IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES,	)	BRIEF ON BEHALF OF
Appellant,	)	THE UNITED STATES
	)	
v.	)	
	)	Crim. App. Dkt. No. 39948
Staff Sergeant (E-5),	)	
TRAVIS D. PULLINGS, USAF,	)	USCA Dkt. No. 22-0123/AF
Appellee.	)	

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TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

ISSUES PRESENTED:

I.

IN ADDITION TO PRISON OFFICIALS, CAN 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?

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 (AFCCA) reviewed this case under Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d) (2019). This Court has jurisdiction to review the above-captioned case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

STATEMENT OF THE CASE

The United States generally accepts Appellant's statement of the case. (App. Br. at 1-2.)

STATEMENT OF FACTS

Appellant's Convicted Offenses

Appellant pleaded guilty to two specifications of sexual assault of a child over the age of 12, but who had not attained the age of 16, and three specifications of sexual abuse of a child in violation of Article 120b, UCMJ. (JA at 033-034.) Appellant committed these crimes against his step-daughter when she was between the ages of 14 and 15 years old. (JA at 003.) Specifically, he penetrated her vulva with his finger and tongue, caused her to touch his penis with a sex toy, and showered naked and watched pornography with her. (Id.) Appellant committed these acts on divers occasions for approximately a year. (JA at 033-034.)

As a result of Appellant's conviction, Appellant was sentenced to confinement for 13 years, reduction to E-1, total forfeitures, and a mandatory dishonorable discharge. (JA at 032-033.) In accordance with his pretrial

agreement, the convening authority reduced his confinement to eight years. (JA at 032.) And, per Appellant's clemency request, the convening authority disapproved the adjudged forfeitures for the benefit of Appellant's minor child. (Id.)

Confinement Conditions as Lowndes County Jail

Military personnel sentenced to confinement at Moody Air Force Base (AFB) are confined at Lowndes County Jail (LCJ) because Moody AFB lacks a confinement facility. (JA at 050.) Confinement of military personnel at LCJ is governed by a memorandum of agreement (MOA). (JA at 050.) Appellant began serving his confinement at LCJ on 27 May 2020. (JA 011-012.) When individuals arrive at LCJ for confinement, they are met by an "intake nurse to go over their medical history and their medical needs." (JA at 101.) Appellant had his intake appointment the day he arrived at LCJ. (Id.) At that appointment, Appellant identified two medical issues – sleep apnea and arthritis – that would need medical care. (Id.) During the initial intake, Appellant did not report that he was on any prescribed medications. (JA at 101.) Following Appellant's intake appointment, the LCJ medical department reached out to Moody AFB to confirm Appellant's medical history. (Id.) Moody AFB confirmed that Appellant was not on any maintenance medication. (Id.)

Appellant received medical care and attention throughout his time at LCJ. On 29 June 2020, despite his assertions at his intake appointment the month before, Appellant reported to the LCJ medical department that he was on

prescription medications for his mental health. (Id.) Two days later, Appellant met with a medical provider who prescribed him medication that day. (Id.) During his continued care, Appellant identified issues with the medication and, on 13 August 2020, a medical provider prescribed him new medications to address the issues. (Id.) Two months later, the medical provider adjusted Appellant's medication dosage. (Id.)

On 23 June 2020, Appellant sustained a "half-quarter sized cut to his head." (JA at 102.) The LCJ medical department were called to the scene, evaluated the injury and provided medical care. (JA at 065, 102.) The LCJ medical department determined that follow up treatment was not required. (Id.) On 24 June 2020, Appellant filed a request for sick call. (JA at 093.) In the request, Appellant claimed a nurse believed that Appellant should be brought back to medical for his wound based on Appellant's complaints. (JA at 093.) But, in the sick call request, Appellant alleged a prison guard chose not to bring Appellant to the medical department. (JA at 093.) On 10 August 2020, Appellant's request was reviewed, and he was told to fill out a request for sick call if he needed further assistance. (JA at 093.) Appellant did not request sick call again for this issue.

Three months after his arrival at LCJ, Appellant notified the LCJ medical department that he had a diagnosis for Raynaud's Syndrome. (JA at 101.) During this visit, Appellant requested an extra blanket due to the symptoms of Raynaud's Syndrome. (Id.) At that appointment, Appellant was prescribed medication to

alleviate his symptoms. (Id.) Approximately a month and a half later, Appellant requested to speak with a provider regarding his symptoms from Raynaud's Syndrome and again asked for an extra blanket. (Id.) Two days later, a medical provider checked his vitals, found them within normal range, and asked whether Appellant had any other symptoms. (Id.) Appellant had none. (Id.) Medical providers ordered Appellant medication following the visit. (Id.)

LCJ provided Appellant with medical care on each of the eleven occasions he requested:

Date Requested	**Date Seen**
27 June 2020	29 June 2020
16 July 2020	18 July 2020
26 July 2020	27 July 2020
6 August 2020	8 August 2020
19 August 2020	22 August 2020
14 October 2020	15 October 2020
20 October 2020	21 October 2020
27 October 2020	31 October 2020
4 November 2020	5 November 2020
15 November 2020	17 November 2020
4 December 2020	5 December 2020

(JA at 065.)

With regard to the food preparation and maintenance of the facility, LCJ followed health and safety guidelines for food services. (JA at 085.) Similar to public dining facilities in the state of Georgia, the LCJ kitchen must be inspected by Lowndes County Health Inspectors, and LCJ consistently passed those inspections. (JA at 062.) All water coolers were cleaned daily by a food service management company, under the supervision of the contracted kitchen staff. (JA at 062.) If incidents of mold were reported, they were addressed immediately. (Id.)

The facility contracted a cleaning service to clean and maintain common areas. (Id.) Incarcerated individuals were provided cleaning supplies to maintain their own cells and shower areas on a daily basis. (Id.) To combat any potential pest problem, the facility contracted with Ace Pest Control to dispense pest control chemicals on a monthly basis in the "common areas of the jail, the jail kitchen, and periodically the inmate housing areas." (Id.)

On 17 September 2020, Appellant filed a maintenance request to have a leak from the ceiling fixed which had disabled the light fixture in his cell. (JA at 087.) Appellant was initially provided with a bucket to capture the water. (Id.) The request was resolved four days later on 21 September 2020. (Id.) Appellant did not file any additional maintenance requests following his initial request on this

date. (JA at 087-099.)

The MOA specified, and LCJ permitted, inmates to receive recreation time in the recreation yard for three hours a week. (JA at 052, 085.) The recreation yard was inside but had one open air window, approximately five feet by ten feet that "allow[ed] in fresh air and sunlight." (Id.)

Clemency

On 5 June 2020, Appellant submitted a clemency request in which he requested the convening authority disapprove his reduction in grade, grade, or in the alternative, defer the adjudged reduction in grade until the convening authority's action. (*Clemency Request*, dated 5 June 2020.) Appellant also requested the convening authority waive forfeitures of pay and allowances. (Id.) The convening authority denied Appellant's request to defer his reduction in grade and disapproved the adjudged forfeitures for the benefit of Appellant's minor child. (JA at 032.)

Appellant did not raise any concerns regarding his confinement conditions in his clemency request. (*Clemency Request*, dated 5 June 2020.)

Appellant's Grievances

LCJ allowed incarcerated individuals to submit written requests and grievances. While at LCJ, Appellant filed thirteen grievances or requests.

Type	Reason	Date Filed	Date Resolved
Mail	Appellant missed a video call, and he or his sister was charged for the call.	6 Jun 2020	9 Jun 2020 Remarks: The request was forwarded.
Sick Call	Appellant requested additional medical attention after he was seen by a provider for a cut on his head. Appellant also complained that a guard refused to take him back to medical despite a nurse's instructions that Appellant be returned to medical.	24 Jun 2020	10 Aug 2020 Remarks: Appellant was instructed to fill out a sick call if he needed further assistance.
Med Non Sick	Appellant requested cushioned shoes.	26 Jun 2020	29 Jun 2020 Remarks: Appellant was told to put in a sick call so he could be evaluated.
Med Non Sick	Appellant requested a medical release authorization form.	20 Aug 2020	26 Aug 2020
Maintenance	Water dripped into Appellant's cell from a fire sprinkler in the	17 Sep 2020	21 Sep 2020

	ceiling due to a clogged toilet in the above cell. The water disabled the lighting Appellant's cell.		
Classification	Requested a new pair of shoes.	6 Oct 2020	7 Oct 2020
Grievance	Reported a fellow inmate for theft.	1 Nov 2020	20 Nov 2020
Grievance	Requested a property release form.	2 Nov 2020	5 Nov 2020
Grievance	Reported a fellow inmate for theft.	4 Nov 2020	4 Nov 2020
Inmate Funds	Requested to withdraw money from his jail funds to send to his sister.	18 Nov 2020	25 Nov 2020
Classification	Requested a phone call with his attorney.	23 Nov 2020	24 Nov 2020 Remarks: The officer explained only the captain can approve attorney phone calls.
Med Non Sick	Appellant stated he had a reaction to his blood pressure medication. He also requested an extra blanket profile because he had difficulty sleeping due to his	3 Dec 2020	7 Dec 2020 Remarks: Appellant saw a provider on 7 Dec 2020.

	Raynaud's Syndrome.		
Classification	Requested a new pair of shoes.	23 Dec 2020	6 Jan 2021 Remarks: The request was forwarded.

(JA at 087-099.)

Only three of the grievances/requests Appellant filed correspond with his appeal: (1) the maintenance request for the water leaking into his cell; (2) the medical non-sick request regarding a reaction to his blood pressure medication and an extra blanket; and (3) the sick call request regarding Appellant's head wound. (Id.)

Article 138, UCMJ, Complaint

On 15 December 2020, after 202 days at LCJ, Appellant filed an informal Article 138, UCMJ, complaint with his wing commander. (JA. at 046.) In the complaint, and relevant to this appeal, Appellant alleged the following wrongs were committed against him: failure to provide sanitary living quarters, edible food, drinkable water, prescribed medication, and adequate medical care. (JA at 046.) To support the Article 138, UCMJ, complaint, Appellant attached a memorandum from the defense paralegal who detailed a conversation he had with Appellant. (JA at 048.) In the memorandum, and relevant to this appeal, the following complaints were highlighted: (1) the conditions of the facility were inhospitable due to "issues with black mold in the water coolers and shower[]"

facilities, and insects were present in shower areas and drains; (2) Appellant requested an additional blanket and was denied; (3) Appellant had been prescribed medication for his mental health and Raynaud's Syndrome that was seized upon arrival at LCJ, and he went without his prescribed medications for a month; (4) When Appellant did receive his medications they did not work effectively; (5) Appellant was not taken to medical after he injured his head. (JA at 048-049.)

Appellant's wing commander looked into Appellant's allegations and determined that LCJ afforded Appellant "the relief requested with respect to sanitary living conditions [and] timely prescribed medications." (JA at 059.) As a result, in his response to the Article 138, UCMJ, complaint, the wing commander wrote that Appellant's request for relief was granted, in part. (Id.)

On 25 January 2021, Appellant filed a formal Article 138, UCMJ, complaint with the 9 AF/CC that was identical to his previous complaint. (JA at 072.) However, at the time Appellant made the formal complaint, the convening authority who had the authority to act upon Appellant's Article 138, UCMJ, complaint was the 15 AF/CC. (JA at 106.) As of 12 July 2021, the 15 AF/CC had not received such a complaint from Appellant. (Id.)

<u>Appellant's Allegations on Appeal</u>

Appellant has categorized his allegations under a denial of necessities: (1) Insufficient food and water; (2) Cell Conditions and Lack of Sanitation; (3) Lack of Air and Recreation; and (4) Insufficient medical care. These allegations will be

addressed in more detail under Issue II.

SUMMARY OF ARGUMENT

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), which allow for military appellate courts to review post-trial confinement conditions that occurred after the entry of judgment based on matters entirely outside of the record. Such precedents goes beyond the plain language of Article 66(d), UCMJ, which provides the Court of Criminal Appeals (CCAs) "may act only with respect to the findings and sentence as entered into the record under section 860c of this title (article 60c)." Article 66(d), UCMJ, 10 U.S.C. § 866(d) (2019 ed.). They also go beyond the plain language of Article 67(c)(1), UCMJ, which states "the Court of Appeals for the Armed Forces may only act with respect to the findings and sentence set forth in the entry of judgment, affirmed or set aside as incorrect in law" by the CCA. Article 67(c)(1), UCMJ.

Post-trial confinement conditions that occur after the entry of judgment are plainly not part of the sentence that military appellate courts are authorized to review. When the above precedents are analyzed under the doctrine of *stare decisis*, the prior decisions are both unworkable and poorly reasoned. United States v. Andrews, 77 M.J. 393, 399 (C.A.A.F. 2018). The precedents are poorly reasoned because the opinions do not take into account the plain language of the statute, and the precedents are unworkable because claims under Article 55,

UCMJ, or the Eighth Amendment that are based purely on material outside the record cannot always be easily adjudicated.

Even if this Court does not choose to overrule its prior precedent, this Court should not expand the portion of the Lovett cruel and unusual test, which analyzes whether a prison official has a "culpable state of mind" that amounts "to deliberate indifference to [the appellant's] health and safety." United States v. Lovett, 63 M.J. 211, 215 (C.A.A.F. 2006). That element should not be expanded to include military personnel who send incarcerated military personnel to a confinement facility with an alleged history of inhumane living conditions because it would go against this Court's reluctance to create additional law outside the plain language of Article 66(d), UCMJ. *See* United States v. Jessie, 79 M.J. 437, 444-446 (C.A.A.F. 2020); United States v. Willman, 81 M.J. 355, 360 (C.A.A.F. 2021). Further, such an expansion is unworkable in practice and would place a significant burden on the CCAs.

Finally, in this case, Appellant did not suffer from cruel and unusual punishment in violation of Article 55, UCMJ, or the Eighth Amendment. Appellant failed to meet his burden to prove that for each of his alleged deficiencies there was "an objectively, sufficiently serious act or omission" which resulted in the denial of necessities, "a culpable state of mind on the part of prison officials amounting to deliberate indifference to [Appellant's] health and safety," and that he "exhausted the prisoner-grievance system . . . and that he has petitioned

for relief under Article 138, UCMJ, 10 USC § 938 [2000]" Lovett, 63 M.J. at 215.

ARGUMENT

I.

BASED ON THE PLAIN LANGUAGE OF ARTICLES 66(d) and 67, THIS COURT SHOULD DECLINE TO REVIEW POST-TRIAL CONFINEMENT CONDITIONS SUCH AS THESE THAT OCCURRED AFTER THE ENTRY OF JUDGMENT. BUT IF THIS COURT DOES REVIEW THE POST-TRIAL CONFINEMENT CONDITIONS IN THIS CASE, THE DECISIONS OF MILITARY PERSONNEL CANNOT SATISY THE "DELIBERATE INDIFFERENCE" ASPECT OF THE CRUEL AND UNUSUAL PUNISHMENT TEST WHEN MILITARY INMATES ARE SENT TO A LOCAL CONFINEMENT CENTER WITH AN ALLEGED HISTORY OF INHUMANE LIVING CONDITIONS FOR INMATES.

Standard of Review

"The scope and meaning of Article 66(c) 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) (citation omitted).

Law

The Court of Criminal Appeals "may act only with respect to the findings and sentence as entered into the record under section 860c of this title (article 60c)." Article 66(d), UCMJ. Similarly, Article 67(c)(1), UCMJ, states "the Court of Appeals for the Armed Forces may only act with respect to the findings and sentence set forth in the entry of judgment, affirmed or set aside as incorrect in

law" by the CCA. Article 67(c)(1), UCMJ. When reviewing sentences, a service court "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, *on the basis of the entire record*, should be approved." Article 66(d), UCMJ.[1] (emphasis added.)

Despite the plain language of the statutes, this Court's precedent allows for CCAs to consider matters entirely outside the record with respect to Article 55, UCMJ, or Eighth Amendment claims of post-trial confinement conditions that occur after convening authority action for pre-MJA 2016 cases or, now, after the entry of judgment. *See* Erby, 54 M.J. 476; Pena, 64 M.J. 259. The Eighth Amendment prohibits "cruel and unusual punishments" from being inflicted. U.S. Const. amend. VIII, while Article 55, UCMJ, states

> [p]unishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by a court-martial or inflicted upon any person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited.

[1] While Article 66 has changed slightly with the Military Justice Act of 2016, there is not a material difference. The current version of Article 66, UCMJ, states the CCAs "may act only with respect to the findings and sentence as entered into the record under section 860c of this title (article 60c)." Article 66(d), UCMJ, 10 U.S.C. § 866(d) (2019 ed.). The version that predated it stated "Courts of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2016 ed.).

Article 55, UCMJ.

Despite the above precedent, this Court has more recently recognized the argument that the holdings in Erby and Pena regarding "the scope of a CCA's responsibilities under Article 66(c) are not properly predicated on the plain language of that statute." United States v. Guinn, 81 M.J. 195, 204 (C.A.A.F. 2021). In United States v. Jessie, this Court highlighted that the opinions in Erby and Pena "did not address the language of Article 66(c) that limits a CCAs review to the 'entire record'" nor did the opinions identify a "limiting principle regarding the scope of a CCA's review." 79 M.J. at 444. This Court explained that "if a CCA's review authority is limitless, then much of the restrictive wording in Article 66(c) would be superfluous." Id. This Court also identified that the opinions in Erby and Pena failed to address the contrary holding in United States v. Fagnan. Id. In Fagnan, this Court held that the words "entire record" in Article 66(c), UCMJ, included the record of trial and allied papers. 12 C.M.A 192, 194 (C.M.A. 1961).

A servicemember is entitled, both by statute and the Eighth Amendment, to protection against cruel and unusual punishment. See United States v. Matthews, 16 M.J. 354, 368 (C.M.A. 1983); Art. 55, UCMJ. To demonstrate an Eighth Amendment violation for conditions of confinement, an appellant must show:

> (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 [the appellant's] health and safety; and (3) that [the appellant] has exhausted the prisoner-grievance system . . . and that he has petitioned for relief under Article 138, UCMJ, 10 USC § 938 [2000].

Lovett, 63 M.J. at 215 (alteration in original) (footnotes omitted) (internal quotations omitted). In Lovett, the appellant argued he had faced cruel and unusual punishment while in post-trial confinement. Lovett, 63 M.J. at 212. Specifically, the appellant argued he was exposed to variety of conditions at his confinement facility including, but not limited to: vermin in the dining room, meals with stale food and milk beyond its expiration date, high iron and lead content from the faucet that tainted his drinking water, and extended lockdown periods which prevented him from being able to exercise. Id. at 214-215. This Court explained the Eighth Amendment prevents 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.'" Id. at 215 (citing to Estelle v. Gamble, 429 U.S. 97, 102-103 (1976). This Court assumed, without deciding, that even if the appellant's claims were true and he exhausted his grievance system, he stilled failed to meet the second element and demonstrate that there was "a culpable state of mind on the part of prison officials" which amounted to a "deliberate indifference" to the appellant's health and safety. Id. Since the appellant in Lovett only made unspecified complaints to prison officials and felt as though nothing changed, this

Court held he failed to meet his burden and establish his Eighth Amendment claim. Id. at 216.

Analysis

Based on the plain language of Articles 66(d) and 67(c)(1), UCMJ, this Court should overrule Erby and Pena and not consider Appellant's claims, which are based entirely on information outside the record and on alleged post-trial confinement conditions which are not a part of the sentence entered into judgment. However, if this Court chooses to consider matters outside the record, this Court should not expand the test from Lovett to include military personnel in the "deliberate indifference" aspect of the test.

1. This Court should overrule United States v. Erby and United States v. Pena, with respect to allowing military appellate courts to review post-trial confinement complaints that occurred after the entry of judgment and are not part of the sentence entered into judgment.

Appellant argues that because the "prison officials" rule under Lovett "is a creature of case law and not of the Constitution or the UCMJ . . . the appropriate legal test is subject to modification as governing courts establish." (App. Br. at 17.) However, Appellant's push to expand the test under Lovett overlooks this Court's express reluctance to further expand its decision under Jessie and the holdings in Erby and Pena.

In Jessie, this Court held a CCA cannot typically consider matters outside of the record, except "when doing so is necessary for resolving issues raised by

materials in the record." 79 M.J. at 444. And while this Court made an exception for Article 55, UCMJ, and Eighth Amendment claims, this Court expressly stated its decision "cabins but does not overrule Erby or Pena with respect to Article 55, UCMJ, or the Eighth Amendment. 79 M.J. at 444-445. This Court also reiterated its reluctance in United States v. Willman and stated the correct approach is to "adhere to the rule announced in Fangan rather than to further expand the exceptions set forth in cases like Erby and Pena. 81 M.J. at 360.

While Appellant's expansion of the Lovett test falls within this Court's narrowly defined exception for Article 55, UCMJ, and Eighth Amendment claims, it still aims to increase the scope of matters outside the record that a CCA can consider. And given the plain language of Article 66(d), UCMJ, and this Court's recognition of the discord between precedents, this Court should overrule its previous holdings which allow for CCAs and this Court to consider post-trial confinement conditions occurring after the entry of judgment. Expanding the test in Lovett to include military personnel is the type of further expansion this Court warned in Willman "would further erode older precedents like Fagnan." 81 M.J. at 360.

This Court has stated that it "may decide in future cases whether [the] holdings with respect to such [Article 55 or Eighth Amendment] claims should be overruled, modified, or instead allowed to stand as 'aberration[s]' that are 'fully entitled to stare decisis' because they have become established." Jessie, 79 M.J. at

445 (citing Flood v. Kuhn, 407 U.S. 258, 282 (1972)). In a concurring opinion, Judge Maggs suggested "a party [could] ask this Court to reconsider [its] precedents" with regards to claims which deviate from the plain meaning of Article 66(c), UCMJ "in a future case." Guinn, 81 M.J. at 205 (Maggs, J. concurring). This is that case.

Here, rather than following the plain language of the UCMJ, Appellant is attempting to further expand the scope of military appellate review to allow, or even require, military appellate courts to consider whether military personnel were deliberately indifferent to post-trial confinement conditions arising well after the entry of judgment. Such an expansion of this Court's existing case law is not predicated on the plain language of the statute, this Court so should take this opportunity to overrule its holdings that allow military appellate courts to review post-trial confinement conditions not entered into judgment as part of the sentence.

This Court analyzes requests to overrule its prior precedents under the doctrine of *stare decisis*. United States v. Cardenas, 80 M.J. 420, 423 (C.A.A.F. 2021) (citing United States v. Blanks, 77 M.J. 239, 241-42 (C.A.A.F. 2018)).

Stare decisis encompasses two distinct concepts: (1) vertical *stare decisis* – the principal that courts "must strictly follow the decisions handed down by higher courts," and (2) horizontal *stare decisis* – the principal that "an appellate court[] must adhere to its own prior decisions, unless it finds compelling reasons to overrule itself." *See* Andrews, 77 M.J. at 399 (quoting United States v. Quick, 74

M.J. 332, 343 (C.A.A.F. 2015) (Stucky, J. dissenting)). "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." Id. (internal quotation marks omitted) (quoting Blanks, 77 M.J. at 242). But, the application of *stare decisis* is, "not an inexorable command." Andrews, 77 M.J. at 399 (citing Blanks, 77 M.J. at 242).

This Court will consider the following factors in evaluating the application of *stare decisis*: "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." Andrews, 77 M.J. at 399 (citing Blanks, 77 M.J. at 242) (internal quotation marks omitted) (citation omitted).

Here, the factors weigh in favor of overruling precedents which allow CCAs to review post-trial confinement conditions occurring after the entry of judgment. First, Congress has slightly changed the text of Article 66 and Article 67, UCMJ, which makes the timing ripe to consider whether Erby and Pena still apply in light of those changes. Next, the opinions in Erby and Pena were poorly reasoned. As this Court identified in Jessie, the opinions in Erby and Pena "did not address the language of Article 66(c), UCMJ, that limits a CCA's review to the 'entire record'" nor did the opinions address the contrary holding in Fagnan. 79 M.J. at 444. Not only do these precedents fail to reconcile the plain language of the statute which

only allows a CCA to look at matters in the "entire record," but they also go beyond what Articles 66(d) and 67(c)(1), UCMJ, permit a CCA or this Court to act on. Article 66(d), UCMJ, states a CCA "may act *only* with respect to the findings and sentence as entered into the record under section 860c of this title (article 60c)." Article 66(d), UCMJ. (emphasis added). The appellant in Erby, complained about his "post-trial confinement conditions that were not in any way a part of the approved sentence," Guinn, 81 M.J. at 205 (Maggs, J. concurring). Similarly here, Appellant is complaining about his post-trial confinement conditions that were not in any way part of the sentence entered into judgment. In United States v. White, this Court held that it has "jurisdiction under Article 67(c) to determine on direct appeal if the adjudged and approved sentence" was "executed in a manner that offends the Eighth Amendment or Article 55" and to ensure the "severity of the adjudged and approved sentence" had not been unlawfully increased by prison officials." 54 M.J. 469, 472 (C.A.A.F. 2001). Then, this Court, in Erby, stated "[i]n addition to its duty and authority to review sentence appropriateness, a CCA also has the duty and authority under Article 66(c) to determine whether the sentence is correct 'in law.'" 54 M.J. at 478. In both White and Erby, this Court did not explain why it deviated from the plain language of the statute. As identified in the concurrence to the Guinn opinion, "it may be argued, from the plain meaning of the text, that Article 66(c), UCMJ does not give a CCA jurisdiction to address post-trial confinement conditions that are

not a part of the approved sentence." Guinn, 81 M.J. at 205 (Maggs, J. concurring).

This Court has now recognized that those precedents have created an "odd paradigm" that deviates from the plain text of Article 66(c). Willman, 81 M.J. at 360. Nowhere in the code does Congress expressly or implicitly permit a CCA or this Court to review post-trial confinement issues that are not part of the sentence entered into judgment or to consider matters entirely outside the record for these types of claims. Had Congress intended to create an exception for matters outside the record for Article 55, UCMJ, or Eighth Amendment claims it would have specifically prescribed that exception in Article 66(c), UCMJ, or the newly formed Article 66(d), UCMJ. But as reflected by the plain language of the statute, Congress chose not to do so. Judicial inquiry into the meaning of an unambiguous statute begins and ends with the plain language of the statute." United States v. Murray, 43 M.J. 507, 514 (A.F. Ct. Crim. App. 1995) (citing to Adams Fruit Co. v. Barrett, 494 U.S. 638, 642 (1990)).

In addition to being poorly reasoned, the precedents are also unworkable. Claims of Article 55, UCMJ, and Eighth Amendment violations that are based purely on material outside the record cannot always be easily adjudicated based on only declarations. For instance, in this case, Appellant, while arguing the record demonstrates he experienced cruel and unusual punishment, also argued for a DuBay hearing because he believes the declarations to be contrary to one another.

(App. Br. at 32-33.) This creates a situation where not only are matters entirely outside the record being considered due to the type of claim, but the CCAs may have to order hearings or accept affidavits to resolve issues not even raised by the record. The CCAs should not be a clearing house for every kind of post-trial confinement complaint, as this imposes a greater burden on the CCAs than Congress intended under Article 66(d), UCMJ. Guinn, 81 M.J. at 203.

The other factors to consider when analyzing *stare decisis* also weigh in favor of overruling past precedent – the reasonable expectations of servicemembers and the risk of undermining public confidence in the law. Since this Court has telegraphed in both Jessie and Willman that precedents which allow for materials outside the record to be considered may be overruled and certainly not expanded, servicemembers have been put on notice that these "aberrations" in case law may be overruled. Jessie, 79 M.J. at 445; Willman, 81 M.J. at 360. And the concern that public confidence in the law would be undermined is also low. Indeed, 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. Such a remedy is not in the best interest of society since Appellant was convicted of sexually assaulting a child on multiple occasions. (JA at 033.) Further, a CCA cannot grant injunctive relief or award damages. But even if this Court were to overrule its prior precedent allowing review of post-trial confinement claims occurring after the entry of judgment, servicemembers would

not be left without any avenue of relief for claims of cruel and unusual punishment. As the Army Court of Criminal Appeals recognized in United States v. Jessie, servicemembers can petition U.S. district courts for injunctive and declaratory relief for oppressive confinement conditions. 2018 CCA LEXIS 609, at *18-19 (A. Ct. Crim. App. 28 December 2018). Thus, overruling prior precedents would not undermine public confidence in the law.

In sum, this Court's cases which allow for materials entirely outside the record to be considered for claims under Article 55, UCMJ, and the Eighth Amendment should be overruled because they violate the plain language of Articles 66(d) and 67(c)(1), UCMJ. And because Appellant's post-trial confinement conditions were not part of the sentence "as entered into the record," the CCAs and this Court have no statutory authority to act upon them. This Court should hold that it and the CCAs have no jurisdiction to review post-trial confinement conditions that were not part of the sentence entered into judgment.

2. Expanding the Lovett test to include military personnel who send incarcerated military personnel to a confinement facility with alleged inhumane living conditions is unworkable.

Appellant's request to include military personnel to satisfy the "deliberate indifference" aspect of the cruel and unusual punishment test particularly demonstrates why such precedent unworkable. Appellant wants to add to the test a very specific category of individuals – "military personnel who have sent military inmates to local civilian confinement centers with a history of inhumane living

conditions for inmates." (App. Br. at 16.) Expanding this test will absolutely create a greater burden on CCAs and this Court that goes far beyond the scope and plain language of Article 66, UCMJ.

Under the second element of the Lovett test, the burden is on the appellant to demonstrate "deliberate indifference." Lovett, 63 M.J. at 216. Expanding the test to include military personnel who send incarcerated military personnel to a specific confinement facility creates a scenario where the appellant could request post-trial discovery or petition the CCA to order affidavits or hearings to determine these additional facts. And the facts that must be determined could be endless. In this scenario, what will qualify as a history of abuse? Would it be a series of abuses or can one specific instance qualify? Would there be a timeline for when the alleged abuses must have occurred? Would the alleged abuses have to be similar? Do the allegations that comprise the history of abuse have to have been substantiated? Or is it enough that military personnel know there have been prior complaints from incarcerated military personnel at a certain confinement facility?

Despite these hurdles, Appellant wants this Court to expand the Lovett test to allow that "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." (App. Br. at 22.) Appellant specifically identifies LCJ as a confinement

facility where inhumane living conditions exist. (App. Br. at 14.) In essence, Appellant wants a rule that if military personnel are confined at LCJ, then they are able to per se meet the "deliberate indifference" element of the Lovett test. But this expansion would bypass the case-by-case analysis the Lovett test implicitly requires. Lovett, 63 M.J. 215.

Not every set of facts will be the same, even where there are parallels. For instance, Appellant claims he did not receive his prescribed medications when he initially arrived at LCJ. In United States v. Citsay, the appellant was also housed at LCJ and complained he did not receive his seizure medication. No. ACM 39712, 2020 CCA LEXIS 453 (A.F. Ct. Crim. App. Dec. 18, 2020) (unpub. op.). Based on these two very similar complaints, it would be easy to assume LCJ has a history of failing to provide military inmates with their prescribed medications. But a deeper dive demonstrates why a test that would rely upon "a history of inhumane living conditions" is unworkable in the context of military cases.

In Citsay, the appellant initially complained he did not receive his seizure medication, and his trial defense counsel relayed the complaints to the base legal office. Citsay, unpub. op. at 4. At trial, a stipulation of fact from a nurse at LCJ revealed that upon intake appellant relayed he took a specific medication, "brand a" for his seizures, and he could not take "brand b." Citsay, unpub. op. at 6-7. "Brand a" was not a part of the prison's formulary so the doctor prescribed the appellant "brand c." Citsay, unpub. op. at 7. For weeks, the medical department

worked with the appellant to find the best brand that would work for the appellant. Citsay, unpub. op. at 7. The Air Force Court of Criminal Appeals stated "the evidence in the record paints a picture of jail personnel seeking to provide [the appellant] with appropriate medication within the jail's formulary." Citsay, unpub. op. at 18. Appellant, here, likewise complained that he did not received his prescribed medication for a month, even though he failed to identify his prescriptions during his medical intake at LCJ. (JA at 101.) The fact that these seemingly parallel claims have vastly different facts that disprove each claim demonstrates the danger of basing a test on a so-called "history of inhumane living conditions."

Just because multiple prisoners at a facility make similar complaints does not mean they are all true. And since the specific facts of each claim are of the utmost importance in determining the validity of that claim, the analysis Appellant proposes will require significant additional fact-finding that reaches for facts far outside the findings and sentence of the case at issue.

The expansion of Lovett's cruel and unusual punishment test to include this specific category is unworkable because of the sheer number of issues it would raise, and the extensive and burdensome post-trial investigation and litigation it would entail. Again, all of which goes far beyond the scope of Articles 66(d) and 67(c)(1), UCMJ. This Court should decline Appellant's invitation to create new legal tests outside the statutory language of the UCMJ.

II.

APPELLANT DID NOT SUFFER CRUEL AND UNUSUAL PUNISHMENT WHILE AT LOWNDES COUNTY JAIL.

Standard of Review

This Court reviews de novo the question of whether an appellant has been subjected to impermissible conditions of post-trial confinement in violation of the Eighth Amendment or Article 55, UCMJ. United States v. Wise, 64 M.J. 468, 473 (C.A.A.F. 2007). Whether an appellant has exhausted administrative remedies under the Lovett test is a mixed question of law and fact, and is reviewed *de novo*. Id.

Law

The Eighth Amendment prohibits the infliction of cruel and unusual punishment. U.S. Const. amend. VIII. Cruel or unusual punishments are punishments that "are incompatible with the evolving standards of decency that mark the progress of a maturing society or which involve the unnecessary and wanton infliction of pain." Estelle, 429 U.S. at 102-03 (1976). Article 55, UCMJ, among other specific proscriptions, also prohibits cruel or unusual punishment. In the absence of legislative intent to create greater protections under Article 55, UCMJ, courts are to apply the Supreme Court's interpretation of the Eighth Amendment to allegations of cruel or unusual punishment. Lovett, 63 M.J. at 215.

As identified above, to demonstrate an Eighth Amendment violation an Appellant must show:

> (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 [the appellant's] health and safety; and (3) that [the appellant] has exhausted the prisoner-grievance system . . . and that he has petitioned for relief under Article 138, UCMJ, 10 USC § 938 [2000].

Id. (alteration in original) (footnotes omitted) (internal quotations omitted).

Regarding the second requirement, in Lovett, this Court held that the appellant failed to meet his burden to show deliberate indifference when his affidavit indicated only "that he made unspecified complaints to various officials or agencies and that he observed no change or got no response." 63 M.J. at 216. This Court reasoned that, "[i]n the absence of evidence showing what the officials knew and that they disregarded known risks to inmate safety, Lovett has failed to demonstrate that prison officials were deliberately indifferent to any conditions that might have violated the Eighth Amendment." Id.

For the third requirement, this Court has made clear that a confined person "must seek administrative relief prior to invoking judicial intervention to redress concerns regarding post-trial confinement conditions." Wise, 64 M.J. at 469. This means that the confined person must exhaust the detention facility's grievance system and petition for relief under Article 138, UCMJ. Id.

This requirement exists to promote "resolution of grievances at the lowest possible level [and ensures] that an adequate record has been developed [to aid appellate review]." Id. at 471 (quoting United States v. Miller, 46 M.J. 248, 250 (C.A.A.F. 1997)).

Analysis

Appellant is not entitled to relief under the Eighth Amendment or Article 55, UCMJ. Appellant was not deprived of basic needs, Appellant was not subjected to an unnecessary infliction of pain, Appellant cannot show the requisite culpable mind of confinement officials, and Appellant has not demonstrated that he exhausted administrative relief at the lowest levels.

Appellant argues he was denied necessities under the categories of: (1) Insufficient food and water; (2) Cell Conditions and Lack of Sanitation; (3) Lack of Air and Recreation; and (4) Insufficient medical care. (App. Br. at 34-36.) Appellant argues he received insufficient food and water because he was "subjected to contaminated drinking water and moldy, expired food with insects, body hair, and flakes of rust." (App. Br. at 34.)

Appellant posits he was denied "the necessity of safe and habitable housing" because he "suffered from pitch darkness" for a month due to sewage that leaked into his cell and disabled his light and made it impossible to track the insects which crawled out of the drains into his cell. (App. Br. at 35.) He further argues that he

was unable to clean the dirt, mold, and mildew in his cell because he could not wake up in time to use the cleaning supplies provided to him. (Id.)

Appellant also argues he was denied fresh air and recreation because he was not given the opportunity to go outside and was only permitted to walk in a dayroom for exercise. (Id.)

Finally, Appellant argues he received insufficient medical care. Appellant claims he did not see a physician for a month, he was denied both his prescribed medications and an extra blanket to alleviate the conditions of Raynaud's Syndrome, and he did not receive medical care for a cut to his head. (Id. at 36.)

1. Appellant fails to establish that the food and water he received violated Article 55, UCMJ, or the Eighth Amendment.

The Eighth Amendment is implicated only when a prisoner is forced to endure deprivations of the minimal civilized measure of life's necessities. Williams v. Berge, 102 F. App'x. 506, 507 (7th Cir.2004) (citing to Hudson v. McMillian, 503 U.S. 1, 8-9 (1992)). "[A]dequate food" is one such necessity. Farmer v. Brennan, 511 U.S. 825, 832 (1994). The first prong of the Lovett test requires there to have been "an objectively, sufficiently serious act or omission resulting the denial of necessities." Lovett, 63 M.J. at 215. While adequate food is a necessity, that does not mean inmates are entitled "to food that is tasty or even appetizing . . . [i]ndeed, routine discomfort is part of the penalty prisoners pay for their offenses, and prisoners cannot expect the 'amenities, conveniences, and

services of a good hotel.'" Williams, 102 F. App'x. at 507 (citing to Harris v. Fleming, 839 F.2d 1232, 1235 (7th Cir. 1988)).

Appellant argues he was denied a necessity when he was subjected to "contaminated drinking water and moldy, expired food with insects, body hair, and flakes of rust." (App. Br. at 34.) But, as the civilian court in Williams found, a "substantial deprivation of food may amount to a constitutional violation" but "being served stale raisins and peanut butter, along with other food, does not." Id. at 507. There has to be an "extreme deprivation" of a necessity. Meyers v. Clarke, 767 F. App'x 437, 439 (4th Cir. 2019) (quoting Jehovah v. Clarke, 798 F.3d 169, 181 (4th Cir. 2015) (internal quotation marks omitted). While individuals should not receive expired or contaminated food that alone is not enough to demonstrate a "denial" or "extreme deprivation of necessities" under the first prong of the Lovett test. (JA at 041-042.) Lovett, 63 M.J. at 215; Meyers, 767 F. App'x at 439.

Assuming, the above claims amount to a denial of necessities, Appellant still fails to demonstrate "a culpable state of mind on the part of prison officials amounting to deliberate indifference" to his health and safety. Id. In his brief, Appellant does not address how prison officials responded with deliberate indifference to his claims of insufficient food or water. He just broadly claims prison officials "responded with deliberate indifference to [his] 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." (App. Br. at 37.)

Appellant's claims fail because he did not establish that the jail (or the Air Force) was indifferent to the quality of the food. He does not show a specific instance in which he made anyone aware of his belief that the food was expired, there were occasionally items in his food, or that the water coolers contained mold. Quite the opposite, the record shows that LCJ water coolers were cleaned and maintained daily by Trinity Food Service and any incidents of mold were addressed immediately. (JA at 062.) The food was likewise monitored by Lowndes County Health inspectors and LCJ consistently passed inspections. (Id.) As in Lovett, "[i]n the absence of evidence showing what the officials knew and that they disregarded known risks to inmate safety," Appellant "has failed to demonstrate that prison officials were deliberately indifferent to any conditions that might have violated the Eighth Amendment." 63 M.J. at 216.

Finally, Appellant fails to meet his burden to demonstrate he "exhausted the prisoner grievance system and that he petitioned for relief under Article 138, UCMJ." Lovett, 63 M.J. 215. Appellant argues he exhausted the prisoner grievance system and filed complaints under Article 138, UCMJ. (App. Br. at 45.) However, Appellant did not exhaust all options at the lower levels for his complaint that he was denied sufficient food and water. In fact, Appellant did not exhaust or even use the prisoner grievance system to bring his concerns to the employees of LCJ. Out of the thirteen grievances and requests Appellant filed

while at LCJ, Appellant did not file a single grievance or request regarding his food or water. (JA at 46-49, 87-99.)

Appellant did identify some concerns with regards to his food and water in his Article 138, UCMJ, complaint. He generally argued he was not provided "edible food and drinkable water." (JA at 046.) In substantiation of his claim, Appellant specified there was mold in the water coolers, hair and insects in the food, and, at one point, he experienced an allergic reaction to the food provided. (JA at 048-049.) Appellant did not claim in the Article 138, UCMJ, complaint that he received moldy or expired food or that he had experienced food poisoning from the weekly peanut butter sandwiches, as he now alleges in his appeal. However, Appellant did not use the prisoner grievance system for any of these concerns. Since Appellant did not attempt to resolve his grievances at the "lowest possible level" this Court can dismiss these complaints without further analysis. Wise, 64 M.J at 471.

2. Appellant fails to establish that the fresh air and exercise he received violated Article 55, UCMJ, or the Eighth Amendment.

Looking next at Appellant's complaint that he was denied fresh air and recreation, Appellant argues he was denied fresh air because he was not permitted to go outside, and the dayroom only had a small skylight in the roof to allow in sunshine. (App. Br. at 35; JA at 043.) Appellant also argues his recreation was limited to walking around the dayroom because LCJ did not provide exercise

equipment. (App. Br. at 35; JA at 043.) The Supreme Court has not ruled on whether the lack of fresh air or sunlight violates the Eighth Amendment. But civilian courts regularly hold that the lack of sunlight or fresh air alone does not violate the Eighth Amendment absent unusual circumstances. *See* Richard v. Reed, 49 F. Supp. 2d 485, 489 n.5 (E.D. Va. 1999) (summarizing cases); *see also* United States v. Avila, 53 M.J. 99, 102 (C.A.A.F. 2000) (rejecting the appellant's cruel and unusual punishment claim, even when the conditions allegedly violated the applicable Navy regulation, because the appellant failed to show that being kept in a windowless cell and unable to communicate with other inmates was "more adverse than those faced by civilian prisoners whose claims of cruel and unusual punishment have been rejected by other courts.").

Here, Appellant was not denied the necessity of fresh air or exercise. LCJ permitted, and Appellant received, three hours of recreation time in the recreation yard each week where he could exercise. (JA at 052, 085.) The recreation yard was inside, but had one open air window, approximately five feet by ten feet that "allow[ed] in fresh air and sunlight. (Id.) Appellant complains the recreation yard lacked exercise equipment, but that does not mean he was unable to perform calisthenics such as push-ups, sit-ups, squats, planks, or a litany of other body weight exercises. Nor was he prevented from performing any aerobic activity such as walking, running, or shuttle runs. Simply being unable to use a weight rack

does not qualify as a denial of a necessity that rises to the level of cruel or unusual punishment.

However, even if this Court determines that Appellant was denied a necessity, Appellant again fails to demonstrate "a culpable state of mind on the part of prison officials amounting to deliberate indifference" to his health and safety. Lovett, 63 M.J. at 215. Appellant does not address how prison officials responded with deliberate indifference to his claims of insufficient fresh air and exercise. He relies on the same broad claim that prison officials "responded with deliberate indifference to [his] 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. (App. Br. at 37.) Appellant does not meet his burden because he neither established that the jail or the Air Force was indifferent to the lack of fresh air and exercise he received nor did he show any specific instance in which he made anyone aware that he did not have access to fresh air or exercise.

Finally, for both of these complaints, Appellant did not "exhaust[] the prisoner-grievance system" and petition for "relief under Article 138, UCMJ," as required under the third prong of the Lovett test. Lovett, 63 M.J. at 215. Appellant did not use the prisoner grievance system or file a petition under Article 138, UCMJ, for either of these allegations. (JA at 46-49, 87-99.) Since Appellant cannot demonstrate he exhausted his administrative remedies, this Court can dismiss these claims without further analysis. Guinn, 81 M.J. at 203.

3. Appellant fails to establish that the overall cleanliness of the facility violated Article 55, UCMJ or the Eighth Amendment.

Appellant argues he is entitled to relief because his cell contained dirt, mold, and mildew and, at one point, water from a clogged toilet in the cell above his leaked into his cell and disabled his light. (App. Br. at 34-35.) Appellant's claims do not constitute an Article 55, UCMJ, or Eighth Amendment violation.

Confinement conditions will constitute cruel and unusual punishment "only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise." Wilson v. Seiter, 501 U.S. 294, 304 (1991). "Nothing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists." Id. at 304-305.

Civilian courts, whose analysis regarding cruel and unusual punishment is persuasive, regularly hold that providing cleaning supplies to incarcerated individuals in order to address more severe sanitary issues does not violate the Eighth Amendment. In Davis v. Scott, the Court of Appeals for the Fifth Circuit summarized cases from the Supreme Court and sister circuits analyzing cell sanitation. 157 F.3d 1003, 1005-06 (5th Cir. 1998). The court then concluded that the allegation at issue – an inmate was provided with cleaning supplies and placed in a "filthy" cell with "blood on the walls and excretion on the floors" for three days—did not demonstrate a sufficiently extreme deprivation to be deemed a

constitutional violation. Id.; *see also* Shrader v. White, 761 F.2d 975, 984 (4th Cir. 1985) ("In light of the evidence of daily attempts to clean the showers and no evidence of disease resulting from mold in the showers, the conditions of the showers at VSP do not, alone or in combination with other conditions, constitute cruel and unusual punishment."). In Whitnack v. Douglas County, the Court of Appeals for the Eighth Circuit, further held that an inmate's short stay in a dirty cell, before cleaning supplies were provided to make the cell tolerable, did not rise to the level of cruel and unusual punishment. 16 F.3d 954, 958 (8th Cir. 1994). While Appellant's stay at LCJ may or may not be considered a short stay, he was provided cleaning products from day one to use and make his cell tolerable. (JA at 062.)

If this Court does decide Appellant was denied a basic necessity because of the cleanliness of his cell and the leak from the ceiling, Appellant would still have to demonstrate a "culpable state of mind on the part of prison officials amounting to deliberate indifference to" his health and safety. Lovett, 63 M.J. at 215. Appellant cannot do so. First, Appellant never brought the allegedly unclean conditions of his cell, with regard to the mold, dirt, and pests, to the prison official's attention. Importantly, Appellant's own declaration demonstrates the prison officials did not have deliberate indifference because they provided him with cleaning supplies for an hour and a half each day. (JA at 041.) Appellant's only complaint was that the cleaning supplies were handed out too early in the

morning and that if he, or the other three people with whom he shared a cell, did not wake up in time they could not clean their cell. (Id.)

There also was not deliberate indifference on the part of the prison officials with regards to the pests in Appellant's cell. Again, Appellant never made the prison officials aware of the alleged problem. If he had, they could have reached out to Ace Pest Control to dispense pest control chemicals to the housing area as was periodically the case. (JA at 062.)

Finally, while Appellant did notify LCJ about the leak in his cell, the prison officials did not act with deliberate indifference to Appellant's health and safety. (JA at 087.) Far from it, the prison officials initially provided Appellant a bucket to capture the water, and then prison guards remedied the problem within four days of being notified about the leak. (Id.) Prison officials also took care to transfer the affected individuals as the roof and leaks were being repaired. (JA at 086.)

Appellant also fails the third prong of the Lovett test because he failed to use both the prisoner grievance system and file and petition for relief under Article 138, UCMJ. Lovett, 63 M.J. at 215. While Appellant did file a maintenance request through the prison grievance system for the leak in his ceiling, he did not address the problem when he petitioned for relief in his Article 138, UCMJ complaint – likely because the problem had already been resolved. (JA at 046-055, 087.) Instead, in his Article 138, UCMJ, complaint, Appellant made a broad assertion he was not provided with sanitary living conditions and alleged there

were insects in the shower area and drains. (JA at 046-055.) But, Appellant did not address either of those issues with the prison staff through the prisoner grievance system. (JA at 46-49, 87-99.) Because Appellant did not raise his complaints at the lowest levels possible or exhaust the administrative remedies available to him, Appellant failed to meet his burden to demonstrate a claim under Article 55, UCMJ, or the Eighth Amendment. Guinn, 81 M.J. at 203.

4. Appellant fails to establish that the medical care he received violated Article 55, UCMJ, or the Eighth Amendment.

Appellant alleges he received insufficient medical care. (App. Br. at 37.) However, he fails to demonstrate how he meets all three prongs of the Lovett cruel and unusual test. As a result, his claims cannot succeed.

The government has an "obligation to provide medical care for those whom it is punishing by incarceration." Estelle, 429 U.S. at 103. But the Supreme Court also recognized that "a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment." Id. at 106.

Appellant claims he was "stripped" of his prescribed medications when he arrived at LCJ, he did not see a medical provider for almost a month, and he was denied an extra blanket to alleviate the symptoms of his Raynaud's Syndrome. (App. Br. at 36.) However, Appellant does not identify what harm was caused by the alleged delay of his prescribed medication, denial of the extra blanket, or the

cut to his head, aside from a vague reference that he experienced pain. (JA at 048.) And, without Appellant identifying for the Court the harm caused, this Court cannot determine whether the need was a "*serious* medical need" that would constitute an Eighth Amendment violation. *See* Estelle, 429 at 105-06. (Not "every claim by a prisoner that he has not received adequate medical treatment states a violation of the Eighth Amendment . . . In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to *serious* medical needs.") (emphasis added). Because Appellant does not provide specifics but instead only alleges a general harm, this Court should hold that Appellant fails to meet the first Lovett requirement. *See* Lovett, 63 M.J. at 214-15; United States v. Ginn, 47 M.J. 236, 248 (C.A.A.F. 1997).

Even if this Court finds Appellant meets the first element of the Lovett test, Appellant cannot show the prison officials had a "culpable state of mind" amounting to "deliberate indifference" to his health and safety. Lovett, 63 M.J. at 215. "[S]ociety does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are 'serious.'" Hudson, 503 U.S. at 9 (citing Estelle, 429 U.S. at 103-104.)

Appellant stated he had Raynaud's Syndrome, but that statement alone does not establish that he had a serious medical need that required an extra blanket. Moreover, in his declaration, Appellant provides he was denied the extra blanket

because the medical providers told him he did not meet the requirements for an extra blanket. (JA at 42.) That implies that, rather than display indifference to a medical need, the medical department evaluated Appellant's condition and determined an extra blanket was not necessary. (JA at 042.) Appellant provides no reason to second-guess that evaluation. Worse, Appellant's statement omits that, in lieu of an extra blanket, the jail prescribed him with medication to alleviate his symptoms. (JA at 101-102.) So, rather than evince an indifference to the symptoms of his Raynaud's Syndrome, the record indicates that the jail responded with professional medical treatment.

Appellant does not attempt to explain how the prison officials acted with deliberate indifference in their response to his request. Appellant only states "LCJ would not even make a basic accommodation by granting him an extra blanket to alleviate his Raynaud's syndrome." (App. Br. at 36.) But, importantly, courts have found that disagreements with prison's medical staff regarding medical treatment do not rise to the level of "deliberate indifference" to an appellant's medical needs. United States v. Heller, 2006 CCA LEXIS 161 at *7 (A.F. Ct. Crim. App. Dec. 6, 2006) (unpub. op.) *aff'd* by United States v. Heller, 64 M.J. 356 (C.A.A.F. 2006). *See also* Jackson v. Lightsey, 775 F.3d 170, 178 (4th Cir. 2014) (holding disagreements "between an inmate and a physician over the inmate's proper medical care . . . consistently have fall[en] short of showing deliberate indifference."); Whitfield v. O'Connell, 402 Fed. Appx. 563, 565 (2d Cir. 2010)

(stating, a "disagreement with the type of medical care provided is insufficient to state a constitutional claim.").

Additionally, without stating how seriously he was injured, Appellant acknowledges he was treated by medical staff for a head wound. (JA at 042-043.) Once notified of Appellant's wound, the medical department treated the "half-quarter sized cut" to Appellant's head by applying a bandage and ointment. (JA at 102.) Appellant complains that he was not brought to a follow up appointment and was only provided with Band-Aids and alcohol swabs to change on his own. (JA at 042-043.) Appellant does not show why that was insufficient (i.e., why he needed medical professionals to re-apply the Band-Aid), let alone why it was so egregious that it violated constitutional standards. *See* White, 54 M.J. at 475 ("[I]t is not constitutionally required that health care be 'perfect' or be the 'best obtainable.' Appellant was entitled to reasonable medical care, but not the 'optimal' care recommended by [the medical provider].") (citing Harris v. Thigpen, 941 F.2d 1495, 1510 (11th Cir. 1991)). Again, the details Appellant omits are telling: the cut was the length of half of a quarter, and it did not require stitches. (JA at 102.) The medical providers informed Appellant how to request a follow up appointment, and he simply never did. (Id.) These details make clear that the jail was not indifferent to a serious medical need of Appellant.

Finally, LCJ was not indifferent to Appellant's medical treatment with regard to his prescription medications or being seen by a provider. Appellant was

seen by provider upon intake into LCJ and was seen by provider within 2-3 days after he requested sick call. (JA at 065.) The statements of the nurse demonstrate that prison officials quickly responded to Appellant's medical needs as soon as he raised them. (JA at 065, 101-102.) There is not deliberate indifference when Appellant was seen shortly after he requested medical treatment.

Appellant also alleges he went a month without his medication, but the jail nurse's review of the medical records establish that this is false. (App. Br. at 36; JA at 101-102.) The statement of the nurse demonstrated that Appellant did not identify he took any prescribed medications during his initial intake interview when asked. (JA at 101.) Even though that was Appellant's response, the medical department still used due diligence, reached out to Moody AFB and received confirmation that Appellant was not on any maintenance medication. (Id.) Once Appellant alerted the LCJ medical department he needed medication, his medical providers took steps to provide him with the medications. (Id.) Accordingly, prison officials did not respond with indifference to his medical needs, but rather prison officials responded with timely treatment. Even accepting Appellant's timeline, Appellant's affidavit does not show deliberate indifference to Appellant's medical issues but rather a conscious effort to provide him with his medication, albeit slowly. Once they were aware that Appellant was not receiving his medication, both the jail and first sergeant attempted to provide it to him—the jail by scheduling an appointment with a medical provider, and the first sergeant by

attempting to bring his old medication to him. (JA at 101-102.) Appellant takes issue with the time this process took, but ultimately the delay was not cruel and unusual given the jail's reasonable policy to verify outside prescription medicine that incarcerated individuals attempt to bring in. *See* United States v. Bowhall, 2019 CCA LEXIS 67 at *9-10 (Army Ct. Crim. App. 13 February 2019) (unpub. op.) (The appellant failed to establish a claim under the Eighth Amendment when treatment was only temporarily delayed because his medication issues were quickly resolved and the prison officials were not deliberately indifferent to his medical needs.)

While Appellant did exhaust the prisoner grievance system and petition for relief under Article 138, UCMJ, for his extra blanket request and the cut to his forehead, his claims still fail the first two prongs of the Lovett test. (JA at 46-49, 87-99.)

Appellant, however, did not file a grievance within the prisoner system for the alleged denial of his prescribed medication or allegation that he did not receive medical treatment for at least a month. (Id.) As is evidenced by the grievances Appellant did file, Appellant was aware of the prison grievance process and could have availed himself of that resource, if needed. (JA at 87-99.)

Appellant argues he did everything in his power to resolve his concerns at the lowest possible level and that he "lodged complaints about lack of medical treatment, conditions of his cell, sanitation, and food." (App. Br. at 45.) And

while this may be true for two of his complaints – his request for an extra blanket and his complaint that he was denied medical care for a head injury – Appellant does not point to anything else in his extra-record submissions that supports his claim that he attempted to resolve the other issues at the lowest level possible. Appellant claims a memorandum from his first sergeant substantiates his allegations, but it does not. (JA at 60.) At most, the first sergeant described Appellant's receipt of substitute medications and Appellant's complaint that the line for the doctor was too long and, if he wanted to be seen by a provider immediately he had to pay $5.00. (Id.) But, those statements do not alleviate Appellant's responsibility to use the prisoner grievance program to address his concerns.

There is a requirement to exhaust all potential remedies at the lowest level before a court will find a violation under Article 55, UCMJ, or the Eighth Amendment because courts have to allow for the allegations to be remedied and to prevent an appellant from receiving an underserved windfall in relief.

5. Separately, even if this Court did extend the Lovett test to include military personnel who sent military personnel to a confinement facility with alleged inhumane conditions, Appellant cannot prove the military officials acted with deliberate indifference.

Even if this Court extended the Lovett test to include military personnel, Appellant cannot prove that they acted with deliberate indifference. Once military officials were notified of Appellant's claims, they investigated the claims and

determined Appellant received the necessary medical care. For instance, after Appellant filed the Article 138, UCMJ, complaint, the wing commander learned, from the investigation that base officials conducted, that Appellant first identified he suffered from Raynaud's Syndrome on 14 October 2020, and he was seen by a medical provider a day later to address his concerns. (JA at 065-066.) And, through the same investigation, the wing commander learned that Appellant received immediate care from nursing staff for his head wound. The nursing staff was called to the scene for Appellant's minor cut and they applied dressing and ointment to the injury. (JA at 065.) Based on this information, the wing commander determined that Appellant had received the relief – medical care – that he petitioned for in his Article 138, UCMJ, complaint.

Appellant attempts to inflate the wing commander's response by arguing the wing commander's determination that Appellant's petition was "granted, in part" as evidence that Appellant suffered a violation of his rights. But instead, the wing commander, after a thorough investigation, determined Appellant had already been granted the relief he requested by the prison officials. (JA at 059-070.) Similarly, Appellant attaches undue importance to the chief of military justice's email where he wrote that Appellant may receive 3:1 credit because "that is the typical amount of credit I've seen for our military members who have spent time at Lowndes." (JA at 41.) Such a response is vague, and it is unclear under what authority other military personnel were receiving such a credit. Such a vague statement is

insufficient to meet Appellant's burden to show deliberate indifference. But even taken at face value, an investigation into the circumstances behind that statement and an analysis of why other military members were given credit is well beyond the scope of the UCMJ.

The inability of Appellant to individually address how military officials acted with deliberate indifference to the above specific instances demonstrates that expanding the Lovett test to apply to Appellant's case is simply unworkable. It is not enough, without addressing each specific claim, to simply argue there is per se deliberate indifference when military personnel are sent to a certain confinement facility.

Since Appellant has failed to establish his burden under the Lovett cruel and unusual test, this Court should deny his claims under either Article 55, UCMJ, or the Eighth Amendment.

CONCLUSION

WHEREFORE the United States respectfully requests this Honorable Court deny Appellant's requested relief and affirm the decision of the Air Force Court of Criminal Appeals.

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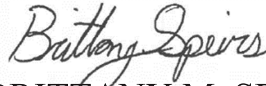
I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 29 July 2022.



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/s/ ______________________________

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APPENDIX

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