UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman STEPHANIE R. TRAUM
United States Air Force

ACM 34225

28 June 2002

Sentence adjudged 17 September 1999 by GCM convened at Maxwell Air Force Base, Alabama. Military Judge: Bruce T. Brown.

Approved sentence: Dishonorable discharge, confinement for the length of her natural life with eligibility for parole, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Captain Shelly W. Schools (argued), Colonel James R. Wise, Colonel Beverly B. Knott, and Lieutenant Colonel Timothy W. Murphy.

Appellate Counsel for the United States: Major Jennifer R. Rider (argued), Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Lieutenant Colonel Bryan T. Wheeler.

Before

YOUNG, BRESLIN, and HEAD
Appellate Military Judges

OPINION OF THE COURT

YOUNG, Chief Judge:

Officer and enlisted court members convicted the appellant of the premeditated murder of her daughter, in violation of Article 118, UCMJ, 10 U.S.C. § 918. The court members sentenced the appellant to a dishonorable discharge, confinement for life, forfeiture of all pay and allowances, reduction to E-1, and a reprimand. The convening authority approved the adjudged sentence, except for the reprimand. The appellant assigns four errors: (1) The appellant's oral and written admissions were obtained in violation of Article 31, UCMJ, 10 U.S.C. § 831; (2) An expert impermissibly opined that

Caitlyn's death was "non-accidental"; (3) The appellant deserved additional credit for illegal pretrial punishment; and (4) This Court should order new post-trial processing of the case. We heard oral argument on the first two issues. We correct the military judge's arithmetic in determining pretrial confinement credit. Otherwise, we affirm.

I. The Facts

The appellant and her husband John married while both were members of the Air Force. John separated from the service so that duty assignments would not separate the couple. At the time of the marriage, the appellant already had a daughter, Dallas, from a previous relationship. The couple had one child of their own, Caitlyn, who was 18 months old. The family moved into military quarters at the Gunter Annex to Maxwell Air Force Base (AFB), Alabama, but due to marital discord, the appellant later threw John out. He moved in with a co-worker.

On 20 December 1998, John, the appellant, and the two children went shopping for Christmas gifts and then went out to dinner. When they returned home, John played with Caitlyn while the appellant wrapped the Christmas gifts in the bedroom. Dallas, who was 5 years old at the time, was asleep on the sofa. John put Caitlyn on the sofa next to her sister, turned the television on, and then returned to the bedroom where he had sex with the appellant. When John left the house at 2245, Caitlyn was sleeping peacefully on the sofa.

The appellant and the children were scheduled to leave the next day for a Christmas visit with her parents. At 0730 on 21 December, the appellant called the childcare facility to notify them that she was going on vacation and would not be dropping the kids off. At approximately 0835, the appellant telephoned emergency services to report that Caitlyn was not breathing. When the paramedics arrived, Caitlyn's body was cool to cold.

Despite the efforts of paramedics and physicians, they could not revive Caitlyn. She was pronounced dead at 0944 at the hospital. Major Stamnas, one of Caitlyn's treating physicians, advised the appellant and John that their baby was dead, and asked if there was anything he could do for them. The appellant did not cry at the news of her daughter's death. She told Major Stamnas that she wanted orders "out of here." A hospital social worker talked to the Traums to see if she could help them in their grief. She put her arm around the appellant and told her she was "so sorry that this has happened." The appellant looked at the social worker and said, "I'm just glad I saved the toy receipts." The appellant repeated this statement and then talked about insurance and a burial place. The social worker invited the Traums to spend a few moments with Caitlyn before the body was sent to the morgue. John went, but the appellant declined to go. "I've already seen her. I don't want to see her." The social worker told them that

she had seen Caitlyn and that she was a beautiful girl. The appellant replied, "She really was mean. She was mean to her sister and really active."

While at the emergency room (ER), the appellant again telephoned the child care center and told them that Caitlyn was dead. She also notified her insurance company.

At trial, the prosecution introduced evidence that, while attending leadership school, the appellant referred to John as her ex-husband, even though they were still married. Approximately one month before Caitlyn died, the appellant told members of her leadership school class that she loved one of her kids less than the other "because it looked like her ex-husband."

II. The Admissions

On 12 January 1999, the appellant telephoned agents of the Air Force Office of Special Investigations (AFOSI) to inquire about the status of the investigation into Caitlyn's death. The agents asked if they could discuss it at their office. She agreed to visit the AFOSI on 13 January.

The appellant arrived at the AFOSI office at approximately 0830, where she met Special Agents Gage and Engleman. She asked them about the status of the investigation. They told her the results of the autopsy were pending and they had interviewed a number of witnesses. She claimed she was interested in getting the autopsy report and death certificate so her unit could process a humanitarian reassignment. The agents also discussed with the appellant their relationship with the Alabama State Medical Examiner's Office, the condition of her other daughter, Dallas, and the appellant's interest in computers. The agent's then asked her if she would be willing to take a polygraph. Special Agent (SA) Engleman explained that the polygraph could eliminate her as being involved in Caitlyn's death and could speed up the processing of the death certificate. The appellant said that she did not want to discuss the details of the night her daughter died. SA Engleman told her that the polygrapher, SA Kraus, would only be interested in some key details and that she could raise her concerns with him. SA Kraus entered the room and was introduced to the appellant. After a couple of minutes of small talk, the appellant agreed to talk to SA Kraus.

SA Kraus and the appellant moved into another room. SA Kraus advised the appellant that she was suspected of causing the death of Caitlyn and of her rights to counsel and to remain silent. The appellant waived her rights and agreed to be interviewed and polygraphed. She did not indicate any hesitancy in talking to SA Kraus, or in taking the polygraph, then or any other time during the interview. She never invoked her right to remain silent or her right to have an attorney.

The appellant ultimately admitted to SA Kraus that she killed Caitlyn. At trial, the military judge denied the defense motion to suppress the confession, and evidence of the appellant's admission was presented to the court members.

The appellant alleges that her statement to SAs Gage and Engleman, that she did not want to discuss the details of 20-21 December, "constituted a clear and unequivocal exercise of her right to remain silent." She asserts that SA Engleman lied "by advising her that she would not 'necessarily' need to discuss the details of that evening." The appellant avers that this lie was an unlawful inducement and the military judge erred by failing to suppress the resulting admissions.

Generally, an involuntary statement "may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress." Mil. R. Evid. 304(a). A statement is involuntary if, *inter alia*, it was obtained in violation of the accused's rights under Article 31, UCMJ, 10 U.S.C. § 831, or is the product of unlawful inducement. Mil. R. Evid. 304(c)(3).

> A person . . . who is required to give warnings under Article 31 may not interrogate or request any statement from . . . a person suspected of an offense without first: (1) informing [her] of the nature of the accusation; (2) advising [her of] the right to remain silent; and (3) advising [her] that any statement made may be used as evidence against [her] in a trial by court-martial.

Mil. R. Evid. 305(c). An interrogation "includes any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning." Mil. R. Evid. 305(b)(2). *See Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980).

If an accused alleges her confession was involuntary because she was denied her right to counsel, we review the military judge's decision to admit the confession for an abuse of discretion. *United States v. McLaren*, 38 M.J. 112, 116 (C.M.A. 1993) (applying an abuse of discretion standard). If, however, an accused asserts that her confession was involuntary because of coercive police activity, we review the issue de novo. *United States v. Bubonics*, 45 M.J. 93, 94 (1996) (citing *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991)).

When SA Gage and SA Engleman met with the appellant, they did not interrogate her within the meaning of Mil. R. Evid. 305(b)(2). The agents met with the appellant at her request—she wanted an update on the status of the case and assistance in moving the autopsy to completion so that a death certificate could be issued. No incriminating response from the appellant was sought, obtained, or was reasonably a consequence of

the discussions. Under the circumstances, asking the appellant if she would be willing to take a polygraph was not an interrogation and did not require Article 31 warnings. *Cf. McNeil v. Wisconsin*, 501 U.S. 171, 182 n.3 (1991) (noting Supreme Court has "never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation'"). As the appellant was a suspect and SA Kraus was seeking an incriminating response, he was required to warn her of her rights prior to administering the polygraph. That is what he did. Furthermore, the appellant's statement that she did not want to discuss all the details of what happened on 20-21 December was not an "unequivocal invocation of her right to remain silent." She agreed to talk to the polygrapher; she just wanted to be able to limit what she would talk about. SA Gage and SA Engleman did not unlawfully induce the appellant to make any statements. They told her the truth; she could limit the discussion, if she so wished. She merely had to explain to the polygrapher the conditions on her willingness to be interviewed. The military judge did not err in refusing to suppress the appellant's admissions.

III. The Expert's Opinion

Prior to trial, the appellant moved the court to exclude the testimony of Dr. Sharon Cooper, a forensic pediatrician. After an extensive and hotly litigated hearing, the military judge denied the motion, but severely limited the scope of Dr. Cooper's testimony. The appellant asserts the military judge abused his discretion by permitting Dr. Cooper to testify that Caitlyn's death was the result of non-accidental asphyxiation because "the conclusion was based, in part, on the expert's credibility assessment of appellant, and the use of impermissible profile evidence, rather than objective medical findings."

In the evidentiary hearing, Dr. Cooper testified that there are three factors to consider in diagnosing fatal child abuse: (1) the history of the complaint and any medical treatment provided—including whether the childcare providers change their stories and whether there was any delay in seeking medical treatment; (2) whether the behavior of the caregiver shows the appropriate concern for the child—including appropriate grieving in cases of death; and (3) the physical examination on presentation at the hospital and the autopsy. She opined that Caitlyn died as a result of asphyxiation by suffocation. Her opinion was based on the following facts: (a) The death could not be explained by other medical causes; (b) The history the appellant provided to EMT personnel was inconsistent with what she provided to the hospital staff; and (c) The trauma to Caitlyn's upper lip, discovered during the autopsy, was similar to that found in other child suffocation cases she had examined. Although she did not specify it as a factor on which she based her conclusion that Caitlyn's death was non-accidental, Dr. Cooper noted that the appellant's grieving response was inappropriate. Dr. Cooper specifically rejected the efforts of the defense counsel to suggest that a diagnosis of child abuse should be made on any of the factors individually.

Dr. Cooper limited her testimony to the scope permitted by the military judge. Dr. Cooper never testified before the members that she based her conclusion that Caitlyn's death was non-accidental on the appellant's credibility or on profile evidence. Thus, it appears that the appellant is now trying to attack Dr. Cooper's testimony as being *based* on impermissible factors.

A witness with scientific, technical, or other specialized knowledge is allowed to testify if her testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue." Mil. R. Evid. 702. In providing an opinion, an expert may rely on information made known to her. If the facts or data made known to her are of the "type reasonably relied upon by experts in the particular field in forming opinions . . . , the facts or data need not be admissible in evidence." Mil. R. Evid. 703. Otherwise admissible expert testimony is "not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Mil. R. Evid. 704.

The proponent of expert testimony must establish, *inter alia*, the qualifications of the expert, the basis of the expert testimony, the legal relevance of the evidence, and the reliability of the evidence. *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993). Even then, the evidence is not admissible unless the military judge determines that the probative value of this evidence is not substantially outweighed by the danger of unfair prejudice. *Id.* at 399-400 (citing Mil. R. Evid. 403).

We will not overturn the military judge's decision on the admission of expert testimony unless we are convinced he abused his discretion. *United States v. Raya*, 45 M.J. 251, 252 (1996). Because of our statutory authority to "determine controverted questions of fact" under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we are not required to defer to the military judge's findings of fact. However, we normally do so unless they are clearly erroneous. *See United States v. Vaughters*, 42 M.J. 564, 566 (A.F. Ct. Crim. App. 1995). We review his conclusions of law de novo. *United States v. Ayala*, 43 M.J. 296, 298 (1995).

Generally, it is error to admit evidence that tends to show that the typical perpetrator of a criminal offense has certain characteristics and that this particular accused fits a "profile" that is consistent with that of the typical perpetrator. *United States v. Banks*, 36 M.J. 150, 161 (C.M.A. 1992) (citing *United States v. Garcia*, 25 M.J. 159 (C.M.A. 1987) (summary disposition); *United States v. August*, 21 M.J. 363, 364 (C.M.A. 1986)). An expert witness is not permitted to act as a human lie detector for the court-martial. *United States v. Birdsall*, 47 M.J. 404, 410 (1998). But, Dr. Cooper neither acted as a human lie detector nor tried to establish that the appellant fit the typical profile of a child abuser.

In her testimony before the members, Dr. Cooper started by explaining the different types of child maltreatment—neglect, physical abuse, sexual abuse, and

emotional abuse. She noted that studies showed that in 80 percent of fatal child abuse incidents there was no previous history of such abuse and that children are statistically more likely to be killed by their biological parents than by a stranger. Dr. Cooper then testified that, in performing a fatality review in an infant death, there were basically three considerations in determining the cause of death: (1) the autopsy; (2) social service information, such as information about the family and school history, if any; and (3) the crime scene report done by law enforcement, if any. On the other hand, if a child is presented to an ER dead, physicians would look at matters a little differently: (1) the history provided by the child care provider; (2) the behavior of the persons who brought the child to the ER; and (3) the physical examination and subsequent autopsy of the child. Dr. Cooper never explained these factors in detail or correlated the facts of the appellant's case to those factors, nor did she provide any opinion as to whether the appellant was the likely source of injuries that caused Caitlyn's death.

Dr. Cooper explained that the most common causes of child deaths were SIDS (sudden infant death syndrome), child abuse, and accident. She stated that SIDS normally occurs in children under the age of 6 months. She ruled out several different conditions "known to shorten the life-span," such as seizure disorders and infections, as causing Caitlyn's death. She next explained the four different types of asphyxiation—suffocation, strangulation, overlying, and chemical. After going over the evidence of the case, she eliminated each type with the exception of suffocation. She then turned her attention to whether the suffocation was accidental or non-accidental. Dr. Cooper briefly explained the process of suffocation, noting the length of time necessary to die of suffocation and the fact that a person, even a child, would struggle mightily to avoid suffocation. Based on her review of the evidence, Dr. Cooper opined that Caitlyn's death was as a result of non-accidental suffocation.

The appellant contends that Dr. Cooper's conclusion was based on impermissible evidence. She asserts that "inconsistent histories and improper grieving response—are nothing more than profile evidence." We disagree.

Evidence that an accused fits an incriminating profile is inadmissible under Mil. R. Evid. 404(a),

> not because it is irrelevant, but because it is so weighty that it might prevent the finders of fact from considering the other more important historical evidence in the case. Bad general character evidence has the tendency of encouraging finders of fact to convict because of the accused's extrinsic conduct as opposed to his charged conduct.

Stephen A. Saltzburg et al., *Military Rules of Evidence Manual* 524 (4th ed. 1997) (citing *Michelson v. United States*, 335 U.S. 469 (1948)). The rule should not bar profile evidence that is not itself likely to arouse sympathy or hostility. 1 John W. Strong et al.,

McCormick on Evidence § 206 (5th ed. 1999). Dr. Cooper's testimony, that there was no previous history of abuse in 80 percent of the fatal child abuse incidents and that children are statistically more likely to be killed by their biological parents than by strangers, are such facts. This testimony was relevant to explain to court members counterintuitive facts—parents actually kill their own children, and there isn't necessarily a history of abuse prior to the killing. Neither of these facts was likely to arouse hostility toward the appellant.

We also reject the appellant's argument that Dr. Cooper's testimony, which was based on "inconsistent histories and improper grieving response," was improper because it was "nothing more than profile evidence." Dr. Cooper did not rely on the appellant's *character* to determine the cause of death. Instead, she relied on the medical evidence and appellant's *conduct* after the death. This conduct—providing inconsistent histories of the period surrounding the death and a grieving response that was outside that normally seen in parents whose child dies—was relevant evidence, both to Dr. Cooper's evaluation of the cause of death and the court members' determination of the charge against the appellant. The evidence had the tendency to establish that the appellant killed her infant daughter.

The military judge did not err in permitting Dr. Cooper to testify. He appropriately limited her testimony before the members. But, that did not mean she could not rely on the information not admitted into evidence as a basis for her opinions. *See* Mil. R. Evid. 703. Dr. Cooper provided sufficient foundation to establish that the consistency of the history and the behavior of the childcare provider are factors forensic pediatricians consider in reaching a conclusion on the cause of a child's death.

We reject the defense contention that Dr. Cooper acted as a human lie detector. She was not concerned with which of the histories of the incident recited by the appellant was accurate. Her conclusion that foul play may have been involved was based on the fact that there were inconsistencies.

IV. Pretrial Punishment Credit

At trial, the appellant moved the court to order her release from pretrial confinement and to award additional confinement credit because of illegal pretrial punishment. The military judge refused to release the appellant from pretrial confinement, but awarded her additional confinement credit because of her maximum custody status and the conditions of her pretrial confinement. The appellant claims the military judge failed to award her sufficient credit for the illegal punishment. As the appellant was sentenced to confinement for life, any credit for illegal pretrial punishment will only affect the date she becomes eligible for parole. Of course, we could still consider any illegal pretrial punishment in determining whether the appellant's sentence is appropriate.

A. Facts

The appellant was ordered into pretrial confinement on 13 January 1999, immediately after she confessed to suffocating Caitlyn. She was placed in maximum custody at the Maxwell AFB confinement facility. On 15 January, the pretrial confinement reviewing officer determined continued pretrial confinement was appropriate. On 19 January, the appellant's defense counsel complained to the staff judge advocates (SJA) of both the special and general court-martial convening authorities about the appellant's maximum-security status. The appellant's custody status was not changed.

On 21 January, the defense counsel asked the convening authority to order a sanity board to evaluate the appellant's mental health. The sanity board was conducted at Lackland AFB, Texas, from 8-13 February. The appellant was held in maximum custody in the Lackland AFB confinement facility during this period.

On 12 March, the defense asked that the appellant's custody status be downgraded from maximum to medium-in. By letter dated 15 March, the Security Forces commander, Lieutenant Colonel (Lt Col) Simmons, denied the request. Lt Col Simmons admitted that the appellant did not, "technically," meet the criteria for maximum custody status outlined in Air Force Instruction (AFI) 31-205, *The Air Force Corrections System* ¶ 27.1 (16 April 1997). He asserted that he needed to consider many factors in determining an inmate's custody status, including "indications of emotional instability or disturbance, irresponsibility, prior escapes, AWOLs, maturity, *degree and severity of offense, and charges still pending*. On the other hand, you should also consider *an inmate's history of emotional stability* and demonstrated sense of productive work." App. Ex. XXIX, Atch 5 (quoting Air Force Pamphlet (AF Pam) 31-221, *Air Force Corrections Program* § B2.3.1 (31 Mar 1995) (emphasis in Lt Col Simmons' letter)). Lt Col Simmons did not explain how these factors applied to the appellant, other than that, "Regardless of how it was done, the alleged offense was not an accident, and therefore *is* an act of violence." *Id.* (emphasis in original).

On 17 March, at the request of the Chief, Military Justice, at the base legal office, the defense submitted a letter from the Chief, Life Skills Clinic, stating that the appellant was not then a serious danger to herself. On 26 March, the defense counsel renewed his request, to the base staff judge advocate (SJA) and Lt Col Simmons, that the appellant's custody status be downgraded. He attached the 17 March letter from the Chief, Life Skills Clinic. On 22 April, the defense counsel wrote to the base SJA, Lt Col Simmons, and the Air University (GCM) SJA complaining that he had not received a response to his earlier requests that the appellant's custody status be downgraded. It appears from the record that these requests also went unanswered.

At a pretrial hearing on 4-5 June 1999, conducted pursuant to Article 39(a), UCMJ, 10 U.S.C. § 839(a), Lt Col Simmons testified that he considered three issues in determining the custody classification of a prisoner: (1) whether the individual is a flight risk; (2) whether the individual is a risk to herself or others: and (3) whether the individual is at risk of injury from others. He decided maximum security status was appropriate for this appellant for the following reasons: (1) The appellant and her husband had a history of domestic disputes, he remained in the area and, since the child was dead, he could be a possible source of danger for the appellant; and (2) Based on her situation and the nature of the pending charges, the appellant could be a risk to herself as well as a flight risk.

The military judge determined that maximum custody status was not appropriate after 26 March 1999:

> I note that, by that time, she had been in pretrial confinement for over 2 months; she had traveled to and from Lackland without a problem; she had been exercising outside her cell on a daily basis since the end of January; she had attended the Article 32 hearing in this case; she had met with her counsel as needed, made phone calls, received visitors. In short, by that time she had demonstrated that maximum-custody was no longer needed.

Although he ruled that the government did not intend to punish the appellant by the conditions of her confinement, the judge found four specific actions of which the appellant complained amounted to a violation of Article 13, UCMJ, 10 U.S.C. § 813, for which she was entitled to credit against her confinement:

(1) One days' credit for each of three weekly phone calls for which the government could provide no legitimate reason the appellant was not permitted to make—a total of 3 days' credit.

(2) One days' credit for each of three days the appellant spent wearing the same colored jumpsuit as a post-trial confinee—a total of 3 days' credit.

(3) Eight days' credit for the failure of the government to permit the appellant to get her hair cut to conform to Air Force regulations between 1 April and 2 June 1999.

(4) Two and one-half days' credit for each day the appellant was in maximum custody, from 26 March through 4 June 1999—a total of 177.5 days' credit (the military judge incorrectly estimated the total credit for this particular violation of Article 13, UCMJ, as being 190 days).

B. The Law

Article 13, UCMJ, 10 U.S.C. § 813 prohibits punishment before trial.

> No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.

"By its terms and clear implications, Article 13 prohibits two types of activities involving the treatment of an accused prior to trial." *United States v. McCarthy*, 47 M.J. 162, 165 (1997). First, it prohibits the imposition of punishment or penalty prior to trial. Second, it proscribes infliction of unduly rigorous circumstances during pretrial detention. *Id. See United States v. Fricke*, 53 M.J. 149, 154 (2000), *cert. denied*, 531 U.S. 993 (2000); *United States v. Allen*, 33 M.J. 209, 214 (C.M.A. 1991).

"[W]hether particular conditions amount to punishment before trial is a matter of intent, which is determined by examining the purposes served by the restriction or condition, and whether such purposes are 'reasonably related to a legitimate governmental objective.'" *United States v. Palmiter*, 20 M.J. 90, 95 (C.M.A. 1985) (quoting *Bell v. Wolfish*, 441 U.S. 520, 539 (1979)). "[I]n the absence of a showing of intent to punish, a court must look to see if a particular restriction or condition, which may on its face appear to be punishment, is instead but an incident of a legitimate nonpunitive governmental objective." *Id.* (quoting *Wolfish*, 441 U.S. at 539 n.20) (alteration in original).

> [I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.

Wolfish, 441 U.S. at 539 (footnote omitted).

At trial, an accused bears the burden of proving, by a preponderance of the evidence, that the conditions of her confinement constituted illegal pretrial punishment. *See* Rule for Courts-Martial (R.C.M.) 905(c)(1) and (2); *United States v. Mosby*, 56 M.J. 309, 310 (2002). On appeal, claims of illegal punishment qualify for independent review. *McCarthy*, 47 M.J. at 165. But, the appellant still bears the burden of establishing by a

preponderance of the evidence that she was entitled to additional confinement credit. *Mosby*, 56 M.J. at 310. On questions of "basic, primary, or historical facts," such as the conditions of the confinement and whether there was intent to punish, appellate courts normally defer to the trial judge. *McCarthy*, 47 M.J. at 165. We will not overturn his findings unless they are clearly erroneous. *Mosby*, 56 M.J. at 310 (citing *United States v. Smith*, 53 M.J. 168, 170 (2000)). But, whether a person was subjected to illegal punishment is a matter we review de novo. *Id.*

C. Discussion

The appellant's main complaint concerned consequences of being in maximum custody status. She was not singled out for special treatment. She was treated in accordance with the rules applicable to any maximum custody grade inmate. The appellant's other complaints, concerning the missed telephone calls, having to wear the same uniform as a sentenced prisoner for 3 days, and not being able to get her hair cut, were *de minimis* and did not warrant pretrial punishment credit. *See Corteguera*, 56 M.J. at 334; *Fricke*, 53 M.J. at 155 (citing *Wolfish*, 441 U.S. at 539 n.21).

We accept the military judge's findings concerning the conditions of the appellant's confinement and the lack of intent by government officials to punish her prior to trial. They are not clearly erroneous. *See Mosby*, 56 M.J. at 310. There is no evidence that the conditions imposed on confinees in maximum custody status were intended as punishment or were not "reasonably related to a legitimate governmental objective." *United States v. James*, 28 M.J. 214, 216 (C.M.A. 1989) (quoting *Wolfish*, 441 U.S. at 539). *See McCarthy*, 47 M.J. at 165. Therefore, our review is limited to whether the assignment of the appellant to maximum custody status is reasonably related to a "legitimate governmental objective." If it is not, we may infer that her assignment to maximum custody status was intended as punishment. *Wolfish*, 441 U.S. at 539.

The appellant concedes that maximum custody status was appropriate from the inception of her pretrial confinement (13 January) until 29 January. But, on 21 January, the defense requested a sanity board. It is difficult to imagine how a decision to retain in maximum custody status an accused charged with murder, whose sanity and competence has been called into question by her own attorneys, can be labeled "arbitrary or purposeless." *Id.* Furthermore, the fact that the appellant later was found to be competent and sane does not revise the facts known to the confinement authorities at the time of classification. *See McCarthy*, 47 M.J. at 168.

The appellant failed to establish that, by assigning her to maximum custody status, the confining authorities intended to punish her or that the decision was so arbitrary or purposeless as to permit an inference that her custody classification was meant as punishment.

D. The Credit

Although not raised by the appellant, we note that the military judge made a mathematical error in determining the appellant's confinement credit. He determined she was entitled to 307 days' credit towards any sentence to confinement. The SJA recommended the convening authority give the appellant "administrative credit for having served 307 days as directed by the military judge." In his action, the convening authority "credited" the appellant with "307 days for pretrial confinement against the sentence to confinement." *But see* Air Force Instruction 51-201, *Administration of Military Justice* ¶ 9.8.3 (2 Nov 1999) (requiring convening authority to note in his action *only illegal* pretrial confinement).

Based on the military judge's rulings, we find the following is the appropriate pretrial confinement credit:

(1)	Days for the miscellaneous minor infractions	14
(2)	Credit for days illegally in maximum custody (72 days x 1 ½)	108
(3)	Credit for days in pretrial confinement (*See United States v. Allen*, 17 M.J. 126 (C.M.A. 1984)	246
	Total	368

As the *Allen* credit is applied automatically by the confinement facility, the convening authority's action need only account for the 122 days of illegal pretrial punishment. AFI 51-201 ¶ 9.8.3.

V. Post-Trial Processing

The appellant asks this Court to order new post-trial processing for the following reasons: (1) The staff judge advocate's recommendation (SJAR) incorrectly advised the convening authority that the maximum punishment was life without parole; (2) There was no addendum to the SJAR; (3) There is no evidence that the convening authority either received or considered the appellant's clemency submissions; and (4) The record of trial is missing four pages from the clemency submissions.

A. Confinement for Life without Parole

A court-martial may adjudge a sentence of confinement for life without eligibility for parole in any case in which confinement for life may be adjudged. Article 56a, UCMJ, 10 U.S.C. § 856a. However, a court-martial may not adjudge a sentence that exceeds "such limits as the President may prescribe for the offense." Article 56, UCMJ,

10 U.S.C. § 856. The appellant contends that life without the eligibility for parole is not an authorized punishment until the President specifically adopts it.

A military member convicted of premeditated murder "shall suffer death or imprisonment for life as a court-martial may direct." Article 118(4), UCMJ, 10 U.S.C. § 918(4). Life without eligibility for parole is a lesser sentence than death. Although the case was referred to a court that was not authorized to adjudge death, neither the President nor the convening authority limited the sentence to life imprisonment with the possibility of parole. Therefore, the SJA was correct in advising the convening authority that life without parole was an authorized punishment for premeditated murder. Regardless, the appellant failed to demonstrate prejudice. The appellant did not receive a sentence of life without parole and she failed to establish that the convening authority would have acted differently if life without parole was not an authorized punishment in her case. Article 59(a), UCMJ, 10 U.S.C. § 859(a).

B. The Remaining Issues

The appellant was correct in asserting that the record of trial as submitted to this Court did not contain an addendum to the SJAR, that there was no evidence the convening authority either received or considered the appellant's clemency submissions, and four pages were missing from the clemency submissions. After the appellant submitted her brief to this Court, the appellee established that an addendum had been prepared and provided to the convening authority, and the convening authority had received and considered the appellant's clemency submissions before taking action on the case. The appellee also provided this Court the missing pages of the clemency submission.

VI. Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the appellant's substantial rights occurred. Article 66(c), UCMJ; *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). The appellant will be credited with a total of 368 days' confinement (122 days of which are for illegal pretrial punishment). The approved findings and sentence are

AFFIRMED.

Judge HATTRUP sat for oral argument, but left the court without voting on this opinion. Judge HEAD was substituted for Judge HATTRUP.

OFFICIAL

HEATHER D. LABE
Clerk of Court