

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS  
WASHINGTON NAVY YARD  
WASHINGTON, D.C.**

**BEFORE**

**D.O. VOLLENWEIDER**

**R.E. VINCENT**

**V.S. COUCH**

**UNITED STATES**

**v.**

**Allen S. HARRIS  
Private First Class (E-2), U. S. Marine Corps**

NMCCA 200500452

Decided 15 February 2007

Sentence adjudged 31 August 2004. Military Judge: S.F. Day.  
Review pursuant to Article 66(c), UCMJ, of General Court-Martial  
convened by Commanding General, Marine Corps Base, Camp Lejeune,  
NC.

LT RICHARD H. MCWILLIAMS, JAGC, USN, Appellate Defense Counsel  
LT TYQUILI BOOKER, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

VOLLENWEIDER, Senior Judge:

A military judge alone, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of assault and aggravated assault with a dangerous weapon, in violation of Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928. The appellant was sentenced to confinement for twelve months, total forfeitures, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

The appellant alleges that the military judge awarded insufficient credit for pretrial confinement and that he was denied effective assistance of counsel during the post-trial phase of his court-martial proceedings. We conclude that the appellant is entitled to additional credit for pretrial confinement, but that the findings and the sentence are otherwise correct in law and fact and that no error materially prejudicial to the rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

## Pretrial Confinement

After a night of drinking, the appellant chased one fellow Marine with a knife, and then later stabbed a second fellow Marine in the back with the same knife. Predictably, the appellant's exploits landed him in the brig and engendered the instant charges. He was in the brig for 186 days prior to sentencing. Prior to his trial, the appellant moved for additional pretrial confinement credit. Appellate Exhibit VI. His motion was based on his allegations that:

- (1) He was denied necessary medical attention.
- (2) He was subject to conditions and restrictions more onerous than those experienced by post-trial confinees (including having documents from his attorney reviewed by guards).
- (3) The decision to place him in pretrial confinement was flawed.

The military judge found that the appellant was appropriately placed in pretrial confinement; that the level of the appellant's classification while in confinement was objectively based on the Corrections Management Information System (CORMIS); that the appellant was not denied appropriate and necessary medical care; and that the Government harbored no intent to punish the appellant during pretrial confinement. Record at 125-27. However, the military judge further found that brig personnel improperly monitored communications between the appellant and his counsel. He therefore granted relief in the form of three-for-one credit for each of the fifteen days that counsel had visited the appellant in the brig. *Id.* at 127. This resulted in the appellant being given a total of 216 days of credit for pretrial confinement.

Whether a pretrial detainee suffered unlawful punishment is a mixed question of law and fact that qualifies for independent review. *See United States v. Pryor*, 57 M.J. 821, 825 (N.M.Ct.Crim.App. 2003). The burden of proof is on the appellant to show a violation of Article 13, UCMJ. *See United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002). Article 13 prohibits two things: (1) the intentional imposition of punishment on an accused before his or her guilt is established at trial, i.e., illegal pretrial punishment, and (2) arrest or pretrial confinement conditions that are more rigorous than necessary to ensure the accused's presence at trial, i.e., illegal pretrial confinement. *See United States v. Inong*, 58 M.J. 460, 463 (C.A.A.F. 2003)(citations omitted). The appellant does not contend that his pretrial confinement was intended as punishment.

The "punishment prong" of Article 13, UCMJ, focuses on intent, while the "rigorous circumstances" prong focuses on the conditions of pretrial restraint. *See Pryor*, 57 M.J. at 825

(citing *United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997)). Conditions are not deemed "unduly rigorous" if, under the totality of the circumstances, they are reasonably imposed pursuant to legitimate governmental interests. See *McCarthy*, 47 M.J. at 168; *United States v. Singleton*, 59 M.J. 618, 621 (Army Ct.Crim.App. 2003), *aff'd*, 60 M.J. 409 (C.A.A.F. 2005). When an arbitrary brig policy results in particularly egregious conditions of confinement, the court may infer that an accused has been subject to pretrial punishment. See *United States v. Mazer*, 58 M.J. 691, 702 (N.M.Ct.Crim.App. 2003), *set aside and remanded on other grounds*, 60 M.J. 344 (C.A.A.F. 2004). However, if the conditions of pretrial restraint were reasonably related to a legitimate government objective, an appellant will not be entitled to relief. See *McCarthy*, 47 M.J. at 167.

The nature and seriousness of the offenses and the corresponding potential length of confinement are relevant factors that brig officials may consider in determining whether to place a detainee in special quarters. See *United States v. Garcia*, 57 M.J. 716, 731 (N.M.Ct.Crim.App. 2002), *set aside and remanded on other grounds*, 59 M.J. 447 (C.A.A.F. 2004). However, a review of the cases where, as here, the accused was placed under significant maximum custody-type restraints based solely on the seriousness of the charges, reveals that relief is warranted under Article 13. See *United States v. King*, 61 M.J. 225 (C.A.A.F. 2005); *United States v. White*, No. 200200803, unpublished op., 2006 CCA LEXIS 228 (N.M.Ct.Crim.App. 31 Aug 2006); *United States v. Brown*, No. 200200095, unpublished op., 2006 CCA LEXIS 135 (N.M.Ct.Crim.App. 12 Jun 2006); *United States v. Evans*, 55 M.J. 732 (N.M.Ct.Crim.App. 2001); *United States v. Scalarone*, 52 M.J. 539 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 114 (C.A.A.F. 2000); and *United States v. Anderson*, 49 M.J. 575, 577 (N.M.Ct.Crim.App. 1998). Cf. *United States v. Crawford*, 62 M.J. 411 (C.A.A.F. 2006); *McCarthy*, 47 M.J. at 162; *United States v. Lord*, No. 200400025, unpublished op. (N.M.Ct.Crim.App. 30 Jan 2007); *United States v. Boykins*, No. 200400986, unpublished op. (N.M.Ct.Crim.App. 28 August 2006); and *United States v. Mazer*, 62 M.J. 571 (N.M.Ct.Crim.App. 2005). The fact that a confinement classification was, as here, calculated by a computer program - the Corrections Management Information System (CORMIS) - does not alter the Government's duty to consider matters other than the seriousness of the charges or allow the military judge to delegate the duty to make appropriate findings.

In the instant case, the Government presented no evidence that the appellant was a flight risk or that there was any risk that he would harm himself or others if lesser degrees of restraint were utilized, besides the seriousness of the charges. Brig personnel, while they testified that they could consider other matters, did not state that they considered anything other than the charges. The military judge made no findings that the appellant was a flight risk or that the maximum security classification represented the minimum (or even reasonable) restraint necessary to ensure safety or the appellant's presence

at trial. The Government gave the military judge no evidence from which such findings could have been made. Under these circumstances, we believe that the appellant is entitled to an additional one day credit for each day spent in pretrial confinement.<sup>1</sup>

### **Ineffective Assistance of Counsel**

The appellant alleges that he was prejudiced by post-trial ineffective assistance of counsel. We disagree.

We apply a presumption that counsel provided effective assistance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004). This presumption is rebutted only by "a showing of specific errors made by defense counsel that were unreasonable under prevailing professional norms." *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005)(citing *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001)). Even if defense counsel's performance was deficient, the appellant is not entitled to relief unless he was prejudiced by that deficiency. *United States v. Quick*, 59 M.J. 383, 385 (C.A.A.F. 2004)(citing *Strickland*, 466 U.S. at 687). If the issue can be resolved by addressing the prejudice prong of this test, we need not determine whether counsel's performance was deficient. *Id.* at 386 (citing *Strickland*, 466 U.S. at 697). See also *United States v. Haney*, 64 M.J. 101, 106-09 (C.A.A.F. 2006).

Here, the matter appellate defense counsel says should have been submitted to the convening authority was present in the record of trial. The convening authority's action states that the convening authority considered the record of trial. The appellant does not state what should have been presented to the convening authority, and does not state that there was anything in addition to the record of trial that could have been submitted to the convening authority that would have altered the convening authority's decision. We find no ineffective assistance of counsel.

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<sup>1</sup> After a detailed review of the record, including all exhibits and pleadings, we conclude that the military judge's findings, that the appellant was not denied appropriate and necessary medical care and that there was no intent to punish the appellant while in pretrial confinement, are fully supported.

### **Conclusion**

Accordingly, the findings and the sentence as approved by the convening authority are affirmed. We order that an additional 186 days of credit towards the appellant's sentence to confinement.

Judge VINCENT and Judge COUCH concur.

For the Court

R.H. TROIDL  
Clerk of Court