentenced to one year of confinement, a reduction in grade, and a dishonorable discharge. *Ibid.*

On February 27, 2019, nearly four months after his sentencing hearing, Willman waived his right to submit matters in clemency to the convening authority. Pet. App. 35a. The court-martial record accordingly contains no information on the conditions of his confinement. See *id.* at 35a-36a. On February 28, 2019, the convening authority approved Willman's sentence as adjudged. *Id.* at 24a, 35a.

b. Petitioner Frantz committed numerous lewd acts against his then-stepdaughter when she was as young as nine or ten years old, repeatedly engaging in sexual communication with her and holding her buttocks against him to satisfy his sexual desires. Pet. App. 65a; see *id.* at 58a-65a. Following trial, Frantz was convicted on two specifications of committing lewd acts upon a child under the age of 12 years, in violation of Article 120b of the UCMJ, 10 U.S.C. 920b, and was sentenced to seven years of confinement, a reduction in grade, and a dishonorable discharge. Pet. App. 56a.

Frantz, like Willman, did not develop a court-martial record to support a request to reduce his sentence based on the conditions of his post-trial confinement. Frantz has subsequently contended that "[s]ince [his] arrival at [the Naval Consolidated Brig] Miramar" in San Diego in "December 2018," officials had applied "Miramar's minor contact policy for sex offenders" to deny him contact with his minor son, who was born in September 2017 and lives with his mother in Italy, and

that he attempted, but was unable, to contact his counsel to raise that purported aspect of his confinement in his "clemency submission to the convening authority." Frantz A.F. Ct. Crim. App. (C.C.A.) Mot. to Attach, App. at 1-2 (Apr. 28, 2000) (Frantz Decl.). On February 15, 2019, the convening authority approved Frantz's sentence as adjudged. Frantz C.A. Supp. to Pet. for Grant of Review 3 (Mar. 1, 2021).

c. Petitioner Turner physically assaulted his then-wife by repeatedly punching her in her head and striking her head with a drumstick, choking her, and throwing her against a wall and furniture. Pet. App. 124a-130a, 135a-136a. Following trial, Turner was convicted on five specifications of assault consummated by a battery, in violation of Article 128 of the UCMJ, 10 U.S.C. 928, and was sentenced to eight months of confinement, a reduction in grade, and a bad-conduct discharge. Pet. App. 122a.

Turner was detained at the Taylor County Jail in Texas beginning March 7, 2019, and he states that he remained there "for the duration of [his] sentence." Turner C.C.A. Mot. to Attach Doc., App. 2 (Apr. 7, 2000) (Turner Decl.); see Pet. App. 146a. Turner submitted matters in clemency to the convening authority but did not raise any concerns about the conditions of his confinement. Pet. App. 146a. On May 28, 2019, the convening authority approved Turner's sentence as adjudged. *Id.* at 122a, 146a.

d. Petitioner Williams sexually assaulted an underage enlisted woman by having sexual intercourse with her while she was highly intoxicated. Pet. App. 176a-183a. Following trial, Williams was convicted on one specification of sexual assault, in violation of Article 120 of the UCMJ, 10 U.S.C. 920, and was sentenced to 45

days of confinement, three months of hard labor without confinement, a reduction in grade, and a dishonorable discharge. Pet. App. 175a.

Although Williams has subsequently contended that his military pay was erroneous reduced while he was serving his post-trial confinement, and was erroneously eliminated while he served his sentence of hard labor without confinement, his clemency request to the convening authority did not address any issues concerning his pay. Pet. App. 227a-232a. The convening authority approved Williams's sentence as adjudged. *Id.* at 175a, 229a.

3. On appeal to the AFCCA, each petitioner challenged the appropriateness of his sentence approved by the convening authority, arguing for the first time that his sentence should be reduced under Article 66(c) of the UCMJ, 10 U.S.C. 866(c) (2012), in light of the conditions of his post-trial confinement. See, *e.g.*, Willman C.C.A. Br. 7. Before appealing to the AFCCA, no petitioner had sought sentencing relief based on the conditions of his post-trial confinement, and the records in each of their cases therefore did not contain evidence about such conditions. Each petitioner instead submitted in the AFCCA as part of his appeal his own declaration discussing the conditions of his post-trial confinement, and filed a motion to attach that declaration (and certain other documents) to his appellate brief. See, *e.g.*, Willman C.C.A. Mot. to Attach Docs. (Sept. 20, 2019); *id.* App. A (Willman Decl.).

Willman's AFCAA declaration asserted that, in December 2018, while serving post-trial confinement, another inmate stepped on his foot as they were playing flag football, bruising Willman's large toe and eventually causing his toenail to detach from its nail bed. Pet.

App. 36a. According to Willman, in January 2019, he reported to sick call for a medical evaluation; a member of the medical staff concluded that no action was needed; and after Willman asked to speak to a medical supervisor, the supervisor applied an antiseptic to his toe but declined Willman's request to remove the toenail. *Ibid.* Willman further asserted that he unintentionally removed his toenail later that night when he took off his boots and socks; that in early February 2019, he returned to sick call and complained that his new toenail was discolored, growing in an unusual manner, and causing him pain; and that medical personnel determined that no action was needed but told him that he could return if further issues or symptoms arose. *Ibid.* Willman did not seek subsequent medical care for his toe. Gov't C.A. Br. 3.

Frantz's AFCCA declaration asserted that, since arriving at Miramar Brig in December 2018, he has been denied contact with his young son based on the "Miramar's minor contact policy for sex offenders." Frantz Decl. 1-2; see Pet. App. 99a. According to Frantz, "he was told he cannot have contact with his son until he completes at least six months in the sex offender treatment program at the Miramar Brig," which Frantz contends would require that he "admit that he is guilty of the offenses." Pet. App. 99a. Frantz claimed that "[a]s a result," he did "not ha[ve] contact with his son" after "arriv[ing] at the Miramar Brig." *Ibid.*

Turner's AFCCA declaration asserted that rodents and insects were present in his cell at the Taylor County Jail; that he had captured "several mice" in his cell and had awoken from sleep with "sugar ants crawling all over [him]"; and that other types of insects were "common in the facility and individual cells." Turner Decl. 2-

3; see Pet. App. 146a-148a & n.6. Turner stated that he complained about those conditions and was informed by a military officer that the county jail "'regularly sprays for insects and rodents to attempt to prevent any inmate from being exposed to potential health concerns.'" Turner Decl. 3. Turner added, however, that the officer had related that his staff had "offered to move [Turner] to a new cell" as "a 'possible immediate resolution.'" *Ibid.* But Turner asserted that he did not "receive[]" that offer. *Ibid.*; see Pet. App. 147a-148a.

Williams's AFCCA declaration asserted that his "post-trial paperwork was incorrectly processed," resulting in an erroneous reduction in his military pay for two weeks in March 2019. Williams C.C.A. Mot. to Attach Docs., Attach. 1 ¶ 2 (June 25, 2020) (Williams Decl.). According to Williams, by the end of August 2019, he was also erroneously "placed in a non-pay [status]" when "[his] enlistment expired," making it difficult to support his family while he completed his sentence of three months of hard labor without confinement. *Id.* ¶¶ 3-5. Williams stated, however, that in October 2019 —after he filed a complaint against his commanding officer under Article 138 of the UCMJ, 10 U.S.C. 938—he received "the remaining back pay owned to [him]." Williams Decl. ¶ 7; see Pet. App. 228a-232a.

4. The AFCCA affirmed in each of petitioners' cases in relevant part. Pet. App. 23a-51a, 55a-117a, 121a-170a, 174a-243a.[2] As relevant here, the court rejected

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[2] The AFCCA affirmed in full in Willman's and Williams's cases. Pet. App. 47a, 243a. The AFCCA affirmed Frantz's sentence in part, limiting his reduction in grade to a reduction to E-3 (rather than to E-1). *Id.* at 104a-112a, 117a. The AFCCA overturned Turner's conviction on one specification of assault against his son,

each petitioner's request under Article 66(c) of the UCMJ, 10 U.S.C. 866(c) (2012), to reduce his sentence to account for post-trial conditions of confinement. See Pet. App. 35a-40a, 43a-47a; *id.* at 98a-103a; *id.* at 146a-155a; *id.* at 227a-234a, 240a.

a. The AFCCA rejected Willman's argument that his sentence should be reduced as inappropriately severe under Article 66(c) in light of the purportedly deficient medical treatment that he received for his asserted flag-football toenail injury while in post-trial confinement. Pet. App. 35a-40a, 43a-47a.

The AFCCA explained that Article 66(c) review of "sentence appropriateness" is "limited to claims based on post-trial treatment that occurs prior to the action of the convening authority" in its prejudgment sentence review "and which is documented in the record of trial." Pet. App. 39a-40a (citation omitted). The court also observed that the CAAF in *United States* v. *Jessie*, *supra*, had determined that the Court of Military Appeals' 1961 decision in *United States* v. *Fagnan*, *supra*, had "established a clear rule that the [courts of criminal appeals] may not consider anything outside of the 'entire record' when reviewing a sentence under Article 66(c)." Pet. App. 44a (citation omitted). And the court found that because "Article 66(c) limits [a court's] review of the appropriateness of the sentence to the record," it lacked authority to consider Willman's statements—made "for the first time on appeal"—about his "post-trial confinement conditions." *Id.* at 43a; see *id.* at 47a.

The AFCCA noted that the CAAF had allowed review of evidence not before the convening authority in the context of Eighth Amendment claims of cruel and

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reduced his sentence of confinement from eight to seven months as a result, and otherwise affirmed. *Id.* at 143a-146a, 167a-169a.

unusual punishment and claims under Article 55 of the UCMJ, 10 U.S.C. 855, which provides that no "cruel or unusual punishment" may be "adjudged by any court-martial or inflicted upon any person subject to [the UCMJ]," *ibid.* See Pet. App. 45a (citing *United States* v. *Erby*, 54 M.J. 476, 478 (C.A.A.F. 2001)). And it noted that it had accordingly applied that CAAF precedent "to consider outside-the-record matters" before rejecting Willman's own Eighth Amendment and Article 55 claims, by accepting and reviewing Willman's appellate declaration for that purpose. *Ibid.*; see *id.* at 40a-43a (rejecting claims on the merits). But it emphasized that the CAAF had not extended that approach to general review of sentence-appropriateness, on the ground that "nothing in the statutory text [of Article 66(c)] requir[es] special treatment for all appeals raising statutory or constitutional claims." *Id.* at 46a (quoting *Jessie*, 79 M.J. at 444) (first set of brackets in original).

Judge Meginley concurred in the result. Pet. App. 48a-51a. In his view, where a servicemember raises Eighth Amendment and Article 55 claims with material submitted for the first time on appeal, the court of criminal appeals should be able to consider the same extra-record evidence in considering an Article 66(c) claim. *Id.* at 48a. But he found that Willman's complaints about the medical treatment of his big toe did not "render his sentence inappropriately severe" so as to "warrant[] relief under Article 66(c)." *Ibid.*

b. The AFCCA similarly rejected the Article 66(c) contentions of the remaining petitioners.

The AFCCA determined that it lacked authority to consider Frantz's Article 66(c) claim based on post-trial conditions of confinement regarding limitations on communications with his son because Frantz's "declaration

addressing [the] issue" is "not in the record." Pet. App. 103a; see *id.* at 98a-103a; cf. *id.* at 103a-104a (concluding that, if Frantz had preserved an Article 55 claim, his contentions would be "insufficient to warrant relief" on the merits).

The AFCCA likewise determined that it lacked authority to consider Turner's Article 66(c) claim based on the presence of rodents and insects in the jail where he served his post-trial confinement because "the matters [he] complains of fall outside the record." Pet. App. 154a-155a; see *id.* at 146a-152a; cf. *id.* at 152a-154a (rejecting Turner's parallel Eighth Amendment claim on the merits).

Finally, the AFCCA determined that it lacked authority to consider Williams's Article 66(c) claim based on assertions of erroneous reductions in his military pay while he was serving his sentence, because he did not address such payroll issues "in his clemency submission to the convening authority" and only "raised [them] for the first time in his appeal." Pet. App. 240a; see *id.* at 227a-234a; cf. *id.* at 234a-239a (rejecting Williams's Eighth Amendment and Article 55 claim on the merits).

5. The CAAF granted review and affirmed in Willman's case. Pet. App. 4a-22a.

In its decision in Willman's case, the CAAF determined, based on the "plain language of Article 66(c)" and its earlier decision in *Jessie*, that the introduction of "outside-the-record evidence" on appeal to support "Eighth Amendment or Article 55, UCMJ, claims" does not vest a court of criminal appeals with "authority to consider [that] outside-the-record evidence * * * when performing sentence appropriateness review under Article 66(c)." Pet. App. 5a.

The CAAF observed that the text of Article 66(c) limiting appellate review to review "'on the basis of the entire record'" is "straightforward." Pet. App. 8a (citation omitted). The court explained that its "longstanding precedent," as reflected in the 1961 decision in *Fagnan*, accordingly rested on "the plain language of the statute" and "'established a clear rule that the [courts of criminal appeals] may not consider anything outside the "entire record" when reviewing a sentence under Article 66(c).'" *Id.* at 8a-9a, 12a (citation omitted). And it noted that it had recently "reaffirm[ed]" that longstanding precedent" in *Jessie*. *Id.* at 8a.

The CAAF acknowledged that a few of its decisions had created a "significant exception" to that rule, under which courts of criminal appeals "may consider materials completely outside of the 'entire record' when determining whether the manner of execution of an accused's sentence violates either the Eighth Amendment or [the provisions of] Article 55." Pet. App. 11a (citing *United States* v. *Erby*, *supra*, and *United States* v. *Pena*, 64 M.J. 259 (C.A.A.F.), cert. denied, 550 U.S. 937 (2007)). The court observed, however, that its decisions "establishing [those] exceptions * * * neither discuss[ed] Article 66(c)'s express 'entire record' restriction nor wrestle[d] with the Court's seemingly contrary holding in *Fagnan*." *Id.* at 13a. The court also observed that it had previously "acknowledged" that those decisions arguably "'are not properly predicated on the plain language of that statute.'" *Id.* at 15a (citation omitted). And it suggested that an extension of those precedents would "raise[] questions not about [the validity of] the *Fagnan* rule, which is based on the plain text of Article 66(c)," but instead the "precedents creating exceptions to the rule." *Id.* at 14a-15a.

The CAAF determined, however, that this case did not require a "complete resolution of the incongruities in [its] Article 66(c)" precedents, because given the option of "choos[ing] between strictly enforcing the *Fagnan* rule" in this context and "further expanding the exceptions to that rule that [its decisions] ha[d] created for cruel and unusual punishment claims," the court "elect[ed] to apply *Fagnan*" by "'cabin[ing]' [the] precedents * * * to their express holdings." Pet. App. 11a-12a, 16a (citation omitted). The court therefore declined to extend its decisions allowing "outside-the-record materials to decide Eighth Amendment and Article 55" claims to the context of "sentence appropriateness review" under Article 66(c). *Id.* at 13a. The court observed that such an extension would erroneously "create a broad, extra-statutory exception that would potentially swallow the text-based *Fagnan* rule" by allowing any "appellant who wished to supplement the record with outside-the-record materials * * * to do so by raising Eighth Amendment or Article 55 * * * claims—regardless of their merit," in order to allow the reviewing court to consider those materials when it conducts sentence-appropriateness review under Article 66(c). *Id.* at 13a-14a.

The CAAF also rejected the contention that Willman's "declaration became part of the 'entire record'" within the meaning of Article 66(c) when the AFCCA granted Willman's "motion to attach" that declaration to his appellate brief. Pet. App. 16a. The court observed that it "has never held, or even suggested, that outside-the-record materials considered to resolve an appellant's cruel and unusual punishment claims became part of the entire record." *Id.* at 17a. The court explained that the relevant record under Article 66(c) is

"the record of trial under [Rule for Courts-Martial (R.C.M.)] 1103(b)(2)" and "matter attached to the record of trial under R.C.M. 1103(b)(3)." *Id.* at 16a. And the court found that because Willman had "waived his right to submit [information about his post-trial confinement conditions] for clemency to the convening authority, the 'entire record' contains nothing about th[e] issue" that he was now attempting to raise. *Ibid.* (citation omitted).

Judge Sparks, joined by Judge Ohlson, dissented. Pet. App. 17a-20a. In their view, if a reviewing court is permitted to consider "'documents outside the record of trial'" in order to resolve an Eighth Amendment and Article 55 claim raised for the first time on appeal, the court should also be allowed to consider the same documents when conducting sentence-appropriateness review under Article 66(c). *Id.* at 18a-20a (citation omitted).

6. Based on its decision in Willman's case, the CAAF summarily affirmed in the other petitioners' cases. Pet. App. 52a, 118a, 171a.

ARGUMENT

Petitioners contend (Pet. 16-29) that because CAAF precedent allowed the AFCAA to consider their appellate declarations in considering Eighth Amendment and Article 55 claims that they raised for the first time on appeal, the AFCCA should have considered their appellate declarations in conducting sentence-appropriateness review under Article 66(c) of the UCMJ. The CAAF correctly rejected that contention, which has limited prospective importance in light of Congress's intervening amendments to Article 66. No further review is warranted.

1. At times relevant here, Article 66(c) provided that "the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority" and "may 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." 10 U.S.C. 866(c) (2012). That text forecloses the review that petitioners seek.

By limiting the reviewing court's authority in sentencing matters to action "only" with respect to the "sentence as approved by the convening authority," 10 U.S.C. 866(c) (2012), Article 66(c) necessarily limits appellate sentencing review to the sentence actually "approved by the convening authority." *Ibid.* A convening authority does not "approve" *how* a sentence may be implemented unless, at the very least, the convening authority has before it evidence showing how the sentence is being, or will be, implemented by officials responsible for executing the sentence. In the absence of such information, the convening authority will have approved only the designation of the sentence—*i.e.*, the length of confinement and other aspects of the sentence adjudged by the court-martial. Article 66(c)'s requirement that appellate review of the "sentence as approved by the convening authority" proceed "on the basis of the entire record," *ibid.*, therefore refers to the court-martial record in existence when the convening authority approved the sentence.

As the CAAF's predecessor explained in *United States* v. *Fagnan*, 12 C.M.A. 192 (1961), Article 66(c) encapsulates a familiar limitation on the authority of an "appellate judicial body," which is "limit[ed]" to the review of "matters reasonably connected to the

proceedings already completed in the cause." *Id.* at 194. It is well established that direct appellate review typically does not proceed on information that "has theretofore formed no part of the record." *Id.* at 195. In accord with that principle, Article 66(c) has been authoritatively construed for more than 60 years to prohibit the consideration of matters that occur "after the convening authority [has] acted upon the sentence and forwarded the record of trial," because such matters are "not a part of the record subject to review under Article 66." *Id.* at 193; see, *e.g.*, *United States* v. *Jessie*, 79 M.J. 437, 441 (C.A.A.F. 2020) (discussing *Fagnan*); see also *United States* v. *Healy*, 26 M.J. 394, 396 (C.M.A. 1988) ("[T]he [UCMJ] does not provide an opportunity for the accused and his counsel to supplement the 'record' after the convening authority has acted.").

In this case, no petitioner submitted to the relevant convening authority any information about the conditions of confinement that now form the basis for their request for the AFCCA to order a sentence reduction based on its authority to consider sentence appropriateness under Article 66(c). See pp. 4-7, *supra*.[3] The "entire record" on which such Article 66(c) review of the

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[3] Where "claims and issues are raised by the record but are not fully resolvable by the materials in the record," the CAAF has permitted courts of criminal appeals to remand the matter for a hearing (known as a *Dubay* hearing) in order to further develop the record or to accept affidavits addressing the matters necessary to resolve the claims that are raised by the record. See *Jessie*, 79 M.J. at 442; cf. 10 U.S.C. 866(f)(3) (2018) (2016 amendment authorizing courts of criminal appeals to "order a hearing as may be necessary to address a substantial issue" if they "determine[] that additional proceedings are warranted"). This case does not call for such proceedings because no petitioner presented any information about his post-trial confinement until after he appealed to the AFCCA. Pet. 9 n.4.

convening authority's determination proceeds therefore contained no information to support their claims. As a result, as the CAAF recognized, the AFCCA lacked authority to consider declarations newly submitted on appeal in considering petitioners' claims that their sentences were inappropriately severe in light of their conditions of post-trial confinement.

2. Petitioners primarily contend (Pet. 17-18) that when the AFCCA granted petitioners' motions to "attach[]" their declarations and other materials to their appellate briefs, those materials "became part of the 'entire record' under the plain meaning of that phrase" in Article 66(c), such that the AFCCA could then consider those matters in reviewing the appropriateness of each of their sentences under Article 66(c). That is incorrect. Although those submissions—like petitioners' appellate briefs—are part of the records of their appeals, they are not contained in the "entire record" referenced in Article 66(c), which concerns the record in existence when the convening authority "approved" the sentence under review, 10 U.S.C. 866(c) (2012). See pp. 16-18, *supra*.

Petitioners' singular reliance (Pet. 19) on the words "entire record" in Article 66(c) fails to analyze the key question—namely, what the "entire record" is *of*. Petitioners do not provide any textual analysis of Article 66(c) on that issue, engage with the more than six decades of jurisprudence interpreting appellate review under Article 66(c) to be review of the record on which the convening authority made its sentencing decision, or reconcile their proposed approach with the nature of appellate review. As the CAAF explained, petitioners' position would circumvent Article 66(c)'s requirement that review proceed on the "entire record" by allowing

appellants to supplement the record on appeal with new evidence. Pet. App. 13a-14a; see p. 14, *supra*. Even if such supplementation were limited to "materials that are relevant to an appellant's cruel and unusual punishment claims" as Willman argued below, such an exception would apply to "a wide range of outside-the-record materials" that were never before the convening authority when it made the sentence-approval decision that is under review. Pet. App. 14a.

Petitioners incorrectly suggest (Pet. 19-20) that "federal civilian court practice" supports their position. This Court has determined that appellate review for plain error is based on "the *entire* record—not just the record from the particular proceeding where the error occurred"—and, for that reason, a federal court of appeals conducting plain-error review may consider materials in the "trial record" in district court as well as materials like "pre-sentence report[s]" in the district court sentencing record. *Greer* v. *United States*, 141 S. Ct. 2090, 2098 (2021). But those evidentiary materials are part of the district court record when the district court enters the judgment that is the subject of plain-error review. See Fed. R. App. P. 10 (contemplating only limited circumstances, typically for clarification of the district-court proceedings, in which the record can be supplemented). An appellate court's consideration of such materials in the district court record does not suggest that different evidentiary materials submitted for the first time as attachments to an appellate brief may be considered as the part of the relevant "record" on review.

Petitioners separately suggest (Pet. 18, 24-25, 29) that military courts of criminal appeals' "unique authority to review the appropriateness of a sentence, even if

no legal or constitutional error occurred," Pet. 24, necessarily requires the ability to consider materials outside the record. But the authority to review the appropriateness of an approved sentence is based on the text of Article 66(c), which limits such review to the record on which the convening authority approved the sentence. See p. 3, *supra*. And while petitioners assert that "no other forum [exists] to consider a service member's claim that his sentence is inappropriate based on improper post-trial confinement conditions that arose after entry of judgement," Pet. 29, they do not appear to dispute that they could have sought relief (other than a reduction in their sentences) to remedy unlawful conditions of confinement in other venues. Cf. *Jessie*, 79 M.J. at 445 (noting possibility of such relief in other venues).

Petitioners also argue (Pet. 6, 17, 25) that it is "incongruous" and "arbitrary" for the CAAF to allow a court of criminal appeals to consider evidence submitted for the first time on appeal for purposes of resolving Eighth Amendment and Article 55 claims but not Article 66(c) sentence-appropriateness claims. But the CAAF has "has never held, or even suggested, that outside-the-record materials considered to resolve an appellant's cruel and usual punishment claims became part of the entire record," Pet. App. 17a, and its creation of an atextual exception to Article 66(c) for that purpose does not require this Court to create an even broader one. Indeed, the CAAF has acknowledged the infirmity of its decisions adopting that judicially crafted exception, observing that they did not grapple with Article 66(c)'s text or the precedent interpreting Article 66(c), Pet. App. 13a, and recognizing that the decisions at least arguably "are not properly predicated on the plain language of that statute." *Id.* at 15a (quoting *United States*

v. *Guinn*, 81 M.J. 195, 204 (C.A.A.F. 2021)). And the CAAF has indicated that it "may decide in a future case whether th[o]se holdings with respect to such claims should be overruled" or "modified," *Jessie*, 79 M.J. at 445, but has not yet had occasion to address the "incongruity" that they create, Pet. App. 11a-12a, other than to recognize that it does "justif[y] further deviation from the plain text of Article 66(c)." *Id.* at 15a.

3. Petitioners err in contending (Pet. 17-18, 21-22) that this Court's review is needed to resolve "confusion" in the military courts. Petitioners rely (Pet. 21-22) on dissenting and concurring opinions that preceded the CAAF's decision in this case, but those decisions do not speak to whether any confusion now exists. And the subsequent decisions of military courts of appeals exhibit no meaningful confusion on the question presented, much less confusion significant enough to warrant review by this Court.[4]

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[4] See, *e.g.*, *United States* v. *Buttigieg*, No. 202000272, 2022 WL 170859, at *3 (N-M. Ct. Crim. App. Jan. 18, 2022) ("[The] CAAF's holdings in *Jessie*, as clarified in *Willman*, require us to treat Appellant's declaration and its enclosures as outside the record."); *United States* v. *Barnaby*, No. ACM 39866, 2021 WL 4887771, at *2 (A.F. Ct. Crim. App. Oct. 19, 2021) (citing *Willman* and *Jessie* to reject relief under the court's Article 66 "sentence appropriateness authority" because "information about the complained-of conditions is outside the record"); *United States* v. *Guinn*, No. 20170500, 2021 WL 3727853, at *2 n.2 (A. Ct. Crim. App. Aug. 20, 2021) (explaining that *Willman* "clarified the limits on what materials outside the record of trial can be considered by service courts in making sentence appropriateness determinations under Article 66(c)"); *United States* v. *King*, No. ACM 39583, 2021 WL 3619892, at *51 (A.F. Ct. Crim. App. Aug. 16, 2021) ("The CAAF has recently held that under the plain language of Article 66(c), UCMJ, and its decision in *Jessie*, 79 M.J. 437, we have no authority to consider such outside-the-record declarations to determine sentence appropriateness even

Finally, further review is unwarranted because Congress recently deleted the text in Article 66 relevant to the question that petitioners present. The December 2021 amendments to Article 66, which will become effective in December 2023, deleted Article 66's text providing that a court of criminal appeals' review of sentence appropriateness shall be based on "the entire record," 10 U.S.C. 866(d)(1) (2018), and revised language in Article 66(e)(2) that defines "the record on appeal." See p. 3 n.1, *supra*. As a result, any decision of this Court interpreting the phrase "entire record" in Article 66 would have limited prospective importance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2022

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when we have already considered them to resolve Eighth Amendment and Article 55, UCMJ, claims.").