IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

TRAVIS D. PULLINGS,
Staff Sergeant (E-5),
United States Air Force,
Appellant.

USCA Dkt. No. 22-0123/AF

Crim. App. Dkt. No. ACM 39948

BRIEF ON BEHALF OF APPELLANT

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II.

ADDITIONALLY OR ALTERNATIVELY, DID APPELLANT SUFFER CRUEL AND UNUSUAL PUNISHMENT FOR 247 DAYS AND NIGHTS AT LOWNDES COUNTY JAIL?

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (hereinafter Air Force Court) reviewed this case pursuant to Article 66(d), Uniform Code of Military Justice (UCMJ).[1] This Honorable Court has jurisdiction to review this case under Article 67(a)(3), UCMJ.

Statement of the Case

On May 27, 2020, consistent with his pleas, Staff Sergeant Travis Pullings (Appellant) was convicted by a general court-martial composed of a military judge alone at Moody Air Force Base (AFB), Georgia, of one charge and two specifications

[1] All references to punitive articles are to the *Manual for Courts-Martial, United States* (2016 ed.). All other references to the UCMJ, Rules for Courts-Martial, or Military Rules of Evidence are to the *Manual for Courts-Martial*, *United States* (2019 ed.).

of sexual assault of a child and three specifications of sexual abuse of a child, in violation of Article 120b, UCMJ. JA at 126. The military judge sentenced Appellant to reduction to the grade of E-1, total forfeitures, confinement for 13 years, and a dishonorable discharge. JA at 127. The general court-martial convening authority approved eight years confinement in accordance with the pretrial agreement. JA at 32. He also disapproved the total forfeitures. *Id.*

The Air Force Court approved the findings and sentence. JA at 16. It denied Appellant's request for reconsideration on January 6, 2022. JA at 28.

Statement of Facts

Lowndes County Jail

When Airmen at Moody AFB are sentenced to confinement, they serve this punishment at Lowndes County Jail (LCJ) in Lowndes County, Georgia, pursuant to a Memorandum of Agreement (MOA) between LCJ and the 23d Wing, located at Moody AFB. JA at 50. After the announcement of Appellant's sentence on May 27, 2020, he was transported to LCJ. JA at 41. Although he was projected to be transferred two weeks later to the Naval Consolidated Brig in Miramar, California, Appellant spent 247 days and nights as a prisoner in LCJ. *Id*.

Initially, Appellant was held in "A-Block," where inmates are usually housed until their arraignment or otherwise moved to general population in the back of the

jail. *Id*. During his time in A-2, Appellant shared a two-person cell with cellmates who were repeat offenders. *Id*. The cells were old and some had broken toilets or sinks. *Id*. The doors to these cells remained unlocked at all times so inmates in those cells could use a different cell to relieve themselves. *Id*. After two weeks, Appellant was moved to general population in C-Block. *Id*. There, he was placed in a four-person cell in C-5. *Id*. The C-Block units housed rivaling gang members, drug dealers, and murderers. *Id*.

The constant threat of violence was not the only issue plaguing the C-Block. The showers, sinks, and toilets were caked with mold and mildew. *Id*. Bugs crawled from the drains. *Id*. A film of yellow-brown dirt blanketed the cell walls. *Id*. Guards handed out cleaning supplies between the hours of 0400-0530, but they would not wake the inmates until breakfast at 0530. *Id*. Accordingly, if an inmate (who was without an alarm of any kind) did not wake up before breakfast, neither the cell nor the day room were cleaned because the guards returned the supplies. *Id*. If the inmates were not outside of their cell by the time breakfast came into the housing unit, they were not served breakfast and had to wait until noon for food. *Id*.

Inmates were also given food items which were days, months, and sometimes years expired. *Id*. Mold grew in the spouts of the daily drink coolers,

which were filled with dirty, debris-laden liquid. *Id*. Appellant routinely found bugs, body hair, and rust flakes in his food. *Id*. Appellant got food poisoning from the weekly peanut butter sandwich he received for lunch. *Id*. The prison served moldy meat sandwiches—sometimes the mold grew on the bread, and other times on the meat. JA at 42. As a result, he stopped eating. *Id*. Appellant lost a total of 30 pounds over a two-month period and continued to lose a pound a week for the next month. *Id*.

For a month, the cell above Appellant flooded toilet water into his cell. *Id*. The dual-use sink/toilet appliance above Appellant's cell clogged, overflowed, and leaked into his cell. *Id*. Sewage dripped from the fire sprinkler and ran down the cell walls onto the floor of his cell. *Id*. The dripping water also disabled the lighting in Appellant's cell, enshrouding him and his cellmates in pitch black darkness for a month. *Id*. The Government's own motion to attach provided the maintenance grievance Appellant filed for this situation. JA at 87. In response, a prison official merely responded, "ok." *Id*.

Prior to his convictions, Appellant took various prescribed medications to treat diagnosed depression, anxiety, and pain for mental, surgical, and chronic issues. JA at 42. Appellant had reconstructive surgery on his ankle before trial; surgeons cut his Achilles tendon to relieve tension in his ankle. *Id*. He then needed a second surgery

to remove the two bolts in his ankle before going to confinement. *Id*. This left Appellant in considerable orthopedic pain. *Id*. Appellant also suffered from diagnosed mental health issues stemming from the deaths of family members, a divorce, and legal troubles throughout 2018-2020. *Id*.

Prison officials took away all of Appellant's medications when he arrived at LCJ. *Id*. This is corroborated by Appellant's first sergeant as part of the Article 138, UCMJ, inquiry. JA at 60. It is also in direct contravention of the MOA, which requires LCJ to accept and dispense medicine as prescribed by the 23d Medical Group at Moody AFB. JA at 53, para. 4.2.14. Medical professional did not evaluate or prescribe Appellant medications for his first two weeks at LCJ—the whole time he was housed in A-Block. JA at 42. They finally evaluated him after having been at LCJ for about three to four weeks in total. *Id*. At his first appointment, Appellant informed the doctor of the medicine he was taking upon arrival at LCJ. *Id*. In response, the jail only provided a two-week dosage of this medicine; these were substitutes rather than what medical professionals at the base had already determined were medically necessary for Appellant. *Id*. Appellant was required to pay every time he needed a refill on his medications, despite still being enrolled in TRICARE health insurance. *Id*.

Prior to confinement, Appellant was diagnosed with Raynaud's Syndrome,

a poor blood circulation disease that produces the same symptoms as frostbite when exposed to cold temperatures. *Id*. The jail kept the air conditioning on at all times, even during the winter. *Id*. Inmates were not allowed to cover the air conditioning vents in their cells for warmth. *Id*. Appellant asked medical providers for an extra blanket to sleep with, but his request was denied. *Id*.

Appellant sustained a head injury in the second month of being in general population after he blacked out and hit the concrete ground headfirst. JA at 42; *see also* JA at 93 (Appellant's grievance to LCJ officials offered as part of the Government motion to attach). The nurses examined him, dressed his wound, and returned him to the housing unit. JA at 42. When it was time to clean and redress the head wound, a correctional officer told Appellant he would not be taken to receive medical attention; Appellant was denied this treatment. *Id*. After Appellant filed a grievance against the officer, the officer came back the next morning with some Band-Aids and an alcohol pad for Appellant to treat himself. JA at 43.

Appellant suffers from severe obstruction sleep apnea, which wakes him up five to six times a night because he cannot breathe; then it is difficult for him to go back to sleep. *Id*. Appellant informed the medical staff of this condition and that he required a Continuous Positive Airway Pressure (CPAP) machine to sleep. *Id*. The medical staff told Appellant the jail would not provide such a machine. *Id*.

Prison officials kept all inmates inside the facility 24 hours a day; they were given no time outside the facility. *Id*. The only sunlight the inmates received was from a small skylight on the roof of the dayroom. *Id*. There was no exercise equipment available; Appellant could only walk around the dayroom for recreation. *Id*. This directly violates the MOA and Air Force regulations, which require LCJ to permit one hour of exercise three times per week. JA at 52, para. 4.2.9; *see also* JA at 196, para. 11.5.

Appellant's Exhaustion of Administrative Remedies

Appellant filed grievances at LCJ; none brought any change. JA at 43, 85-99 (Sworn declaration of Captain JC cataloging 12 grievances, attached to the record by the Government). Although, on appeal, Captain JC ultimately provided these 12 grievances, he previously indicated in response to the Article 138, UCMJ, inquiry that "our records indicated the Inmate Pullings has only filed one grievance since his incarceration began and it was regarding theft of property by another inmate."[2] JA at 62.

On December 15, 2020, appellate defense counsel filed an informal complaint under Article 138, UCMJ, on Appellant's behalf with the wing commander at Moody

[2] Curiously, all but one of the 12 grievances later provided by Captain JC predate December 31, 2020, the date upon which he asserted only one grievance had been filed. *Compare* JA at 62 *with* JA at 85-99.

AFB who signed the MOA with LCJ. JA at 46-47. In addition to requesting amelioration of the above-mentioned concerns, Appellant sought 3:1 confinement credit for being confined in such inhumane conditions. JA at 47. Appellant based this formula on the assertions of the chief of justice JAG at Moody AFB, who acknowledged that "3:1 credit . . . is the typical amount of credit [he had] seen for our military members who have spent time at [LCJ]." [3] JA at 56.

> On January 12, 2021, the wing commander responded, writing:
>
> > I find the Memorandum of Agreement in place with the Lowndes County Jail affords [Appellant] the relief requested with respect to sanitary living accommodations, free prompt medical care, timely prescribed medications, and access to an unrecorded phone line for attorney-client communications. Therefore, I grant [Appellant's] request for relief in part, and deny his request in part with respect to credit for 3:1 confinement.

JA at 59. Although the "granted in part" language indicated that sanitary living conditions, free and prompt medical care, and timely prescribed medication would be required, neither the wing commander nor any prison official took any action to effectuate these changes at LCJ; Appellant's experience at the facility did not change. JA at 43.

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[3] The chief of justice further asserted that while he could not confirm that Appellant would receive 3:1 credit, he was "fairly confident" it would happen. JA at 56. Given that Appellant spent 247 days at LCJ, this credit would have amounted to more than two years off Appellant's sentence. Ultimately, however, Appellant received no such credit.

On January 25, 2021, Appellant's counsel filed a formal complaint with the general court-martial convening authority. JA at 72-73. The commander never responded to the complaint, in writing or otherwise, despite the Air Force's express regulatory requirement to do so. JA at 79; *see also* JA at 193-195, paras. 7.1, 7.6.

The Air Force Court Opinion

On appeal, Appellant renewed his request for relief by alleging cruel and unusual punishment. *Brief on Behalf of Appellant*, dated June 18, 2021 at 7-21. In this assignment of error, he included a list of other appellants who had similarly lodged complaints against LCJ. *Id*. at 9-10. The Air Force Court denied relief, analyzing the entire assigned error in approximately one page of text. JA at 15-16. Though in his reply brief Appellant specifically requested a hearing pursuant to *United States v. DuBay*, 37 C.M.R. 411, 413 (C.M.A. 1967),[4] the Air Force Court found such a hearing "unnecessary." JA at 15, 115-122. In doing so, the lower court articulated that resolving any factual disputes in Appellant's favor would not result in relief to Appellant. *Id*.

Turning to the substance of the allegations, however, the Air Force Court did not reach any factual findings regarding food, water, cell conditions, or lack of outdoor

[4] *See* JA at 118-121 (when comparing Appellant's and the Government's motions to attach, highlighting how Appellant's assertions were corroborated and the Government's documents were internally inconsistent and contradictory).

time and recreation, nor did it articulate whether such deprivations amounted to a denial of necessities. JA at 12-13, 15-16. Despite Appellant repeatedly referring to the "deliberate indifference" of prison officials throughout his brief, the Air Force Court summarily concluded, "Regarding Appellant's complaints regarding food and water, the conditions of his cell, and lack of outdoor time and recreation facilities, Appellant has neither *claimed* nor demonstrated a culpable state of mind on the part of prison officials."[5] JA at 15 (emphasis added). The Air Force Court then surmised Appellant "impl[ied]" a culpable state of mind regarding lack of medical care, but concluded relief was not warranted. *Id.* Again, it did not present or analyze any of Appellant's factual assertions—ones that would need to be resolved in Appellant's favor in the absence of a *Dubay* hearing—in coming to this conclusion. *Id*.

The Air Force Court never mentioned or considered the role Air Force officials played in the cruel and unusual punishment analysis. It did not respond to Appellant's factual assertion that judge advocates designated a standing "typical amount" of confinement credit for LCJ prisoners. The Air Force Court did not acknowledge that neither the wing commander nor any member of the Office of the Staff Judge

[5] In his December 30, 2021, motion for reconsideration, Appellant noted that he used the term "deliberate indifference" in relation to a "culpable state of mind" 25 times in his assignments of error brief and that he had both claimed and demonstrated such scienter.

Advocate rectified any confinement condition concerns at LCJ. It did not analyze whether Air Force officials knew or reasonably should have known of the conditions they were sending Appellant into in May 2020, nor did it analyze the convening authority's express grant of relief concerning the lack of sanitary living conditions and medical care. It did not review any of its prior cases addressing cruel and unusual confinement conditions arising out of the same civilian confinement facility in the previous year and a half. This is in spite of the fact that the very same prison official, Captain JC—who authored responsive documents for the Article 138, UCMJ, complaint and a declaration for the Government's motion to attach—is the exact same prison official who *had previously been named by the Air Force Court* as a known commodity. JA at 62-63, 85-99, 170. The Air Force Court was silent as to whether the actions of military personnel could constitute deliberate indifference when they knew or reasonably should have known they were sending Air Force inmates into unconstitutional conditions. Appellant requested reconsideration as to these omissions; the Air Force Court denied the motion the day after the Government filed its response. JA at 17, 22, 28.

Summary of Argument

Where—as here—a military organization contracts with a local confinement facility to be its jailor, appellants can meet their burden to demonstrate deliberate indifference to their health and safety by pointing to the actions or inactions of *either* prison officials *or* military personnel. While this slightly modifies the test this Court recognized in *Lovett*;[6] it merely recognizes basic principles of agency law wherein the actions or inactions of one entity can be attributable to another. The requisite legal association between the actors yields certain consequences for the actors. Sometimes the agency stems from an employee/employer relationship. Or, like here, agency principles apply to contractual partners. These concepts are taught in mandatory first year law school courses, tested on the bar exam, and recognized in case law from every jurisdiction in the nation.

In a 42 U.S.C. § 1983 context, the existence of the relationship itself between the two entities is itself insufficient for liability to attach to the non-primary actor. *See City of Canton v. Harris*, 489 U.S. 378, 392 (1989) (rejecting a purely vicarious liability standard). It is only when the non-primary actor has the requisite scienter may liability attach. Although the criminal law, of course, is not concerned with civil liability, the exact same principle applies. When there is a certain legal relationship

[6] *United States v. Lovett*, 63 M.J. 211, 215 (C.A.A.F. 2006).

between two entities, the action or inaction of one actor can be attributed to the other. Such is the case where, by contract, a military organization binds itself to a local civilian confinement facility to jail its servicemembers. As a function of traditional agency principles, it is legally appropriate to determine whether those military personnel possess sufficient scienter. Supreme Court and federal circuit case law establish various tests for the "deliberate indifference" required in these scenarios where a plaintiff seeks to attach liability on a secondary actor. Those cases, and the standards articulated therein, provide ample support from which this Court can craft a "deliberate indifference" standard to apply to military personnel under the circumstances.

Appellant suffered cruel and unusual punishment for 247 days and nights at LCJ. His food was expired and contained insects, hair, and rust. His water was moldy. The cells were caked with mildew. Bugs crawled out of the drains. A toilet rupture in the cell above Appellant's caused human waste and drainage to leak down into his living quarters, extinguishing his sole source of light. Appellant never ventured into clean, open air during his eight month stay at LCJ. He was afforded no opportunity for exercise. Appellant's lawfully prescribed medications for chronic orthopedic, mental health, and autoimmune conditions were stripped away. Appellant was denied required follow up treatment for a head wound.

The denial of these necessities were a product of a culpable state of mind—deliberate indifference—on behalf of *both* prison officials *and* military personnel, though under Appellant's proposed test, either one is legally sufficient to make a *prima facie* case of cruel and unusual punishment on appeal. This facility's confinement conditions have been the subject of repeated appellate opinions over the previous two years. The same confinement officer was responsible for responding to all those claims, and drafted documents for this case. The jail has been put on notice each time and has yet to correct course. Appellant repeatedly filed grievances to no avail. Once the wing commander *found* rights violations, prison officials sat idly and offered no remedies.

Alternatively, Air Force officials either knew or reasonably should have known they were sending Air Force inmates to a facility where the prisoners would be subjected to confinement conditions that have repeatedly been cause for judicial inquiry. A judge advocate in the legal office averred that LCJ inmates typically get 3:1 confinement credit for time spent at the facility, a tacit acknowledgement that the conditions at LCJ are substandard, so much so that they deserve significant credit. The standing 3:1 policy is more than just an acknowledgment of the problem; it shows an intolerable apathy towards the plight of the affected prisoner because Air Force officials believe they can cure unconstitutional confinement practices with credit

rather than by addressing the inhumane conditions to which they subject their Airmen.

Appellant—while he was still subject to these conditions at LCJ—took the time and effort to file grievances at the jail, as well as informal and formal complaints under Article 138, UCMJ, to seek redress. Prison officials did nothing. The wing commander found deficiencies and "granted" the complaint, yet did nothing to ensure the jail fixed anything. The superior commander never responded.

Appellant has satisfied all three components of the *Lovett* test, regardless of how this Court resolves the first granted issue. Even if the deliberate indifference of military personnel cannot be used by appellants to make their *prima facie* case of cruel and unusual punishment on appeal, it is certainly relevant as to the magnitude of the remedy if a *prima facie* case can be made by other means. The unconstitutional confinement conditions at LCJ unlawfully increased the severity of Appellant's sentence, and warrant relief. *United States v. White*, 54 M.J. 469, 472 (C.A.A.F. 2001).

Argument

I.

THE DECISIONS OF MILITARY PERSONNEL SATISFY THE "DELIBERATE INDIFFERENCE" ASPECT OF THE CRUEL AND UNUSUAL PUNISHMENT TEST WHEN THEY REPEATEDLY SEND MILITARY INMATES TO A LOCAL CIVILIAN CONFINEMENT CENTER WITH A HISTORY OF INHUMANE LIVING CONDITIONS FOR INMATES.

Standard of Review

Questions of law are reviewed *de novo*. *United States v. Jessie*, 79 M.J. 437, 440 (C.A.A.F. 2020). The scope and meaning of a statute is a matter of statutory interpretation, which as a question of law, is reviewed *de novo*. *United States v. Gay*, 75 M.J. 264, 267 (C.A.A.F. 2016). The question of what legal standard to apply to a deliberate indifference analysis is a question of law reviewed *de novo*. *Williams v. Mehra*, 186 F.3d 685, 690 (6th Cir. 1999).

Law and Analysis

As a threshold matter, nothing in the text of the Eighth Amendment to the United States Constitution or Article 55, UCMJ, identifies prison officials as the only relevant actors in post-trial confinement claims. Nothing in the text requires such a restrictive reading. Article 55, UCMJ, which prohibits cruel and unusual punishment being inflicted upon "any person subject to this chapter" certainly contemplates that

another "subject to this chapter" may be responsible for said infliction. Perhaps, one "subject to this chapter" may be *most* likely to inflict the prohibited harm. The traditional case law emphasis on the acts and mindset of prison officials is certainly a logical jurisprudential development as they are the ones typically subjecting servicemembers to such conditions and, thus, it is their culpable state of mind amounting to deliberate indifference that matters. However, because the "prison officials" rule is a creature of case law and not of the Constitution or the UCMJ, under suitable circumstances, the appropriate legal test is subject to modification as governing courts establish.

Agency

There are a variety of doctrines under which a party can be held legally responsible for the acts of another, traditionally manifested within the principal/agent relationship. Agency is an association "which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *General Bldg. Contractors Ass'n, v. Pennsylvania*, 458 U.S. 375, 392 (1982) (citing Restatement (Second) of Agency § 1 (1958)). Vertically, *respondeat superior* or vicarious liability "enables the imposition of liability on a principal for the tortious acts of his agent and, in the more common case, on the master for the wrongful acts of his servant." *Id*. (citing Restatement §§

215-216, 219). Horizontally, such agency relationship may be established by contract. *See* Restatement §§15,[7] 16 comment (a).[8]

In a Civil War-era case, the Supreme Court recognized "[a] principal is bound by all that a general agent does within the scope of the business in which he is employed as such general agent." *Butler v. Maples*, 76 U.S. 766, 766 (1869). Moreover, even if the agent did something the principal did not intend, "the principal would still be bound if the agent's acts were within the scope of the business in which he was employed, and of his general agency." *Id*.

Deliberate Indifference

Deliberate indifference is a state of mind "more blameworthy than negligence." *Farmer v. Brennan*, 511 U.S. 825, 835 (1994) (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). Thus, it requires more than a showing of a lack of due care but something less stringent than purposeful or knowing conduct. *Id*. at 835-36. "It is, indeed, fair to say that acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk." *Id*. at 836.[9] The Supreme Court held such officials must "know[] of and disregard[] an

[7] "An agency relation exists only if there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent so to act."
[8] "Agency may result from a contract between the parties."
[9] This Court has defined "recklessly" as follows: "In such a manner that the actor knew

excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id*. at 837. In the context of cruel and unusual punishment claims arising out of confinement conditions, the law has traditionally looked to the actions or inactions of "prison officials" to determine whether a denial of necessities was the product of a culpable state of mind amounting to "deliberate indifference." *Id*. at 828. But the Supreme Court and various federal circuits have applied "deliberate indifference" to non-prison officials in causes of action for violations of constitutional rights.[10]

In *Connick v. Thompson*, the Supreme Court applied the deliberate indifference standard to "municipal actors." 536 U.S. 51, 61 (2011). The case was about a district attorney's potential liability under 42 U.S.C. § 1983 for failing to train his subordinates on the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963), effectively sanctioning a discovery violation under his watch which contributed to a wrongful conviction. *Id*.

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that there was a substantial and unjustifiable risk that the social harm the law was designed to prevent would occur and ignored this risk when engaging in the prohibited conduct." *United States v. Haverty*, 76 M.J. 199, 204-205 (C.A.A.F. 2017) (citing Black's Law Dictionary 1462 (10th ed. 2014)).

[10] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . ." 42 U.S.C. § 1983.

at 54. In the "municipal actor" setting, if the policymakers were on actual or constructive notice that a deficient training program caused city employees to violate a citizen's constitutional rights, "the city may be deemed deliberately indifferent if the policymakers choose to retain that program." *Id*. at 61. With actual or constructive notice, the "policy of inaction" "is the functional equivalent of a decision by the city itself to violate the Constitution." *Id*. at 62 (citing *Canton*, 489 U.S. at 395 (O'Connor, J., concurring in part and dissenting in part)). In other words, a "continued adherence to an approach they know or should know has failed" may constitute deliberate indifference. *Id*. at 62.

In *Board of the County Commissioners v. Brown*, the Supreme Court reviewed another § 1983 claim wherein a plaintiff sued the county for his injuries based on the sheriff's decision to hire the police officer who used excessive force in her arrest. 520 U.S. 397, 399 (1997). The sheriff hired a Deputy Burns, the son of his nephew, despite Burns' record of driving infractions and various misdemeanors to which he had previously pleaded guilty, including assault and battery, resisting arrest, and public drunkenness. *Id*. at 401. The plaintiff's claim was structured around the county's liability for its agent—the sheriff—not conducting an adequate check into Burns' background which would have revealed his prior transgressions. The Court clarified, "Only where adequate scrutiny of an applicant's background would lead a reasonable

policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right can the official's failure to adequately scrutinize the applicant's background constitute 'deliberate indifference.'" *Id*. at 411. For the decision to hire to satisfy the deliberate indifference standard, there must be more than a "mere probability" that any inadequately screened applicant will inflict constitutional injury; the officer must be "highly likely to inflict the *particular* injury suffered." *Id*. at 412 (emphasis in original).

In *Vance v. Rumsfeld*, the plaintiffs—previously and wrongfully detained by military law enforcement—sued, among others, then-Secretary of Defense Donald Rumsfeld for the actions of contracted security guards of National Shield Security. 701 F.3d 193, 196 (7th Cir 2012) (en banc). The plaintiffs alleged the guards violated their constitutional rights by holding them in solitary confinement and using "threats of violence and actual violence, sleep deprivation and alteration, extremes of temperature, extremes of sound, light manipulation, threats of indefinite detention, denial of food, denial of water, denial of needed medical care, yelling, prolonged solitary confinement, incommunicado detention, falsified allegations and other psychologically-disruptive and injurious techniques." *Id*. The court applied deliberate indifference to "public officials." *Id*. at 204. Reviewing Supreme Court precedent,

the court determined "to show scienter by the deliberate-indifference route, a plaintiff must demonstrate that the public official knew of risks with sufficient specificity to allow an inference that inaction is designed to produce or allow harm," ultimately concluding the plaintiffs were unable to meet their threshold burden. *Id*.

Application of Agency and Deliberate Indifference Principles to Military Personnel

Where a contract creates an agency relationship between a civilian confinement facility and the military, an appellant can meet his or her burden to establish "deliberate indifference" by looking to the actions or inactions of *either* prison officials *or* the military personnel that caused the incarceration to occur. That is to say, the "deliberate indifference" of military personnel in directing a military prisoner to a confinement facility where inhumane conditions and a denial of necessities are reasonably certain to occur is independently sufficient for an appellant to make his or her *prima facie* cruel and unusual punishment claim on appeal. This would, in effect, slightly modify the second prong of the *Lovett* test. This is not so much an expansion of the current test as much as a recognition that the law routinely permits legal accountability for "Actor A" based on what "Actor B" does or does not do. Although this purely legal question can be resolved absent a factual application, the facts of this case illustrate the point.

By contract, LCJ became the "agent" of the 23d Security Forces Squadron ("the

principal") located on Moody AFB, Georgia. Of course, that squadron is an Air Force component comprised of Air Force personnel. According to the MOA, the 23 SFS lacks a confinement facility to incarcerate inmates and/or detainees serving sentences or pre-trial confinement. JA at 50. Because of its inadequacies, the Air Force contracted with the local jail to accomplish its jailing on its behalf. The Air Force, in essence, held the keys to the jail. If the confinement facility *was* located on Moody AFB, Air Force officials accomplishing the incarceration would surely be responsible for not inflicting cruel and unusual punishment in violation of the Eighth Amendment and Article 55, UCMJ. By contracting with another entity to do its bidding in that respect (jailing), the Air Force is not permitted to argue "not my jail, not my problem."

What happens at that jail is just as much attributable to the Air Force as it is to LCJ itself. The Air Force cannot enter into a contract with a civilian jail, send inmates there, and then look the other direction while inmates live in unconstitutional conditions. That is the exact type of scienter requirement the Supreme Court has indicated would be sufficient for a finding of deliberate indifference on the part of a non-primary actor, whether it be a municipality, a superior, or an employer. *See generally Farmer, Connick, Brown, Vance supra*. Agency law—by virtue of the contract—puts the actions or inactions of military personnel at issue as if they were the prison officials themselves.

Admittedly, it would be the rare case where an appellant alleging cruel and unusual punishment will be unable to establish deliberate indifference on behalf of prison officials but will be able to do so as to military personnel. But that does not mean the latter is legally unsound. The key is the legal tethering between the principal and the agent that makes them one and the same. In these instances, the military is making a business decision to contract with a civilian confinement facility to accomplish its jailing on its behalf. In fact, as discussed *infra* with regard to the slate of appellate cases *about this very jail* and the military's blithe *de facto* policy to "pay the fine" with 3:1 credit instead of remedying the unconstitutional conditions or contracting with another jail, this case may be one in which the actions or inactions of Air Force officials *alone* are sufficient for an appellant to meet the "deliberate indifference" burden.

The question still remains as to what "deliberate indifference" of military personnel means under post-trial confinement circumstances. Supreme Court and federal circuit case law is instructive as to the appropriate standard to apply. Any, or a combination of, the standards articulated *supra* are suitable frameworks to analyze the deliberate indifference of military personnel. This Court could adopt the "actual or constructive notice" test that the complained of harm will occur. *Connick*, 536 U.S. at 61. Second, the Supreme Court articulated that a "policy of inaction" could yield

municipal liability. *Id*. at 62. Third, this Court could find that an appellant can meet his or her burden by demonstrating "adequate scrutiny" would "lead a reasonable" actor "to conclude that the plainly obvious consequence of the decision" to contract with a particular confinement facility "would be the deprivation of a third party's federally protected right." *Brown*, 520 U.S. at 411. This would require more than a mere probability; it must be highly likely the harm will occur. *Id*. at 412. Finally, this Court may reason an appellant can meet his or her burden by demonstrating the military actor "knew of risks with sufficient specificity to allow an inference that inaction is designed to produce or allow harm." *Vance*, 701 F.3d at 204. Adoption of any of these standards would be faithful with Supreme Court and federal circuit precedent.

There is no negative legal consequence to military personnel or the organization should this Court answer the granted issue in the affirmative. No individual or branch of the armed forces would become subject to civil liability as if this were a § 1983 claim. The only consequences would be holding government actions accountable, deterring future indifference, and providing an appellant another means to argue the same test that has always governed cruel and unusual punishment claims.

If the first granted issue is answered in the negative, Appellant respectfully requests this Honorable Court recognize that, although the deliberate indifference of

military personnel may in and of itself be legally insufficient for an appellant satisfy the second *Lovett* prong, such deliberate indifference is still relevant to the Courts of Criminal Appeals' (CCAs') consideration of what remedy ought to be provided. For instance, if an appellant prevails under the current *Lovett* test in a situation where the deliberate indifference of military personnel caused that incarceration to occur, a more significant remedy would be appropriate to deter future similar action or inaction. *Cf.* Mil. R. Evid. 311(a)(3) (application of the exclusionary rule).

WHEREFORE, Appellant respectfully requests this Honorable Court answer the granted issue in the affirmative and apply that standard in Issue II, or alternatively, remand to the Air Force Court to conduct a new Article 66, UCMJ, review consistent with this opinion.

II.

APPELLANT SUFFERED CRUEL AND UNUSUAL PUNISHMENT FOR 247 DAYS AND NIGHTS AT LOWNDES COUNTY JAIL.

Standard of Review

This Court reviews *de novo* whether an appellant has been subjected to impermissible post-trial confinement conditions in violation of the Eighth Amendment or Article 55, UCMJ, 10 U.S.C. § 855. *United States v. Wise*, 64 M.J. 468, 473 (C.A.A.F. 2007) (citing *White*, 54 M.J. at 471).

Law

In the context of post-trial confinement claims, this Court has "two distinct responsibilities: (1) to ensure that the severity of the adjudged and approved sentence has not been unlawfully increased by prison officials; and (2) to ensure that the sentence is executed in a manner consistent with Article 55, UCMJ, and the Eighth Amendment." *United States v. Guinn*, 81 M.J. 195, 200 (C.A.A.F. 2021) (referencing *White*, 54 M.J. at 472); *see also United States v. Erby*, 54 M.J. 476, 478 (C.A.A.F. 2001); *United States v. Pena*, 64 M.J. 259, 265–66 (C.A.A.F. 2007). A CCA has the authority and "*duty* to ensure that the severity of an adjudged and approved sentence has not been *unlawfully increased by prison officials*." *Guinn*, 81 M.J. at 200 (emphasis in original) (referencing *Erby*, 54 M.J. at 478); *see also Gay*, 75 M.J. at 269. This Court has recognized military prisoners, as opposed to their civilian counterparts, have "no civil remedy for alleged constitutional violations." *White*, 54 M.J. at 472 (citing *United States v. Palmiter*, 20 M.J. 90, 93 n. 4 (C.M.A. 1985) (additional citations omitted)). "Thus, they must rely on the prison grievance system, Article 138, UCMJ, 10 U.S.C. § 938, the Courts of Criminal Appeals, and this Court for relief." *Id*.

Both the Eighth Amendment and Article 55, UCMJ, prohibit cruel and unusual punishment. "[T]he Eighth Amendment prohibits two types of punishments: (1) those

'incompatible with the evolving standards of decency that mark the progress of a maturing society' or (2) those 'which involve the unnecessary and wanton infliction of pain.'" *Lovett*, 63 M.J. at 215 (quoting *Gamble*, 429 U.S. at 102-03). "The Constitution 'does not mandate comfortable prisons,' but neither does it permit inhumane ones." *Farmer*, 511 U.S. at 832 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981)). "[P]rison officials must ensure that inmates receive adequate food, clothing, shelter and medical care, and must 'take reasonable measures to guarantee the safety of the inmates.'" *Id.* at 832 (quoting *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984)).

A violation of a servicemember's Eighth Amendment right can be established by demonstrating:

> (1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to [an appellant]'s health and safety; and (3) that [an appellant] "has exhausted the prisoner-grievance system . . . and that he has petitioned for relief under Article 138, UCMJ."

Lovett, 63 M.J. at 215; *United States v. Miller*, 46 M.J. 248, 250 (C.A.A.F. 1997).

"Denial of adequate medical attention can constitute an Eighth Amendment or Article 55 violation." *White*, 54 M.J at 474. The standard is "reasonable" medical care rather than "perfect" or "optimal" care. *Id.* at 475 (citing *Harris v. Thigpen*, 941

F.2d 1495, 1510 (11th Cir. 1991)). The Eighth Amendment prohibits "deliberate indifference to serious medical needs of prisoners," whether manifested by prison guards "intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." *Gamble*, 429 U.S. at 104-05. In order to state a cognizable claim of medical mistreatment under the Eighth Amendment, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Id.* at 106. "Deliberate indifference" as to prison officials requires the responsible official to be aware of an excessive risk to an inmate's health or safety and disregard that risk. *Farmer*, 511 U.S. at 837.

"A prisoner must seek administrative relief prior to invoking judicial intervention to redress concerns regarding post-trial confinement conditions." *Wise*, 64 M.J. at 469 (citing *White*, 54 M.J. at 472). "This requirement 'promot[es] resolution of grievances at the lowest possible level [and ensures] that an adequate record has been developed [to aid appellate review].'" *Id.* at 471 (alterations in original) (quoting *Miller*, 46 M.J. at 250). An appellant must show that "absent some unusual or egregious circumstance . . . he has exhausted the prisoner-grievance system [in his detention facility] and that he has petitioned for relief under Article 138, UCMJ." *White*, 54 M.J. at 472 (citation omitted).

The Air Force Court reviewed illegal post-trial confinement claims related to confinement conditions at LCJ on at least three occasions in the year-and-a-half before Appellant filed his brief at that court, and has acknowledged illegal confinement conditions occurring at the LCJ since at least 13 years ago. *See United States v. O'Bryan*, No. ACM 39602, 2020 CCA LEXIS 211 (A.F. Ct. Crim. App. Jun. 24, 2020) (unpub. op.);[11] *United States v. Johnson*, No. ACM 39676, 2020 CCA LEXIS 364 (A.F. Ct. Crim. App. Oct. 16, 2020) (unpub. op.) *reversed as to sentence by United States v. Johnson*, 81 M.J. 451 (C.A.A.F. 2021);[12] *United States v. Citsay*, No. ACM 39712, 2020 CCA LEXIS 453 (A.F. Ct. Crim. App. Dec. 18, 2020) (unpub. op.);[13] *United States v. Melson*, No. ACM 36523, 2007 CCA LEXIS 372 (A.F. Ct. Crim. App. Sep. 14, 2007) (unpub. op.) *set aside by United States v. Melson*, 66 M.J. 346 (C.A.A.F. 2008).[14]

In *O'Bryan*, the appellant suffered physical abuse from other inmates during his 56-day stay at LCJ. JA at 134-135. The Air Force Court denied relief, concluding the appellant had not met his burden to demonstrate the prison officials possessed the

[11] JA at 129.
[12] JA at 143.
[13] JA at 173.
[14] JA at 183.

necessary culpable state of mind amounting to deliberate indifference, and that he did not exhaust administrative remedies. JA at 138-140.

In *Johnson*, the appellant spent 33 days at LCJ pretrial and approximately another two months post-trial. JA at 168. His condition complaints included: 1) sharing a single cell and toilet with 16 other prisoners, some of whom were gang members and suffering drug-withdrawal symptoms; (2) suffering physical attacks and injuries from other prisoners; (3) the guards were not located close to his cell and neglected calls for help; (4) cleaning supplies were never made available to clean the toilet; (5) confinement officials withheld his mail; (6) he was prohibited from receiving any visitors until his transfer to military confinement; (7) confinement officials withheld food from him; (8) he was prohibited from going outside for the entirety of his two-month confinement; (9) he was not provided clean clothes; and (10) he had limited opportunities to bathe. *Id*. The Air Force Court denied relief because the appellant had not raised his concerns to prison officials or to his command through the Article 138, UCMJ, complaint system, but instead raised the issue in clemency after having been transferred to a military prison. JA at 170-172. The Air Force Court found that by not filing the appropriate complaints, appellant failed to meet his burden as to deliberate indifference. *Id.* On a related, though different, issue, this Court

reversed as to sentence and remanded for the Air Force Court to conduct further review under Article 66, UCMJ. 81 M.J. at 451.

In *Citsay*, the appellant requested sentence relief for the conditions of his pretrial confinement at LCJ. JA at 175. He spent 50 days at LCJ in pretrial confinement before being transferred to a military facility. JA at 177. Among the complained conditions were that he was not given clean toilet paper, the toilets were full of excrement, and he did not receive his seizure medication. JA at 176. The appellant filed a motion under Article 13, UCMJ, before trial seeking 3:1 confinement credit for his time at LCJ. JA at 177. Trial defense counsel withdrew the motion when the members returned a sentence below the amount of time already spent in pretrial confinement. JA at 179. The Air Force Court concluded that the issue was waived on appeal and did not address the merits of the confinement conditions at LCJ. JA at 180.

Analysis

A. *Dubay* hearing.

In reply before the Air Force Court, Appellant specifically requested a factfinding hearing pursuant to *Dubay* and *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997) (concluding a *Dubay* hearing must be ordered when five predicate conditions are not met). JA at 118-121. Appellant noted that "when reading both briefs side by side, it appears counsel are arguing completely different cases based on

an entirely different factual predicate" and "the facts contained in the various motions to attach from the parties cannot be reconciled with each other." JA at 118. In over three pages of argument, Appellant analyzed how his declaration was sufficiently corroborated by portions of the Government's declarations to overcome the suspicion he was offering hyperbolic or embellished allegations as a self-interested declarant. JA at 118-121. Moreover, the Government's documents were internally inconsistent. *Id*.

The Air Force Court declined Appellant's invitation to order such a hearing, determining that the resolution of factual disputes in Appellant's favor would not result in relief.[15] JA at 15. If this Court is not satisfied with the factual record as it currently sits, it may certainly remand with instructions to order such a hearing. *See United States v. Furth*, 81 M.J. 114, 120 (C.A.A.F. 2021) (Maggs, J., dissenting); *but see Furth*, 81 M.J. at 119 n. 5. The record currently demonstrates Appellant suffered cruel and unusual punishment based on matters properly attached to the record. JA at 38-113.

[15] The Air Force Court did not acknowledge almost any of Appellant's factual assertions in its overview section. *Compare* JA at 12-14 *with Brief on Behalf of Appellant*, dated June 18, 2021 at 2-7.

B. Application of the Cruel and Unusual Punishment Test.

1. Appellant's confinement conditions have resulted in a denial of necessities.

LCJ prison officials denied Appellant necessities during his time there. *See Farmer*, 511 U.S. at 832 ("[P]rison officials must ensure that inmates receive adequate food, clothing, shelter and medical care."). Appellant's complaints stem from the deprivation of basic human necessities: food, water, air, sanitation, and medical care.

a. *Insufficient Food and Water.*

Edible food and clean drinking water are essential to human life. This is so axiomatic that the deprivation of these essentials constitutes *res ipsa loquitur*. By subjecting Appellant to contaminated drinking water and moldy, expired food with insects, body hair, and flakes of rust, Appellant was unquestionably denied necessities. JA at 41-42. Appellant faced a Hobson's choice to either consume unsafe food and moldy debris-laden water, thereby risking further illness, or forgo these hazards and starve. This put Appellant's health in jeopardy, as evidenced by his bout of food poisoning and his alarming 30 pound weight loss. JA at 42.

b. *Cell Conditions and Lack of Sanitation.*

Mirroring the unseemly state of his food, Appellant's cell was also unsanitary and unhealthy, to such a degree that Appellant was denied the necessity of safe and habitable housing. Not only did Appellant live in filth and human waste from other

prisoners (which is a vector for disease and which emits a foul odor), he suffered in pitch darkness for a month as a result of sewage dripping into his cell from the ceiling shorting out his only source of light. *Id*. In that darkness, Appellant could not track and avoid the insects crawling out of the drains into his cell. Without the means to wake up in time to avail himself of cleaning supplies, Appellant could do nothing about the dirt, mold, and mildew covering his cell. JA at 41. Appellant also endured other inmates relieving themselves in his cell because of the inoperable toilets in their cells. *Id*.

c. *Lack of Air and Recreation.*

No one, prisoner or otherwise, should live without access to fresh air. Yet during the entire time Appellant was confined at LCJ, he was never permitted to go outside. JA at 43. He only saw natural light through a skylight in the dayroom. *Id.* He received no opportunity for exercise and could only walk in the dayroom. *Id.* Air Force regulations recognize recreation and exercise as a necessity. *See* JA at 196, para. 11.5 ("[T]he facility will provide recreational and welfare activities which are intended to constructively occupy time and fill the gaps between scheduled details, training, and administrative activities . . . Recreation also helps relieve stress brought on by living in confinement."). Not only was Appellant unable to exercise, he never

took a breath of fresh air, which is even more harmful when the interior air space reeked of human waste.

d. *Insufficient Medical Care.*

LCJ personnel denied Appellant necessary medical care. They stripped him of his lawfully prescribed medicine upon arrival in May 2020. JA at 42. He did not see a physician for almost a month, which meant an individual with chronic orthopedic, mental health, and autoimmune conditions and diseases was dangerously cut off from a health care management program that had previously sustained him. *Id.* Appellant's status as a post-operative orthopedic patient did not prevent officials from withholding pain medication and doctors' visits for rehabilitation of his Achilles tendon. *Id.* They also denied him access to his previously issued medication for depression and anxiety, which he arguably needed more than ever at that time given the increase in his stress and anxiety following his conviction and confinement in unsafe conditions. *Id.* LCJ would not even make a basic accommodation by granting Appellant an extra blanket to alleviate his Raynaud's syndrome, a common-sense, easy demonstration of an adherence to some level of medical acceptability, let alone humane empathy. *Id.*

Raynaud's syndrome causes the patient to suffer in extreme cold, so a simple blanket could make a significant difference to a symptomatic individual.[16]

As this Court discussed in *White*, lack of medical care can form the basis of an Eighth Amendment claim. 54 M.J. at 474. Here, the medical care (or lack thereof) did not merely fail to meet a "perfect" or "optimal" standard, but was objectively unreasonable. *Id.* at 475. Appellant never required perfect care, he simply sought adequate care. Not only did his medical treatment fail to make him better—as is its purpose—it actually made things worse by discarding his continuity of care upon arrival. That is the reason why the MOA between Moody AFB and LCJ requires LCJ to not interrupt the continuation of medication. JA at 53, para. 4.2.14.

2. LCJ prison officials and Air Force personnel have demonstrated a deliberate indifference to Appellant's health and safety, resulting in a denial of necessities.

a. *Prison officials.*

LCJ prison officials responded with deliberate indifference to Appellant's confinement conditions, as evidenced by their failure to remedy any of the above-described denials of necessities for a significant amount of time, if at all. Forcing an inmate to breathe, sleep, and live surrounded by someone else's human waste is

[16] *See* https://www.mayoclinic.org/diseases-conditions/raynauds-disease/symptoms-causes/syc-20363571, last accessed June 22, 2022.

appalling in its own right; but moreover, the uncorrected damage here deprived Appellant of his cell's sole source of light for an entire month. The best a prison official could do in response to Appellant's grievance was to annotate "ok." JA at 87. This apathetic response is fairly indicative of the deliberate indifference infecting the entire LCJ staff. It, indeed, represents a heightened level of scienter above mere negligence that the Supreme Court finds blameworthy. *Farmer*, 511 U.S. at 835-37. It is just not caring.

Medical deliberate indifference is manifested by prison guards "intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." *Gamble*, 429 U.S. at 104-05. That is exactly what happened here. The cavalier attitude of the prison official about Appellant's head wound is evidence of deliberate indifference. LCJ medical staff explicitly instructed Appellant to return to medical for redressing; yet, when Appellant tried to follow this directive, LCJ guards denied his request. JA at 42, 93. A prison guard said that it sufficient to "fix" the problem of Appellant's head wound with a Band-Aid. *Id*.

Evidence of deliberate indifference is further demonstrated in that Appellant's lawfully prescribed medications were pulled from him without sufficient substitute, or any substitute at all for a period of time. JA at 42. Appellant had orthopedic, autoimmune, sleep, and mental health issues go unresolved. *Id.* No responsible LCJ

official could reasonably assert they were unaware of an excessive risk to Appellant's health or safety. *Farmer*, 511 U.S. at 837. By taking away Appellant's mental health medications, LCJ officials disregarded that risk despite their knowledge that confining a new inmate with diagnosed mental health issues without his lawfully-prescribed stabilizing medication would result in severe harm to his mental and possibly physical health. If LCJ officials now claim they never knew of the risk posed by these medical deprivations, that alone is deliberate indifference. It is patently unreasonable to strip a prisoner of medication and never consider the consequences of that action or do anything about it. The MOA even seeks to prohibit this from happening precisely because of the disastrous consequences that can flow from abruptly cutting someone off from their medications. *See* JA at 53, para. 4.2.14.

As will be discussed below with regard to Air Force officials, the history of cases arising from this particular jail is, in and of itself, additional, damning evidence of deliberate indifference by LCJ staff. At a certain point, which now has been surpassed, too many prisoners are presenting inhumane living conditions and treatment at this jail far too often. The jail has been put on notice each time and has yet to correct course. *See* JA at 170 ("This is not the first time this court has seen an appellant bring forth a post-trial confinement claim from [LCJ] . . . . Interestingly, [O'Bryan] was incarcerated at [LCJ] just months before Appellant . . . was transferred

there. Our court also reviewed an affidavit from Captain JC in *O'Bryan*.") (citations omitted); *see also* JA at 178 (another case before the Air Force Court where Captain JC testified in an Article 13, UCMJ, illegal pretrial punishment motions hearing for regarding the conditions at LCJ). Captain JC is the correctional officer who, in Appellant's case, provided responses to the wing commander's Article 138, UCMJ, informal complaint inquiry and again on appeal. JA at 62-63, 67-68, 85-99. Captain JC all of LCJ administration have been on notice for years and nothing has changed, as evidenced, in part, by the striking similarities between Appellant's claims and those made in *O'Bryan*, *Johnson*, and *Citsay*.

And in this case, the wing commander found rights violations and granted the complaint in part. The commander wrote "I *find* the [MOA with LCJ] *affords* [Appellant] *the relief requested* with respect to sanitary living accommodations, free prompt medical care, timely prescribed medications, and access to an unrecorded phone line for attorney-client communications. Therefore, I grant [Appellant] request for relief in part. . . ." JA at 59. This was a finding. The commander *found* Appellant was afforded the relief requested. The only circumstance that would yield affording relief and granting the complaint would be conditions deserving of relief. If the conditions were suitable, there would be no remedy to afford and nothing to grant. Because it was not his jail, the remedy he granted was a charge to the jail to fix the

problems. But the jail cured nothing. JA at 43. That is a culpable state of amount amounting to deliberate indifference as to prison officials.

b. *Air Force officials*.

Not only did LCJ prison officials act with deliberate indifference, so too did Air Force officials. At the unit and wing level, Moody AFB officials—whether it be the security forces commander, staff judge advocate, or wing commander—would surely be aware of LCJ's utterly deficient track record. There is credible and probative evidence that the base legal office was well aware. *See* JA at 56 ("While I can't confirm 100% that [Appellant] is receiving 3:1 credit, that is the typical amount of credit I've seen for our military members who have spent time at Lowndes, so I am fairly confident stating he'll receive that as well."). Confinement credit, generally, is not "typical," and surely not 3:1 credit for *all military members* who go to the exact same jail, without any consideration of case-specific facts. That a "typical amount" exists is evidence of actual knowledge of and deliberate indifference to inhumane conditions affecting Appellant's health and safety. Worse than a "policy of inaction," Air Force officials apathetically adopted a policy of penance to absolve themselves of the habitual abuses of LCJ officials and the consequences of their "continued adherence to an approach"—confining Airmen at LCJ—"they know or should know has failed." *Connick*, 531 U.S. at 62.

The staff judge advocate, a security forces commander, or a wing/installation commander—whoever established this policy—decided the right thing to do was cavalierly toss confinement credit at a situation rather than cure unconstitutional conditions at the jail, contract with another jail, or seek fiscal authorization to construct a facility at the base. This policy is akin to choosing to pay a fine instead of curing the underlying conditions which give rise to the need to pay the fine in the first place. At bottom, this is the exact scienter the case law requires for a finding of deliberate indifference. This is not a result of mere negligence or even a situation where the Air Force contracted with a jailor who unforeseeably caused Appellant harm. This is apathy; the Air Force did not care enough to do better.

As to the judge advocates, they would have been on "actual or constructive" notice of the confinement conditions at LCJ. *Connick*, 531 U.S. at 61. Judge advocates have a duty to know and research the law. When CCA opinion after opinion come out naming *this particular jail* associated with the base, the judge advocates assigned *to that installation* were duty-bound to not turn a blind eye to what was increasingly evident.[17] They "should have known better." *United States v Horne*, 82 M.J. __, No. 21-0360/AF, 2022 CAAF LEXIS 356, *15 (C.A.A.F. May 13, 2022).

[17] Ostensibly, a judge advocate assigned to the legal office at Moody AFB would have represented the Government as trial counsel during the motions hearing in *Citsay*,

There have been too many documented instances of insufficiency for Air Force officials to have been blind to them, and if they were, that too shows a deliberate indifference to Appellant's plight. Here, LCJ's history would lead a reasonable military official to conclude that the "plainly obvious" consequence of the decision to continue to send military inmates to LCJ would be the deprivation of those inmates' constitutionally and statutorily protected rights. *Brown*, 520 U.S. at 411. Indeed, it was more than a "mere possibility" Appellant was entering substandard conditions; it was "highly likely." *Id*. at 412. This situation—like *Brown*—is akin to an employer's review of a prospective employee's disciplinary record and discovering the likelihood of future harm based on past performance. That this particular confinement facility, associated with this particular base and command, continues to encounter these issues without taking remedial action is perhaps the best evidence of deliberate indifference an appellant would ever be able to produce for an appellate court's consideration short of an explicit acknowledgment of indifference. In other words, they willingly assumed an appreciable risk military prisoners would suffer from unconstitutional conditions by continuing to send Airmen to LCJ and even adopted a curative measure in the form of confinement credit, credit Appellant never received.

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where the appellant asserted the conditions of his pretrial confinement amount to illegal pretrial punishment in violation of Article 13, UCMJ. JA at 178.

Reasonably inferring that Moody AFB officials would have been well aware of LCJ's track record, it would be incumbent on them to thoroughly and consistently check on the prison and the Airmen housed there to ensure compliance with legal and humane standards, and then mitigate and rectify any problems encountered. That did not happen. It should also generate motivation to transfer a military inmate to an approved military confinement facility in a relatively short amount of time. Although there was no requirement for Appellant to have been transferred within the suggested 14 days, that he lay in squalor for 247 days and nights, even after raising complaints, is evidence of institutional neglect and deliberate indifference.

Moreover, when Appellant specifically raised his concerns to the wing commander through an informal complaint under Article 138, UCMJ, the commander found various violations, "granting" the complaint in part, yet doing nothing to improve Appellant's conditions. JA at 59. While the commander answered the complaint as required by the UCMJ and Air Force regulations, his response is, oddly, both consequential and insignificant at the same time. On the one hand, the commander found rights violations as to, *inter alia*, sanitary living accommodations, free prompt medical care, and timely prescribed medications, but on the other hand, did not actually do anything to ensure those things happened. Nothing about Appellant's confinement conditions changed as a result of this hollow response.

Appellant's conditions were just as bad the day he left as when he arrived 247 days earlier. JA at 43. The purpose of Article 138, UCMJ, complaints is to actually resolve the underlying issues, not merely acknowledge that the complainant has a "right" to not have their rights infringed and ignored.

After granting the complaint, the wing commander and his staff undertook an affirmative obligation to actually ensure LCJ did its part to fix the defective practices. The granting of the complaint without ensuring future compliance is the same "set and forget" attitude Air Force personnel exhibited after signing the MOA in the first place. A commander learning of wrongs being committed against Airmen, acknowledging the wrongs, but failing to take appropriate action to remedy the wrongs paints a stark picture of *deliberate* indifference. As articulated in *Vance*, these Air Force officials knew of risks with sufficient specificity to allow an inference that inaction is designed to produce or allow harm. 701 F.3d at 204.

3. Appellant exhausted the prisoner grievance system and filed complaints under Article 138, UCMJ.

Appellant did everything within his power to resolve his concerns "at the lowest possible level." *Wise*, 64 M.J. at 471. Specifically at LCJ, Appellant lodged complaints about lack of medical treatment, conditions of his cell, sanitation, and food. JA at 48-49, 87-99. Several of Appellant's medical concerns are substantiated by his

first sergeant, MSgt AL, who wrote a declaration in response to the informal Article 138, UCMJ, complaint. JA at 60.

As noted above and as required by military case law, Appellant filed complaints under Article 138, UCMJ. First, he complained to the base commander. JA at 46-47. As further required by regulation, Appellant filed a formal complaint with the general court-martial convening authority. JA at 72-73. Whereas at least the wing commander responded to the informal complaint, the general court-martial convening authority never responded to the complaint as required by law. JA at 79. As a logical extension of the failure to respond, no condition or concern was addressed. The failure to respond to the formal complaint serves as a de facto denial, and at the very least, ripens Appellant's claim of error on appeal.

4. Appellant suffered cruel and unusual punishment at LCJ in violation of the rights afforded him by the Eighth Amendment and Article 55, UCMJ.

Appellant suffered for 247 days and nights. Appellant has established all three prongs of the required test. The horrid sanitation, unsafe food, lack of recreation and fresh air, and denial of adequate medical care constitute, individually and collectively, a deprivation of necessities. Both prison and Air Force officials responded to these clearly inhumane conditions with culpable negligence amounting to deliberate indifference, evidenced by both a failure on the part of anyone to rectify his conditions

upon complaint as well as the long track record at this particular jail of Air Force inmates complaining of substandard care.

At the Air Force Court, Appellant requested 3:1 credit for all time spent at LCJ, the "typical amount," of credit according to the Moody AFB legal office. JA at 56. That there is even a "typical amount" demonstrates Air Force officials are patently aware of the inhumane conditions at LCJ yet they repeatedly send Airmen like Appellant back to this appalling facility, while routinely handing out confinement credit as a facile remedy rather than fix the problems. Appellant's suffering is directly attributable to LCJ and Air Force official's apathy. This connection between the harm suffered and the culpable state of mind of those who permit the harm to occur and endure is exactly what deliberate indifference is all about.

CONCLUSION

WHEREFORE, Appellant respectfully requests this Honorable Court conclude Appellant suffered from cruel and unusual punishment for 247 days and nights and remand to the Air Force Court to reassess the sentence consistent with this opinion.

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CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Appellate Government Division on June 22, 2022.

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CERTIFICATE OF COMPLIANCE WITH RULES 24(d) and 37

1. This brief complies with the type-volume limitation of Rule 24(c) because it contains 11,132 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a proportional typeface using Microsoft Word Version 2016 with Times New Roman 14-point typeface.

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