UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
J.R. PERLAK, M.D. MODZELEWSKI, C.K. JOYCE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

KRISTEN M. WEST
SERGEANT (E-5), U.S. MARINE CORPS

NMCCA 201200189
SPECIAL COURT-MARTIAL

Sentence Adjudged: 27 January 2012.
Military Judge: LtCol Robert G. Palmer, USMC.
Convening Authority: Commanding Officer, MALS-31, MAG-31, 2d MAW, Beaufort, SC.
Staff Judge Advocate's Recommendation: Maj V.C. Danyluk, USMC.
For Appellant: LCDR Brandon E. Boutelle, JAGC, USN.
For Appellee: Maj Paul Ervasti, USMC; LT Joseph Moyer, JAGC, USN; LT Philip S. Reutlinger, JAGC, USN.

21 March 2013

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

JOYCE, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to her pleas, of one specification of conspiracy, two specifications of violating a lawful general order, one specification of drunken operation of a vehicle, one specification of wrongful possession of a controlled substance, and two specifications of adultery, in violation of Articles 81, 92, 111, 112a, and 134, Uniform Code

of Military Justice, 10 U.S.C. §§ 881, 892, 911, 912a, and 934. The military judge sentenced the appellant to reduction to pay grade E-1, forfeiture of $994.00 pay per month for 6 months, confinement for 6 months, and a bad-conduct discharge. In accordance with a pretrial agreement (PTA), all confinement in excess of time served was to be mitigated to a period of restriction. However, following the advice of his staff judge advocate, the convening authority instead suspended all confinement in excess of time served. The adjudged forfeitures were suspended for 12 months, while the remainder of the sentence was approved.

The appellant assigns six errors, and this opinion addresses two of them.[1] We find merit in the first and second assignments of error concerning unlawful pretrial punishment and take remedial action in our decretal paragraph.

Background

Before, during, and after a 2011 deployment to Afghanistan, the appellant committed several offenses, many stemming from her personal relationships with two superiors. One was a master sergeant with whom she conspired to use cocaine on one occasion in June 2011, and from whom she received illegal drugs in July 2011. The other was a major, her executive officer, with whom she had an intimate, unprofessional relationship throughout 2011, culminating in an episode of adultery in Afghanistan in September 2011 that caused the appellant to be ordered back to the United States.

Before commencing her return trip, the appellant was prescribed medication for anxiety and warned not to consume alcoholic beverages while taking the medication. Nonetheless, the appellant consumed multiple alcoholic beverages between flights as she traveled back to the United States. The final

[1] The third assignment of error regarding the convening authority's action is rendered moot by our subsequent action. The appellant's fourth, fifth, and sixth assignments of error were submitted citing to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). We find no merit to the appellant's arguments concerning the alleged bias of the military judge and the alleged disparity of her sentence. Although we are critical of the military judge's legal analysis in this case, we do not believe that he was biased against the appellant. We rejected nearly-identical claims related to the same military judge in *United States v. Sanders,* No. 201200202, 2012 CCA LEXIS 441, unpublished op. (N.M.Ct.Crim.App. 13 Nov 2012), *rev. granted*, __ M.J. __ (C.A.A.F. Mar. 14, 2013), and we reach the same result here. Of note, the military judge recommended that the convening authority grant the appellant clemency in this case. Record at 42.

layover in Baltimore was longer than she anticipated; after consuming several alcoholic drinks at an airport bar on 21 October 2011, she rented a van with the intent to return more quickly to her duty station at Beaufort, South Carolina. She drove while drunk and, shortly into her journey, rear-ended another automobile on the highway.

Pretrial Confinement and Procedural History

After her accident, upon her return to her command,[2] the appellant's command placed her in pretrial confinement at the Beaufort County Detention Center (Beaufort County), because the closest Naval Brig did not house female detainees. The record suggests that her confinement began on 24 October 2011. Service regulations require that commands seek immediate approval from the second echelon commander when they place a female Marine or Sailor in a civilian jail: the female member may remain in confinement for 72 hours pending that approval. *See* Appellate Exhibit XII at 3. There is no evidence that the appellant's command ever sought the required approval. Instead, the command confined the appellant without approval in the local jail for nearly three months pending her trial by special court-martial.[3]

At trial, the military judge found the following facts:[4] while at Beaufort County, no command representative visited her during the first month; she spent 18 hours in her cell each day; she was housed among both violent and nonviolent criminals; she was denied access to her anti-anxiety medications and suffered some level of panic attacks;[5] she had difficulty communicating

[2] It is not clear from the record how the appellant returned back to her duty station in South Carolina, but the post-accident medical records reveal that she was seen by Beaufort Naval Hospital personnel during the evening and early morning hours of 23-24 October 2011.

[3] The initial review of the appellant's pretrial confinement was conducted on 28 October 2011, and the magistrate continued her pretrial confinement. Record at 19; AE XVIII at 2.

[4] While we are bound by the military judge's findings of fact on the illegal pretrial punishment motion unless they are clearly erroneous, *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005), we do not agree with the military judge's conclusions of law, including those that he placed in his findings of fact, such as his use of the term "arrest." We also note that the findings of fact were under-developed concerning certain aspects of the appellant's confinement, and we have cited here other portions of the record where necessary.

[5] The appellant characterized these as "chronic panic attacks" which gave her physical "tremors." Record at 20.

with her young son (of whom she is the sole parental caretaker) since phone calls cost $15 each and were limited to 7 to 10 minutes; and, she experienced difficulty communicating with her military defense counsel.[6] AE XVIII at 2-3.

The appellant was finally released from Beaufort County not because her case was adjudicated or because the command changed its opinion of her dangerousness or flight risk, but because she agreed to plead guilty and testify against the master sergeant. This agreement was formalized in a pretrial agreement on 11 January 2012 that included the following term:

> Within 24 hours of the accused's sworn testimony . . . the accused shall be removed from pre-trial confinement at the Beaufort County, South Carolina Detention Center and ordered into *a lesser form of pre-trial restraint* while awaiting disposition of her charges at a special court-martial.

AE IV at 5, ¶ 16a (emphasis added).

After testifying at her co-conspirator's Article 32, UCMJ, proceeding on 18 January 2012, the appellant was released from Beaufort County the next day, 19 January 2012. That same day, the command ordered her into the back room of its barracks "duty hut." *See* AE V. In a letter stating the conditions of her restraint, the appellant's commanding officer alternately referred to her status as "restrained, with suspension from duty" and "pretrial restriction."[7] *Id*. The order purported to restrict her to certain "limits," which included the back room of the duty hut, the medical clinic, the chapel, the post exchange ("for health and comfort items, haircuts only"), the gym ("for a maximum of 1 hour a day"), the post office, and the law center. *Id.* at 1. Travel to any of those locations required escort by a duty Marine, *id.*, and the duty Marines were required to check on her every two hours, Record at 138. The chow hall was not an approved location, and the appellant received all meals in her room. *Id.* at 37. If the appellant failed to comply with the terms of this duty hut arrangement,

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[6] The appellant testified that her military defense counsel could only visit her in ten-minute increments, which were monitored and recorded. Record at 22.

[7] "The actual nature of the restraint imposed, and not the characterization of it by the officer imposing it, will determine whether it is technically an arrest or restriction in lieu of arrest." RULE FOR COURTS-MARTIAL 304(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), Discussion. *See also United States v. Williams*, 37 C.M.R. 209, 212 (C.M.A. 1967).

she would be "immediately returned to Beaufort County Detention Center." AE V at 2.

The military judge found that, as a result of these conditions, the appellant spent 22-23 hours per day in the back room of the duty hut. AE XVIII at 4. The appellant testified that her room was a "closet-type room" with a door that did not open from the inside. Record at 36. Although she could prop the door open or close it at her discretion, she needed the permission of the duty Marines to open it after it had been closed because it locked from the outside. *Id*. The door had to remain open in order for air to circulate, because the windows were locked shut. *Id*.

The room itself had a bed and a chair. There was a separate toilet outside the room and she was given access to a shower in another location, to which she was escorted by duty Marines. *Id.* at 37. She was permitted to have only "appropriate reading material," clothing, and a personal cellular phone in the room. AE V at 1. The appellant remained in this status until her trial, which commenced just before midnight on 26 January 2012 and concluded on 27 January 2012.

At trial, the military judge awarded one day of pretrial confinement credit for each day that the appellant spent at Beaufort County and each day that she spent in the duty hut. Notably, the Government did not oppose one-for-one credit for the duty-hut days. Record at 117. After hearing argument again by both counsel at a post-trial Article 39a, UCMJ, session, the military judge declined to award additional credit because he found no violation of Article 13, UCMJ. He concluded that the restraint in the duty hut was a form of pretrial arrest. AE XVIII at 9.

On 10 January 2013, this court ordered the Government to produce the documents that must accompany civilian confinement under Secretary of the Navy Instruction (SECNAVINST) 1640.9C (3 Jan 2006), including authorization from a second-echelon commander and the report to Headquarters, U.S. Marine Corps (Headquarters), required for all service members placed in civilian confinement, regardless of gender. We also ordered production of the appellant's pre-confinement medical evaluations and the memorandum of agreement between Beaufort County and Marine Corps Air Station (MCAS) Beaufort referenced in the record.[8] In return, we received no evidence of second-

[8] "A Court of Criminal Appeals has discretion . . . to determine how additional evidence, when required, will be obtained." *United States v.*

echelon commander approval, but we did receive the report to Headquarters, though filed three months late, after the appellant's release. The Government also produced records of the appellant's pretrial confinement physical and a Memorandum of Agreement between Beaufort County and Marine Corps Recruit Depot Parris Island, which makes no mention of Marines assigned to MCAS Beaufort.

On 27 February 2013, we heard oral argument concerning the lawfulness of the appellant's pretrial confinement, and whether the PTA term releasing her from confinement violated public policy.

Discussion

The appellant's first two assignments of error renew her trial motion for relief for illegal pretrial punishment, inflicted both at Beaufort County and in the duty hut.[9] We agree that the command's actions and the conditions of the appellant's pretrial restraint violated Article 13, UCMJ.

"Article 13, UCMJ, prohibits two things: (1) the imposition of punishment prior to trial, and (2) conditions of arrest or pretrial confinement that are more rigorous than necessary to ensure the accused's presence for trial." *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005). Courts often analyze these clauses separately, but in this case both are implicated. *See infra*, n.11. The command's intent to punish the appellant is revealed both by a disregard of applicable regulations and by the unnecessarily rigorous conditions of her restraint, particularly after the Government acknowledged in the PTA that "a lesser form of pretrial restraint" was appropriate. Based on the record before us, we conclude that the actions and inaction by the command reveal an unlawful intent to punish the appellant prior to trial, accompanied by regulatory noncompliance and

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Lewis, 42 M.J. 1, 6 (C.A.A.F. 1995). "Such determinations are necessarily contextual and not generally conducive to a single solution." *United States v. Campbell*, 57 M.J. 134, 138 (C.A.A.F. 2002).

[9] The Government argued on appeal that this motion was waived by the appellant's unconditional guilty plea, citing *United States v. Bradley*, 68 M.J. 279 (C.A.A.F. 2010). We do not find *Bradley* applicable here because the legality of the appellant's confinement was not a pretrial defect. Although the confinement occurred before trial, the Article 13 motion was a request for sentencing credit, which was renewed after the guilty plea and argued again post-trial, and remains subject to appellate review. *See, e.g., United States v. Adcock*, 65 M.J. 18 (C.A.A.F. 2007).

conditions of restraint far more rigorous than necessary to ensure her presence at trial.

It bears on our discussion below that the appellant carries the burden to prove an Article 13 violation. *United States v. Mosby,* 56 M.J. 309, 310 (C.A.A.F. 2002). Many of the facts central to our decision emerged from the appellant's testimony. We ordered the production of additional documents in light of that testimony and a portion of SECNAVINST 1640.9C attached to the record, consistent with our obligation under Article 66(c), UCMJ.

Confinement at Beaufort County

The appellant was confined at Beaufort County in clear violation of naval regulations. Although this does not create a *per se* entitlement to relief, *United States v. Williams,* 68 M.J. 252, 253 (C.A.A.F. 2010), it can shed light on whether an impermissible intent to punish should be attributed to confinement officials. Direct evidence of their intent is often unavailable, so courts consider whether the confinement is reasonably related to a legitimate Government objective. *King*, 61 M.J. at 227. If a court detects arbitrariness, it "permissibly may infer that the purpose of the governmental action is punishment." *United States v. James*, 28 M.J. 214, 216 (C.M.A. 1989) (quoting *Bell v. Wolfish*, 441 U.S. 520, 539 (1979)).

A command's disregard for service regulations may lead us to infer an improper purpose, such as to punish, even where an accused's status as a flight risk or a threat of continuing misconduct justifies the decision to confine him. For example, in *Williams*, the accused was at a high risk for violence and suicide, but the court still agreed that the Government violated Article 13 when it disregarded service regulations concerning suicide watch. 68 M.J. at 254-55. Its failure to conduct the suicide watch properly "resulted in the accused being subjected to more onerous conditions that were not related to a legitimate governmental objective." *Id*. at 255.[10]

[10] Like this case, *Williams* is an example of the close relationship between the two clauses of Article 13. On its face, Article 13 appears to present two separate categories of violation, but in practice the conditions of confinement (the second clause) often inform courts' consideration of intent (the first clause). In *Williams*, the court approved the trial judge's determination that the Government exhibited an unlawful intent to punish by imposing confinement conditions with no legitimate government objective. 68 M.J. 255-57.

Here, the appellant likewise endured illegitimate and onerous conditions because of her command's sustained disregard for SECNAVINST 1640.9C. One requirement of that instruction is for commands to visit detainees in civilian facilities at least once a week (¶¶ 7104d(3) and 7208), but the military judge found that the appellant's command failed to visit her for the first month of her confinement at Beaufort County. This is disturbing, since the appellant had just been in a car accident and sustained injuries which are documented in her medical records.[11]

The failure to visit was not the only regulatory violation in this case. The command never reported or gained approval for the appellant's confinement within 72 hours, effectively preventing any oversight of her case.[12] *Id.*, ¶ 7103.2c. Combined, these regulatory violations demonstrate carelessness, arbitrariness, or a desire to avoid accountability, all of which support an inference that the Government lacked a legitimate objective and therefore harbored an unlawful intent to punish the appellant.

Confinement in the Duty Hut

Our assessment of the appellant's treatment after the parties negotiated a PTA and she was released from Beaufort County is that she fared no better. The command promised her "a lesser form of restraint," but then established, in essence, its own private jail in the barracks duty hut, characterized by

[11] Had the command representatives made the required visits, they could have addressed the appellant's lack of medication, which led her to suffer from the "chronic panic attacks," and could have improved her access to military counsel in the critical stages of her case and led to her release from Beaufort County far sooner; especially in light of the fact that she ultimately pled guilty.

[12] The command never sought second-echelon approval, and it only sent the separate required report to Headquarters, U.S. Marine Corps on 27 January 2012, the same day that the appellant's case was adjudicated. This was more than three months after she was first confined, and eight days after she was released from Beaufort County. By Marine Corps order, this notification should have occurred "[p]rior to effecting the confinement," MCO 1640.3F ¶ 6.a (reference (i) to AE XII), which would have subjected the command's decision and the conditions of the appellant's confinement to greater scrutiny. Even after the passage of so much time, the command's report was riddled with errors; such as, identifying the wrong civilian confinement facility and representing that the appellant was still confined and that her court-martial was still pending when she had already been released from Beaufort County and her case was already adjudicated.

conditions "more rigorous than necessary to ensure the accused's presence for trial." *King*, 61 M.J. at 227.

Neither SECNAVINST 1640.9C nor any regulation authorizes such an arrangement.[13] On the contrary, clear rules exist to protect the rights of detainees, especially females. For example, "total visual and acoustic berthing separation" of genders must be assured, and "[t]rained and qualified female staff members" must be utilized. SECNAVINST 1640.9C, ¶ 7103.2c. Here, the record shows that the appellant had to place herself in full sight and hearing of Marines on duty just to receive adequate airflow in the room where she spent 22-23 hours per day.[14] The same Marines (gender and rank unknown) guarded the appellant on the way to the shower and any other required movements.

The military judge considered these same facts and denied the appellant's motion for relief, instead finding a lawful instance of pretrial arrest. We review that legal conclusion *de novo*. *King*, 61 M.J. at 227.

Although, at trial, the military judge was careful to distinguish between arrest and confinement, we note that for Article 13 purposes, there is no distinction. Both forms of restraint are mentioned in the text of Article 13, and neither may be punitive or unduly rigorous. 10 U.S.C. § 813. In this case, however, the distinction between arrest and confinement implicates a term of the PTA, which obligated the command to place the appellant in "a lesser form of pretrial restraint." Arrest, typified by moral restraint versus physical confinement, is ostensibly a lesser form of restraint than a civilian jail. However, on the facts of this case, the finding of arrest was clearly erroneous and invalidates the military judge's ruling that there was no violation of Article 13.

First, the duty hut arrangement was not arrest; it was continued confinement. Second, that confinement was unlawful because it was unduly rigorous and indicative of the command's intent to punish the appellant. Third, the novel confinement in the duty hut was simply not a "lesser form of pretrial restraint" as bargained for in the PTA.

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[13] "Treatment of persons in naval confinement shall be uniform . . . . Local instructions, directives, and standard operating procedures (SOPs) may supplement, but not supplant, policies and procedures set forth in this manual." SECNAVINST 1640.9C, ¶1201.2.

[14] *Compare* SECNAVINST 1640.9C, ¶ 2104.1d(2) (requiring ventilation of 10 cubic feet per minute per prisoner in naval confinement facilities).

1. The Duty Hut Arrangement was Confinement, not Arrest

Confinement, arrest, and restriction have long been viewed as "gradations" of restraint. *United States v. Schuber*, 70 M.J. 181, 186 (C.A.A.F. 2011). Article 9, UCMJ, defines arrest and confinement:

> Arrest is the restraint of a person by an order, not imposed as a punishment for an offense, directing him to remain within certain specified limits. Confinement is the physical restraint of a person.

10 U.S.C. § 809(a).

From this text and the implementing rules, it is apparent that there are two principal distinctions between arrest and confinement. One is spatial. "Confinement" definitionally requires a small space, while "specified limits" could be of any size. The second distinction relates to enforcement. Arrest is "by an order," while confinement contemplates "physical restraint . . . depriving a person of freedom." R.C.M. 304(a)(4). Confinement is often accomplished by the walls and bars of a cell, or by the presence of guards.[15] Arrest, in contrast, is usually not enforced by physical monitoring. *Schuber,* 70 M.J. at 185-87. Instead, it is more honor-bound like restriction, the distinction being that the spatial limits of arrest are one's own military quarters, and that arrest (unlike restriction) involves the surrender of any military authority. *Id*.

With these distinctions in mind it is apparent to us that the appellant was placed in conditions tantamount to confinement in the duty hut, not arrest. Her spatial limits were minimal. She was never given the freedom of her own regular military quarters, and was instead kept in a "closet-type room." Record at 36. She was monitored by guards on duty at all times, even going to and from the shower. To be free of them, she had to close the door and cut off the circulation of air, leaving her in a locked space that we can only call confining. At trial, the Government appears to have tacitly agreed, since the trial counsel did not oppose one-for-one credit for the duty hut period. *Id.* at 117.

[15] For example, if one is restricted to a jailhouse yard with no walls, one would still feel confined, not arrested, if his continued presence was assured by the presence of armed guards.

2. The Lawfulness of the Duty Hut Confinement

As we noted above, our conclusion that the appellant was placed in confinement does not determine whether she was punished in violation of Article 13. To answer that question, we consider the conditions of her confinement, and how the failure of those conditions to comply with the PTA reveals the command's punitive intent.

The appellant's confinement in the duty hut was undoubtedly "more rigorous than the circumstances required to insure [her] presence" at trial. If there was any doubt that a lesser means of restraint would have sufficed, one need look no further than the PTA. The command promised that something less than confinement was satisfactory, strengthening our conclusion that traditional restriction, enforced by competent noncommissioned and commissioned officers, would have sufficed. Perhaps even arrest, under which the appellant would have been restricted to her own quarters[16] instead of a makeshift prison cell, could have passed muster. But the command imposed neither of these. The appellant remained confined, under constant guard, even after the command demonstrated that confinement was not "required" within the meaning of Article 13 by treating it as a bargaining chip.[17]

Beyond the fact that the duty hut was "more rigorous than the circumstances required," the surrounding context also provides powerful evidence that the command intended to punish

[16] As a single parent with a young child, her quarters could have been base housing or a private dwelling, not a room in the barracks.

[17] We decline to hold that this PTA violates public policy. PTA provisions violate public policy if (1) if they interfere with court-martial fact-finding, sentencing, or review functions or (2) undermine public confidence in the integrity and fairness of the disciplinary process. *United States v. Cassity*, 36 M.J. 759, 762 (N.M.C.M.R. 1992). The first category is not at issue here, since the PTA allowed for the litigation of the Article 13 motion. The second category is implicated, but we do not feel that this case demands the enactment of a *per se* prohibition. Instead, we favor a case-by-case approach, mindful that "[t]he mere potential for abuse of prosecutorial bargaining power is an insufficient basis for foreclosing negotiation altogether." *United States v. Rivera*, 46 M.J. 52, 54 (C.A.A.F. 1997) (quoting *United States v. Mezzanatto*, 513 U.S. 196, 210 (1995)). We also note that an accused is permitted to waive Article 13 motions, and thus consent to having been illegally confined in order to achieve a further aim in pretrial negotiations. *See United States v. McFadyen*, 51 M.J. 289, 291 (C.A.A.F. 1999). Where, as here, an accused retains the right to challenge the lawfulness of confinement, there is significantly less of a public policy concern.

the appellant. As if the establishment of a private jail was not enough, this jailing was also a broken promise, followed by a heavy-handed threat.[18] There is no legitimate Government objective for such tactics, and they fully confirm our earlier inference: that this command intended to punish the appellant before her trial.

3. **The Pretrial Agreement**

We view the duty hut confinement as a breach of a material term of the PTA, not a misunderstanding or term which can be voided as a remedy.

The appellant's position at trial and on appeal is consistent with our interpretation that the PTA is a valid agreement that the Government simply failed to fulfill. As in *United States v. Mead*, 68 M.J. 44, 48 (C.A.A.F. 2009), the PTA in this case "does not involve the mutual misunderstanding by the parties, but rather a failure of one party – the Government – to fulfill its obligation under the pretrial agreement." The parties' different expectations with respect to the "lesser form of pretrial restraint," which so troubled the military judge, was not a fatal lack of "meeting of the minds," but instead the product of a permissible option clause.[19] It is written to allow the command to choose a lesser form of restraint among several possible gradations. What was enforceable by the appellant was that the restraint would have to be "lesser," which of course it was not here.

The military judge's insistence that the appellant consider whether she wanted to withdraw from the PTA presented a hollow solution. By that point, the Government had already received a benefit for its bargain; the appellant had testified against the master sergeant. In return, she had received nothing, and withdrawal from the PTA would have set her back even further, as it would today if we followed the approach in *United States v.*

[18] The appellant would be "immediately returned to Beaufort County Detention Center" if she violated any condition of restraint, including by simply becoming "uncooperative." AE V at 2. Notably, this document does not base the prospect of future confinement on the lawful predicates found in R.C.M. 305.

[19] "When an appellate issue concerns the meaning and effect of a pretrial agreement, interpretation of the agreement is a question of law, subject to review under a *de novo* standard." *United States v. Smead*, 68 M.J. 44, 59 (C.A.A.F. 2009) (citation omitted).

Perron, 58 M.J. 78 (C.A.A.F. 2003).[20] Thus, we will provide alternative relief under Article 66(c), UCMJ. *United States v. Mitchell*, 50 M.J. 79, 83 (C.A.A.F. 1999).

Alternative Relief

Our choice of remedy exceeds additional confinement credit per R.C.M. 305(k). The conduct of the appellant's command was more than careless, especially in light of its threat to send the appellant back to Beaufort County if she failed to comply with continuing rigorous confinement in the duty hut. Further, at a point in time, post-arraignment, a military judge is uniquely positioned to review the "propriety" of pretrial confinement per R.C.M. 305(j). The military judge in this case was not attentive to, and did not properly address, the pretrial punishment and overreaching.

First, the military judge called the appellant's court to order approaching the midnight hour to dispose of her case sooner rather than later, perhaps because of his knowledge of the PTA and the appellant's current status in the duty hut. Record at 49-51. Second, documents such as the command confinement order and the Initial Review Officer's report are not in the record; the military judge did not request them and the Government did not produce them. Instead, the military judge made the assumption that the appellant was confined because of her drunken driving offense, but no such fact exists in the record. *See* AE XVIII at 2.

Third, the military judge omitted any definition of confinement in his findings of fact, but instead, defined arrest and restriction in lieu of arrest. He also made no mention of SECNAVINST 1640.9C, which required the command to obtain authorization from the second echelon commander and higher headquarters, despite the fact that the trial counsel attached a portion of this order to the record as AE XII.[21] This is not the

[20] Courts should not force a remedy on an appellant for which he did not bargain when he gave up his right to due process, 58 M.J. at 86, but in this case, the appellant particularly requested alternative relief for illegal pretrial confinement which we provide below.

[21] Even after the Government tried to show that higher headquarters approved civilian confinement through an e-mail exchange between the command's executive officer and a civilian Government employee from higher headquarters, the failure of the higher headquarters in questioning this late request was another system failure in that no one held the commander accountable for keeping the appellant confined at Beaufort County for more

depth of inquiry expected of a military judge at a point in time, post-arraignment (and eventually in this case, post-trial), that he is uniquely positioned, per R.C.M. 305(j), to discuss.

In our view, the military judge's findings of fact and conclusions of law erroneously portray a command that reluctantly confined the appellant, then dealt with her at arm's length and eventually eased her burden with lesser forms of restraint. What the record actually reflects is a command that threw the appellant in jail, neglected to visit her for at least a month, and then used her confinement to bargain with and threaten her.

Thus, the command's mismanagement of the situation, coupled with the military judge's failure to adequately address it, distinguishes this case from the many other cases that remedy violations of Article 13, UCMJ, by simply applying additional confinement credit per R.C.M. 305(k). *See United States v. Harris*, 66 M.J. 166, 167 (C.A.A.F. 2008); *United States v. Adcock*, 65 M.J. 18, 21 (C.A.A.F. 2007); *United States v. Crawford,* 62 M.J. 411, 414 (C.A.A.F. 2006); *King*, 61 M.J. at 227. Awarding additional confinement credit is no remedy here. "Such a course would deprive the accused of all meaningful relief, and would rightly suggest that this Court is prepared to wink at such grossly illegal treatment of [women] in pretrial confinement." *United States v. Nelson*, 39 C.M.R. 177, 181 (C.M.A. 1969).

Instead, based on the circumstances of this case, we follow another line of cases that recognize "other relief" as a remedy to an Article 13, UCMJ, violation, when warranted. *See United States v. Zarbatany*, 70 M.J. 169, 175 (C.A.A.F. 2011). "Other relief" can range from disapproval of a bad-conduct discharge to complete dismissal of the charges, depending on the circumstances. *Id.* at 175. We do not deem dismissal appropriate in this case;[22] however, in light of the flagrant

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than 72 hours without timely authorization. Government's Response to Court's Order of 10 Jan 2013.

[22] Dismissal is not always necessarily appropriate "even where an appellant has been denied a significant constitutional right. Even in cases of severe infringement on the right to counsel, the Supreme Court has 'implicitly recognized the necessity for preserving society's interest in the administration of criminal justice [and] that remedies *should be tailored to the injury suffered* from the constitutional violation and should not unnecessarily infringe on competing interests.'" *United States v. Fulton*, 55

disregard by the command and the conspicuous disinterest by the military judge in addressing other facts before him, we conclude the appellant merits meaningful relief with respect to modification of her sentence.

We acknowledge that this appellant's meaningful relief must not be disproportionate to the harm that she suffered or the seriousness of her offenses. *Zarbatany*, 70 M.J. at 177. While her offenses are serious, they were nonviolent. To the extent that this appellant deserved punishment for the minimal risk she posed to others, she received it while enduring more than three months of unlawful confinement. Therefore, we will allow only her conviction to remain.

Conclusion

The findings are correct in law and fact and are affirmed. We affirm only a sentence of "no punishment." *See id.*; Art. 66(c), UCMJ. The supplemental court-martial order will reflect that the adjudged sentence included forfeiture of $944.00 pay per month for six months vice "two-thirds pay per month for a period of 6 months." Record at 141.

Chief Judge PERLAK and Senior Judge MODZELEWSKI concur.

For the Court

R.H. TROIDL
Clerk of Court

M.J. 88, 89 (C.A.A.F. 2001) (citing *United States v. Fulton*, 52 M.J. 767, 769 (A.F.Ct.Crim.App. 2000)) (emphasis added.)