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. 22-0123AF

Crim. App. Dkt. No. ACM 39948

REPLY BRIEF ON BEHALF OF APPELLANT

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Pursuant to Rule 19(a)(7)(B) of this Honorable Court's Rules of Practice and Procedure, Staff Sergeant (SSgt) Travis D. Pullings, the Appellant, hereby replies to the Government's Answer (Gov. Ans.) concerning the granted issues, filed on July 29, 2022.

ARGUMENT

1. The constitutional and statutory prohibitions against the infliction of cruel and unusual punishment do not evaporate at the entry of judgment.

Even servicemembers who are serving a sentence as punishment for their convicted offenses are entitled to the protections and guarantees of the United States Constitution and the federal statutory code. It is beyond debate that the prohibitions against cruel and unusual punishment in the Eighth Amendment and Article 55, Uniform Code of Military Justice (UCMJ), apply to servicemembers. *See United States v. Matthews*, 16 M.J. 354, 386 (C.M.A. 1983). Indeed, this Court has held that "in enacting Article 55, Congress 'intended to grant protection covering even wider limits' than 'that afforded by the Eighth Amendment.'" *Id*. (citing *United States v. Wappler*, 9 C.M.R. 23, 26 (C.M.A. 1953).

Even if Appellant's efforts within the first granted issue amount to slight expansion to the second prong of the well-recognized judicial test for cruel and unusual punishment,[1] its legal underpinnings—which the Government does not

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

counter in its Answer—merely seek to hold Government actors accountable when they violate an inmate's constitutional and statutory rights. Moreover, this "accountability" is not to be conflated with "liability" in the traditional sense; the test would only permit an appellant an opportunity to meet his or her burden to demonstrate cruel and unusual punishment by another means. The deliberately indifferent military official would suffer no harm as a result. The appellant would still, as always, maintain the burden to satisfy all three prongs of the *Lovett* test.

The Government, on the other hand, has taken a position which seeks to—and if endorsed by this Court, would—strip all appellants of those constitutional and statutory rights if such violations happen to occur any time after the entry of judgment. By the Government's measure, the Eighth Amendment, and the greater protections Article 55, UCMJ, affords servicemembers, would cease to exist after the arbitrary date a military judge is available to sign the entry of judgment. Such a proposition is not supported by the text of the UCMJ or the case law that interprets it. If case law has traditionally looked to the "deliberate indifference" of a governmental actor as the requisite state of mind in a cruel and unusual punishment claim, the Government's proposed interpretation would permit *intentional* infliction after the entry of judgment; that cannot stand.

2. <u>This Court should decline the Government's invitation to overrule its precedents in cases "like" *Erby* and *Pena*.</u>

a. *Congress—presumed to know the law—could have, but did not, amend Articles 66 and 67, UCMJ, in such a manner as to expressly prevent military appellate courts from reviewing claims and granting relief when an appellant suffers from cruel and unusual punishment during the execution of the sentence.*

The Court of Criminal Appeals (CCA) derives its jurisdiction from Article 66, UCMJ. For a case properly referred to it and subject to the qualifying conditions of Article 66(b), UCMJ:

> [T]he Court may act only with respect to the findings and sentence as entered into the record under section 860c of this title (article 60c) [10 USCS § 860c]. The Court may affirm only such findings of guilty as the Court finds correct in law, and in fact in accordance with subparagraph (B). The Court may affirm only the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved.

Article 66(d)(1)(A), UCMJ, *Manual for Courts-Martial, United States* (2019 ed.) (*2019 MCM*).

In this 2019 version of Article 66, UCMJ, Congress only made slight modifications to conforming language from the previous version of Article 66, UCMJ, found in the *Manual for Courts-Martial, United States* (2016 ed.) (*2016 MCM*). The only difference between the two versions of the statute is the *2016 MCM* version referred to the "findings and sentence as approved by the convening authority," whereas the *2019 MCM* version referred to the "findings and sentence as entered in

the record under" Article 60c, UCMJ (the entry of judgment). *Compare* Article 66(c), UCMJ (*2016 MCM*) *with* Article 66(d)(1)(A), UCMJ (*2019 MCM*). The Government concedes this change was "not a material difference." Gov. Ans. at 15 n.1.

Notably, Congress *did not* change the core function of the CCA: that it may only act with respect to findings and sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved. As this Court noted in *United States v. Kelly*, Congress has made numerous changes to the Code over the years, to include limiting the convening authority's post-trial power, but the core of Article 66, UCMJ, has remained intact. 77 M.J. 404, 407 (C.A.A.F. 2018). Congress is presumed to know the law. *Id*. at 407-408 (citing *United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979) ("It is reasonable to assume that Congress was aware of the existence of such military law when performing its constitutional task to make laws for the armed forces."); *see also Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law....")).

As such, it is fair to presume that Congress was well-aware of this Court's long-standing precedent on reviewing post-trial confinement claims. Had it desired to limit a military appellate court's review of post-trial confinement conditions to just those included in the record prior to the entry of judgment, it would have explicitly said so.

But it did not. Accordingly, this Court should continue to apply its longstanding jurisprudence on Eighth Amendment and Article 55, UCMJ, claims, until Congress says otherwise. *See Kelly*, 77 M.J. at 408.

b. *Articles 66 and 67, UCMJ, and the statutory scheme to which those statutes belong, permit the CCA and this Court to review claims of cruel and unusual punishment in post-trial confinement arising after the entry of judgment*.

Alternatively, although the Government is generally correct in noting that "[j]udicial inquiry into the meaning of an unambiguous statute begins and ends with the plain language of the statute" (Gov. Ans. at 23); here, the statutory provision could be considered ambiguous. "Ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more difference senses." 2A NORMAN J. SINGER ET AL., SUTHERLAND ON STATUTORY CONSTRUCTION § 45.2 at 13 (7th ed. 2007). There are at least two different understandings of the phrase "the [] sentence as entered into the record under section 860c of this title." Does this phrase solely confine appellate jurisdiction to the words listed on the entry of judgment and anything that occurs prior to its signing, or does appellate jurisdiction to review the adjudged and approved sentence on said document take into account the sentence *as executed*? The latter is a more plausible interpretation.

The Government's interpretation of this statutory provision is Congress provided the CCA jurisdiction to review a post-trial confinement claim arising before

entry of judgment, but none that arise after. This narrow and restrictive reading does not take the entire statutory scheme into account. A fundamental canon of statutory construction is "that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Kelly*, 77 M.J. at 406-07 (citation omitted). Consequently, "'a reviewing court should not confine itself to examining a particular statutory provision in isolation.'" *United States v. McPherson*, 73 M.J. 393, 399 (C.A.A.F. 2014) (Baker, C.J., dissenting) (quoting *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000). "'The meaning -- or ambiguity -- of certain words or phrases may only become evident when placed in context.'" *Id*. (quoting *Food and Drug Admin.*, 529 U.S. at 132-33).

Article 66(d)(1)(A), UCMJ, references Article 60c, UCMJ—the entry of judgment. The entry of judgment shall include the statement of trial results and any modification based on the convening authority's post-trial action. Article 60c(a)(1)(A), UCMJ; Article 60c(a)(1)(B)(i). The statement of trial results shall set forth the sentence. Article 60(a)(1)(B), UCMJ. Therefore, the entry of judgment will contain the adjudged sentence as modified or approved by the convening authority. This means the CCA has jurisdiction to review the sentence. But appellate review of a sentence has never been so rigidly construed as to look only to the sentence as written on a piece of paper or announced at the court-martial or the sentence as executed before a certain date; it has always considered how that sentence is implemented during its

execution without regards to when/how the case gets sent to the CCA. In other words, Article 66, UCMJ, review considers not just *that* a sentence was imposed (i.e., a reprimand) or the quantity of that imposition (i.e., eight years confinement), but rather *how* that sentence is executed *in toto*.

A servicemember "cannot be subjected to a sentence greater than that adjudged" by the court-martial. *United States v. Stewart*, 62 M.J. 291, 294 (C.A.A.F. 2006) (citation omitted). Convening authorities may not amend an adjudged sentence in a manner that increases the severity of the punishment. *United States v. Carter*, 45 M.J. 168, 170 (C.A.A.F. 1996). Either of these would make the sentence incorrect in law. It is only logical to conclude that if an adjudged sentence cannot lawfully be increased—either formally by the convening authority or functionally in its implementation—it follows that subjecting a servicemember to confinement conditions amounting to cruel and unusual punishment would render the sentence incorrect in law. Making such a judgment is a core CCA function, one which also Congress afforded this Court with its comparable jurisdiction in Article 67(c)(1), UCMJ.

In Appellant's case, the convening authority approved eight years of confinement. JA at 32. The convening authority did not approve eight years of solitary confinement, or eight years of daily physical abuse in confinement. The Government's strained reading of Article 66, UCMJ, would require such an explicit

acknowledgement on the entry of judgment, or at least facts in the record to that effect prior to the entry of judgment, to permit the CCA or this Court to review the claim. A plain reading of the contextual statutory scheme demonstrates the CCA and this Court are authorized and required by statute to review how the days, months, and years of Appellant's confinement sentence are *experienced* by Appellant.

Article 55, UCMJ, explicitly prohibits the infliction of cruel and unusual punishment. Cruel and unusual punishment, as recognized by the Supreme Court and this Court, certainly can occur in post-trial confinement. *Farmer v. Brennan*, 511 U.S. 825 (1994); *United States v. White*, 54 M.J. 469, 472 (C.A.A.F. 2001). Within the military justice system, the CCA is the body most capable of enforcing the prohibition against cruel and unusual punishment in post-trial confinement, and in the event of lengthy post-trial confinement, the only enforcement mechanism. Considering CCA jurisdiction springs into existence typically with a sentence of six months or greater (Article 66(b)(3), UCMJ), and the entry of judgment would presumably occur in less time than that, it is hard to imagine Congress's chosen language signals an intent to gut Article 55, UCMJ, any time after the entry of judgment—there is no evidence that Congress temporally qualified the applicability of Article 55, UCMJ. Relatedly, Article 66(d)(1)(A), UCMJ, cannot reasonably be read to *require* the CCA to consider a cruel and unusual punishment claim before the entry of judgment but *prohibit* the consideration of the exact same claim from the exact same confinement facility a day

later. A military judge signs the entry of judgment at his or her convenience; an appellant's constitutional and statutory rights do not live or die with a military judge's availability to sign a document.

The Government's interpretation of Article 66, UCMJ, as to claims of cruel and unusual punishment in post-trial confinement, would also have consequences for the imposition of other components of the sentence. For instance, restriction to a specified area or hard labor without confinement can only be executed *after* the convening authority decides on action and the military judge signs the entry of judgment. Article 57(a)(6), UCMJ. Such a statutory interpretation would prevent the CCA from reviewing a claim that an appellant was starved while serving an on-base restriction or that he was brutally beaten during hard labor without confinement. Under the Government's interpretation, the CCA would be powerless in such situations, preventing it from fulfilling the "awesome, plenary, *de novo* power of review." *Kelly*, 77 M.J. at 406 (citing *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)). The courts would not have "*carte blanche* to do justice." *Kelly*, 77 M.J. at 406 (citing *United States v. Claxton*, 32 M.J. 159, 162 (C.M.A. 1991)). Such a narrow reading keeps justice out of reach for those at the mercy of the United States' immense carceral power.

The Government's statutory interpretation creates yet another quagmire with existing case law. As articulated in *United States v. Jessie*, a litigant may "supplement

the record when deciding issues that are raised by materials in the record." 79 M.J. 437, 442 (C.A.A.F. 2020). So long as any recently convicted appellant mentions any current confinement condition or references, by name, the confinement center they will be moving to in the future when submitting matters pursuant to R.C.M. 1106, he or she would be able to supplement the record after the entry of judgment and fully present an assignment of error alleging cruel and unusual punishment in post-trial confinement occurring after the entry of judgment. Doing so would not alleviate the "burden" on the CCA. Gov. Ans. at 13, 24, 26.[2]

A more plausible reading of Article 66(d)(1)(A), UCMJ, in its plain and natural terms—but also within the context of the statutory scheme—is that Congress gave the CCA jurisdiction to review a sentence to determine whether it is correct in law, both as announced and reflected on the entry of judgment (i.e., whether the sentence exceeds that which is allowed under the MCM) *and* the way in which that sentence is effectuated (i.e., the real-life application of the sentence) across the lifespan of that sentence. If that is *not* what the statute's words mean, the term "correct in law" has little practical application; rare would be the case that a sentence exceeding the maximum authorized punishment makes its way to the CCA's front doors. Every

[2] The Government has not specifically called for line of cases permitting record supplementation to be overruled. Closing one "*Jessie* exception" would merely cause the two exceptions to meld into one, thus creating no real substantive change.

word in a statute must be given meaning. *Alaska Dep't of Envtl. Conservation v. E.P.A.*, 540 U.S. 461, 489 n.13, (2004) (citations omitted). A CCA's review of the announced *and applied* sentence for "correctness in law" gives Article 66, UCMJ, meaning.

c. *Even if this Court concludes Articles 66 and 67, UCMJ, do not permit the CCA and this Court to review claims of cruel and unusual punishment in post-trial confinement occurring after the entry of judgment, the appellate decisions establishing those rules are firmly rooted and established, fully entitling them to stare decisis.*

Even if Articles 66 and 67, UCMJ, by their plain language, do not provide a CCA or this Court jurisdiction to review post-trial confinement claims of cruel and unusual punishment occurring after the entry of judgment, such precedents that *do* establish that legal principle may remain as "fully entitled to the benefit of *stare decisis*" because they have become established." *Jessie*, 79 M.J. at 445 (quoting *Flood v. Kuhn*, 407 U.S. 258, 282, (1972) (internal quotations and alterations omitted)).

Stare decisis "provides that 'adherence to precedent is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *See United States v. Blanks*, 77 M.J. 239, 242 (C.A.A.F. 2018) (referencing *United States v. Sills*, 56 M.J. 239, 242 (C.A.A.F. 2002); *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). This Court considers the

following factors when determining if a prior decision should be overruled: whether the prior decision is unworkable or poorly reasoned; any intervening events; the reasonable expectations of servicemembers; and the risk of undermining public confidence in the law. *Id*. at 242 (citing *United States v. Quick*, 74 M.J. 332, 336 (C.A.A.F. 2015) (footnote omitted)). "A party must present a 'special justification' for us to overrule prior precedent." *Id*. (citing *Kimble v. Marvel Ent., LLC*, 135 S. Ct. 2401, 2409 (2015)). The Government has provided no special justification; moreover, an analysis of the four *stare decisis* factors weighs in favor of adherence to well-established precedent.

First, the question of whether a decision is unworkable or poorly reasoned is problematic from the beginning. In its "Summary of the Argument" section, the Government leads off with "This Court should overrule its precedent in cases like *United States v. Erby*, 54 M.J. 476 (C.A.A.F. 2001) and *United States v. Pena*, 64 M.J. 259 (C.A.A.F. 2007)." Gov. Ans. at 12. Later in its analysis section, it asks this Court to overrule *Erby* and *Pena*, but no others. Gov. Ans. at 15. Curiously, nowhere in its brief does the Government call for this Court to overturn *United States v. White*. *White* and *Erby* were companion cases, both decided the same day, with *White* addressing the Article 67, UCMJ, component of appellate jurisdiction over post-trial confinement cruel and unusual punishment claims while *Erby* addressed the Article 66, UCMJ, jurisdictional aspect of the same issue. The *Erby* Court not only adopted, but rested

on, the *White* Court's reasoning; *Erby* does not itself lay out its own independent rationale for appellate jurisdiction over cruel and unusual punishment claims. 54 M.J. at 478 ("This Court addressed the jurisdictional issue in [*White*] . . . . This authority under Article 66(c) is virtually identical to our Court's authority to review the sentence under Article 67(c).").

It is hard to square how the Government can call for *Erby* to be overruled for being poorly reasoned when *Erby*'s reasoning stems from *White*, which the Government appears to spare. If the reasoning of the *White* Court was flawed, the Government should have asked for *White* to be overturned. It did not. The Government identifies no aspect of *Erby* that was poorly reasoned. *Pena* never considered whether the CCA or this Court lacked jurisdiction to entertain the cruel and unusual punishment claim. 64 M.J. at 265-267. The *Pena* Court granted the issue and substantively reviewed the claim, denying the appellant relief. *Id*. at 265. Therefore, *Pena* has no reasoning as to appellate jurisdiction for this Court to question. The Government generally argues the decisions are poorly reasoned because the proposition they establish is counter to its preferred statutory interpretation. Gov. Ans. at 22-23. Finally as to this factor, the decisions are not "unworkable;" rather, the CCAs and this Court have been reviewing these claims for decades without a discernible strain on judicial economy or the military justice system as a whole. To

the contrary, it is the Government's proposal—nullifying the protections of the Eighth Amendment and Article 55, UCMJ, after the entry of judgement—that is unworkable.

Second, as to intervening events spurring judicial review of prior decisions, the Government argues Congress's slight change to Articles 66 and 67, UCMJ, "makes the timing ripe to consider whether *Erby* and *Pena* still apply in light of those changes." Gov. Ans. at 21. Earlier in its brief, however, the Government correctly noted, "While Article 66 has slightly changed with the Military Justice Act of 2016, there is not a material difference." Gov. Ans. at 15 n.1. It is difficult to reconcile how an immaterial amendment provides the requisite extraordinary rationale for overruling precedent. Congress only replaced the term "as approved by the convening authority" with "as entered into the record under [Article 60c]." A non-substantive conforming amendment does not make the time "ripe" to overrule precedent. The statutory language regarding the CCA's duty to only approve a sentence that is correct in law has endured for decades and applies in full force today.

Third, the Government argues that appellants have no reasonable reliance on these precedents because this Court "telegraphed" its willingness to overrule them. Gov. Ans. at 24. Appellant respectfully disagrees this Court telegraphed any intent to overrule its precedent when it said, "We may decide in a future case whether [these precedents] should be overruled, *modified, or instead allowed to stand* as 'aberration[s]' that are 'fully entitled to the benefit of *stare decisis*' because they have

become established." *Jessie*, 79 M.J. at 445 (emphasis added). The Government asserts that a majority of this Court announced, "[T]he scope of a CCA's responsibilities under Article 66(c) are not properly predicated on the plain language of that statute." Gov. Ans. at 16 (citing *United States v. Guinn*, 81 M.J. 195, 204 (C.A.A.F. 2021)). The full quote from that opinion is, "*[I]t certainly may be argued that this Court's precedents regarding* the scope of a CCA's responsibilities under Article 66(c) are not properly predicated on the plain language of that statute." *Guinn*, 81 M.J. at 204. The concurring opinion spoke with an equally judicious tone: "I agree with the Court that *it may be argued*, from the plain meaning of its text, that Article 66(c), UCMJ, does not give a CCA jurisdiction to address post-trial confinement conditions that are not part of the approved sentence." *Id*. at 205 (Maggs, J., concurring) (emphasis added).

Here, the Government is using these selective partial comments to assert an unreasonable claim that all appellants have lost their ability to reasonably rely on this Court's precedent, including cases that have been on the books for decades. As highlighted on opening brief, this Court's precedent underscores the reliance, *especially* for these types of claims. Brief on Behalf of Appellant, dated June 22, 2022 at 27 (App. Br.). 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*. (emphasis added). The Court's own words signal *reliance* on the CCA and this Court's ability to review claims such as these. That is what *stare decisis* is all about.

Finally, the Government argues that the risk to public confidence in the law as a result of overturning these precedents is "low," and, in fact, argues the opposite: that "public confidence in the law might be undermined by the status quo because there is little relief a CCA can provide other than reduction of the adjudged sentence," a remedy which is "not in the best interest of society" in this case. Gov. Ans. at 24. The Government highlights the nature of the offenses to which Appellant pleaded guilty as justification for this proposition. Neither the text of the Eighth Amendment nor Article 55, UCMJ, permit cruel and unusual punishment if a servicemember has been convicted of a particular subset of the criminal code. Appellant's personal constitutional and statutory rights are no less significant or applicable if he had been convicted of failing to show up to work on time in violation of Article 86, UCMJ. To this point, the Government still adheres to the Army Court's opinion in *Jessie* for the proposition that an appellant can file suit in federal district court for injunctive or declaratory relief. Gov. Ans. at 25 (citing *United States v. Jessie*, No. 20160187, 2018

CCA LEXIS 609, at *18-19 (A. Ct. Crim. App. Dec. 28, 2018). *White*, however, directly refutes such contention. 54 M.J. at 472.

In sum, the Government has failed to establish the requisite factors this Court considers when asked to overrule its cases. This Court should be especially reluctant to do so when the party requesting a major jurisprudential development fails to identify any "special justification" for its request. *Blanks*, 77 M.J. at 242.

d. *Because the Government could have, but did not, certify the question of whether the text of Articles 66 and 67, UCMJ, permit CCAs and this Court to review post-trial confinement claims, it should not be allowed to present that argument in its Answer*.

In its Answer, for the very first time, the Government asks this Court to overrule decades of jurisprudence confirming the jurisdiction of military appellate courts to review post-trial confinement claims. Gov. Ans. at 12-13, 18-25. Appellant filed a motion to strike this portion of the Government's Answer. *See* Motion to Strike, dated August 4, 2022. The Government opposed this action, and on August 29, 2022, this Court denied Appellant's motion. Notwithstanding that ruling, this Court still has discretion to disregard the Government's argument to overrule precedent. This Court should exercise that discretion for two reasons.

First, the Government did not raise its case law concerns with the Air Force Court of Criminal Appeals (Air Force Court). *See Brief on Behalf of the United States*, dated July 19, 2021. The Air Force Court did not question its jurisdiction to review

the claim. JA at 1-16. The Government did not author an Answer to Appellant's Supplement to the Petition for Grant of Review, instead opting to waive its opportunity. *See* Waiver Letter, dated March 11, 2022. The Judge Advocate General did not certify this issue for review pursuant to Article 67(a)(2), Uniform Code of Military Justice (UCMJ). It is appropriate to consider whether the Government waived its ability to make this claim before this Court.

Second, utilization of the cross-appeal doctrine is inappropriate under the circumstances. The general rule for presentation of an issue to an appellate court is "a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party." *United States v. Am. Ry. Exp. Co.*, 265 U.S. 425, 435 (1924). However, the cross-appeal doctrine "may allow the Government to defend a favorable judgment below on any ground even if the Government did not cross-appeal." *United States v. Nelson*, __ M.J. __, 2022 CAAF LEXIS 523, at *26 (C.A.A.F. July 22, 2022) (Maggs, J., concurring in the judgment) (citations omitted).

The cross-appeal doctrine "does not make consideration of the prevailing party's arguments mandatory when the prevailing party does not file a cross-appeal and the issue was neither argued before nor addressed by the lower courts." *United States v. Steen*, 81 M.J. 261, 270 (C.A.A.F. 2021) (Maggs, J., dissenting). Further,

utilization of this doctrine may not be used to "lessen[] the rights of [the] adversary." *Am. Ry. Exp. Co.*, 265 U.S. at 435.

In *Steen*, Judge Maggs would have utilized the cross-appeal doctrine because "the CGCCA ruled on the issue of admissibility, both parties thoroughly addressed the issue in their briefs before this Court, and the Government is not asking for anything more than an affirmance of the judgment below." 81 M.J. at 271 (Maggs, J., dissenting). Here, however, the Government is asking for more than affirmance of the judgment below. The Government is asking this Court to overrule generations of precedent by reinterpreting the meaning of Articles 66 and 67, UCMJ on an issue the Air Force Court did not question—its jurisdiction. And in doing so, the Government seeks to lessen the rights of the adversary, namely Appellant—and all future appellants—from ever being able to raise a cruel and unusual punishment claim occurring after the entry of judgment when they are serving the confinement sentence adjudged by a court-martial. There is far more at stake than affirming the Air Force Court decision in Appellant's case.

3. <u>Omissions in the Government Answer.</u>

a. *The Government Answer does not engage with any facts Appellant properly attached to the record.*

The Government's Statement of Facts does not acknowledge a single fact proffered by Appellant. Gov. Ans. at 2-11. Instead, the Government exclusively relies

on assertions made before the Air Force Court via its Motion to Attach. JA at 81-113. This perpetuates the problem that began with the appellate litigation at the Air Force Court[3] and endured through its opinion[4] and on opening brief before this Court.[5] In Issue II, the critical threshold issue is: what are the facts? The Air Force Court did not engage in factfinding; it merely asserted that accepting Appellant's facts would not yield relief. JA at 15. As Congress did not give this Court factfinding capability within Article 67, UCMJ, this Court is left with the consequences of the Air Force Court electing to neither find facts nor order a *Dubay*[6] hearing. *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). Pursuant to *Ginn*, a CCA "is required" to order a fact-finding hearing when certain conditions are not met. *Id*. Contrary to the Air Force Court's reasoning, if it accepted Appellant's proffered facts, it—or this Court—would be compelled to adjudicate the claim in Appellant's favor. At this stage of the appellate litigation, Appellant respectfully requests the following from this Court: 1) apply the cruel and unusual punishment test based on facts asserted by Appellant if this Court believes the Air Force Court accepted those facts; or, 2) remand with instructions to order a *Dubay* hearing.

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[3] JA at 118-121.
[4] JA at 11-16.
[5] App. Br. at 32-33.
[6] *United States v. DuBay*, 37 C.M.R. 411, 413 (C.M.A. 1967).

b. *The Government Answer does not engage with Supreme Court or federal circuit case law, or the basic legal principles attendant to the first granted issue in this case*.

The Government's Answer to the first granted issue—whether the decisions of military personnel are relevant to a cruel and unusual punishment claim—does not attempt to engage with any source of law which counter Appellant's primary argument. Gov. Ans. at 18-28. Appellant's argument germinated from United States Supreme Court case law, federal circuit case law, federal statutes, and basic contract and agency principles as recognized in the Restatements of the Law. App. Br. at 16-26. The Government mentions none of these sources to distinguish them or designate their inapplicability, nor does it offer additional legal sources to argue Appellant's reasoning is unsound. Instead, it attempts to argue in its Answer that all relevant, well-established case law should be overruled, and that policy arguments should persuade this Court to reject Appellant's suggestion. However, "[p]olicy typically is not law." *United States v. Kohut*, 44 M.J. 245, 250 (C.A.A.F. 1996) (citing *United States v. Sloan*, 35 M.J. 4, 9 (C.M.A. 1992); *see also Jessie*, 79 M.J. at 445 ("We think policy arguments should not guide our decision in this case . . . .").

To the extent the Government offers policy as a reason why Appellant's proposition should not be endorsed, the policy arguments are unsound. The Government acknowledges the association of military officials is a "very specific

category of individuals" (Gov. Ans. at 25); yet, in the next sentence, it argues expanding the test will "absolutely create a greater burden on CCAs and this Court. . . ." Gov. Ans. at 26. If the court is already engaging in the analysis, such presentation of matters is no different than what CCAs have done for decades. In a paragraph entirely comprised of questions, the Government asks how the CCA will fulfill its function. *Id*. The answer is simple—it will do what it has always done reviewing these claims. *Cf. United States v. Chin*, 75 M.J. 220, 223 (C.A.A.F. 2016) (dismissing the Government's concerns over a CCA piercing a waiver provision to conduct its Article 66, UCMJ, duties, "Contrary to the Government's claims of Armageddon, there is nothing new about today's decision."). If Appellant's proposed standard is adopted, the CCA simply will review evidence to determine whether the sentence, as applied, is correct in law. Appellant does not, as the Government suggests, request a *per se* rule that if prisoners are confined at LCJ then they are able to meet their deliberate indifference burden. Gov. Ans. at 27. By contrast, Appellant is only requesting this Court acknowledge the basic legal principle that the actions of one actor can be attributed to another actor by virtue of a legal relationship and tethering between the two. App. Br. at 12, 17-18. Then, the CCA will determine if an appellant can satisfy his or her burden on all three *Lovett* prongs, as has always been the case.

The Government argues that "[j]ust because multiple prisoners at a facility make similar complaints does not mean they are all true." Gov. Ans. at 28. But

determining the truth in a dense and voluminous record of trial is precisely what Congress created the CCA to do. Reviewing some documents and either accepting their content as true or dismissing them because they are implausible or contradicted by other evidence is within the scope and duty of the court in the first place. *See, e.g.,* Article 66(d)(1)(A), UCMJ (factual sufficiency review providing "the Court may . . . determine controverted questions of fact. . . .").

The procedural history from LCJ and the facts of this case are significant to the analysis. Certainly, a series of allegations in and of themselves, do not corroborate each other. But common-sense dictates that where there is smoke, there is often fire. When appellants who are housed at the jail at different times over a matter of years and do not know each other make astonishingly identical allegations, there is likely some truth behind what they are saying. And in this case, with the chief of military justice at the legal office acknowledging a standing policy of 3:1 credit for *all* LCJ prisoners, and the wing commander "granting" Appellant's Article 138, UCMJ, complaint—which acknowledges deficiencies at the facility—there is more than enough in this record to counter the Government's insinuation that prisoners will burden the CCAs with sham allegations. JA at 56, 59. For generations, the CCAs and their predecessors have been entrusted to distill fact from fiction. Moreover, although the Government continues to argue the test is unworkable because of the "sheer number of issues it would raise," this Court has swiftly rejected such contention in the

past. *See Guinn*, 81 M.J. at 203-04 (acknowledging "a CCA's responsibilities under Article 66(c) cannot properly be viewed as being unduly onerous" because for forty years, CCAs have been tasked with evaluating claims made pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982)). This Court has routinely trusted the CCAs to fulfill their responsibilities; this is no different.

Despite its policy arguments, the Government simply did not engage with the substance of the first granted issue. When this Court exercises its discretionary review power to grant an issue raised by an appellant, the Government must be called on to substantively engage in the matter. That did not happen in this case; this Court should answer the first granted question in Appellant's favor.

c. *The Government Answer does not cite or borrow the reasoning from the decision below.*

The Government, departing from standard and usual practice, elected to not cite the Air Force Court opinion below on even a single occasion or borrow its underlying reasoning in its Answer. Perhaps this decision implicitly acknowledges that even the Government does not believe the Air Force Court satisfied its Article 66, UCMJ, duties in this case regarding fact finding, or the Government implicitly concedes the lower court's sparse reasoning in denying the cruel and unusual punishment claim is flawed or lacking.

4. The recent dissent in *United States v. Johnson* illustrates the importance of this Court's decision in this and future cases.

Last term in *United States v. Johnson*—another case involving confinement conditions at LCJ—this Court remanded to the Air Force Court to accomplish its Article 66, UCMJ, review because, after concluding the appellant was not entitled to relief for a cruel and unusual punishment claim, it did not also determine whether the conditions of confinement rendered the sentence inappropriately severe. 81 M.J. 451, 452 (C.A.A.F. 2021) (mem.); *see also* JA at 143-172; App. Br. at 31-32. In one sentence of a split opinion on remand, and after Appellant filed his opening brief before this Court, a majority of the Air Force Court in *Johnson* found the conditions of confinement did not render the sentence inappropriately severe and affirmed the sentence. *United States v. Johnson*, No. ACM 39676 (rem), 2022 CCA LEXIS 413, at *6 (A.F. Ct. Crim. App. Jul. 19, 2022) (unpub. op.).

One judge dissented. *Id*. at *6-10 (Meginley, J., dissenting in part and in the result). He noted this Court's grant of review in Appellant's case has caused him to reconsider his previous determination that Appellant did not suffer from cruel and unusual punishment, and he could not properly conduct the analysis without the benefit of this Court's decision in Appellant's case. *Id*. at *9. He would have ordered a *Dubay* hearing to resolve inconsistencies between declarations, "particularly Captain JC's affidavit." *Id*. Judge Meginley also included a footnote cataloguing an

extensive history of the Air Force Court reviewing claims arising from local civilian jails Moody AFB contracted with. *See id*. at *10 n. 2 (listing seven other cases).

What sets Appellant's case apart from other allegations of cruel and unusual punishment violations is the extensive history at LCJ itself. The history may help substantiate the allegations themselves, but more importantly, the repeated nature of the allegations and the appellate decisions that follow generates evidence of deliberate indifference—both of prison *and* military officials. Moody AFB personnel continue to send military inmates to LCJ because the MOA calls for it, despite their actual or constructive knowledge of the deplorable conditions. That is evidence of apathy to, and deliberate indifference of, the conditions to which Airmen will foreseeably be subjected. In Appellant's case, that foreseeable harm did, in fact, occur.

The extensive history of the jail is also evidence of deliberate indifference on behalf of prison officials. LCJ is put on notice every single time an appellate court identifies it or when Government counsel contact prison officials for affidavits to beat down yet another claim. It is Captain JC who, time and time again, responds to these allegations, but his credibility has been so tarnished at this point that a sitting CCA judge has called for Captain JC's sworn testimony. *Johnson*, 2022 CCA LEXIS 413 at *9 (Meginley, J., dissenting); *see also* App. Br. at 7 n. 2 (questioning Captain JC's credibility). Captain JC's credibility matters because the Government's ability to prevail in this appeal relies on him. Appellant is not arguing for "*per se* deliberate

indifference" when military personnel are sent to a particular confinement facility. Gov. Ans. at 49. Rather, Appellant merely asks this Court to recognize a universal legal principle in a well-established test derived from Supreme Court case law.

Especially if this Court answers the first granted issue in the affirmative, Appellant has met his burden to establish all three elements of the cruel and unusual punishment test. Even if that issue is answered in the negative, the facts currently in the record establish such a claim as to Captain JC and prison officials. It is time for Appellant to be awarded the 3:1 credit every other Airman receives when he or she has the misfortune of being convicted and sentenced at Moody AFB. This is also why, as discussed *supra*, the way in which a sentence is actually implemented is the relevant appellate inquiry. It has never been, nor should it be now, that only the words on the entry of judgment or evidence in the record before the entry of judgment are subject to appellate review.

WHEREFORE, Appellant respectfully requests this Honorable Court answer Issues I and II in the affirmative, reverse as to the sentence, and remand to the Air Force Court to conduct a new Article 66, UCMJ, review consistent with this opinion. If this Court is not satisfied with the factual record, Appellant respectfully requests this Court remand with instructions to order a *Dubay* hearing.

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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 September 8, 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 6,823 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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