**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Staff Sergeant DERRICK M. WILLIAMS**
**United States Air Force**

**ACM 36679**

**19 December 2007**

Sentence adjudged 2 March 2005 by GCM convened at Kirtland Air Force Base, New Mexico. Military Judge: Jack L. Anderson (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 18 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Anniece Barber, Captain Vicki A. Belleau, and Captain Timothy M. Cox.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Robert V. Combs, Major Matthew S. Ward, and Major Jeffrey A. Ferguson.

Before

SCHOLZ, JACOBSON, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

JACOBSON, Senior Judge:

In accordance with his pleas, the appellant was found guilty of desertion, escaping from confinement, two specifications of fleeing from apprehension, operating a vehicle in a reckless manner, wrongful appropriation of an automobile,[1] assaulting an airman who

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[1] The appellant was originally charged with robbery of the vehicle, in violation of Article 122, UCMJ, 10 U.S.C. § 922, but pled guilty to the lesser included offense of wrongful appropriation in violation of Article 121, UCMJ, 10 U.S.C. § 921.

was in execution of her law enforcement duties, three specifications of assault consummated by battery, assault upon a federal law enforcement officer who was in the execution of his duties, assault with a dangerous weapon, unlawful entry,[2] communicating a threat, and wrongfully seizing and holding an individual against her will in violation of Articles 85, 95, 111, 121, 128, and 134, UCMJ, 10 U.S.C. §§ 885, 895, 911, 921, 928, 934.

Contrary to his pleas, the appellant was found guilty of additional specifications of assault consummated by battery, assault with a dangerous weapon, wrongfully confining and holding an individual against her will, and communicating a threat, in violation of Articles 128 and 134, UCMJ, 10 U.S.C. §§ 928, 934. A military judge, sitting alone as a general court-martial, sentenced the appellant to a dishonorable discharge, confinement for 18 years, total forfeitures of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged. On appeal, the appellant raises four assignments of error.[3] Essentially he argues 1) he was illegally punished prior to trial in violation of Article 13, UCMJ, 10 U.S.C. § 813; 2) that several specifications, taken together, constitute an unreasonable multiplication of charges; and 3) that his sentence should be reassessed because his illegal pretrial confinement resulted in a reduction in his potential good conduct time abatement credit. Finding no merit in his asserted errors, we affirm the findings and sentence.

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[2] The appellant was originally charged with burglary, in violation of Article 129, UCMJ, 10 U.S.C. § 929, but pled guilty to the lesser included offense of unlawful entry in violation of Article 134, UCMJ.

[3] The appellant's specific assignments of error are as follows:

I.

Whether mental health care providers were deliberately indifferent to appellant's psychiatric needs by keeping him in suicide watch status without evaluating him in accordance with acceptable mental health standards and AFI 31-205, such that he was punished in violation of Article 13, UCMJ, and if so, whether appellant is entitled to additional sentence credit.

II.

Whether the conditions of appellant's pretrial confinement in suicide watch, which included, inter alia, denial of books, a radio, and/or a CD player, and 24-hour-a-day lighting, were so excessive that they constitute punishment in violation of Article 13, UCMJ, and if so, whether appellant is entitled to additional sentence credit.

III.

Whether the specification of additional Charge III and Specification 2 of Additional Charge V and the Specifications of Additional Charges VI and IX constitute an unreasonable multiplication of charges.

Supplemental Assignment of Error

Whether the interests of justice require reassessment of appellant's sentence to confinement in light of the fact were it not for his illegal pretrial confinement, he would have been eligible to receive 10 days per month good conduct time abatement credit against his sentence instead of only 5 days per month. This issue filed pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

*Background*

The appellant was a noncommissioned officer with almost 10 years of service when he was ordered by his commander to undergo a mental health evaluation in March 2004. The evaluator, Dr. Leckie, concluded that the appellant was a low, though not nonexistent risk for suicide and recommended the unit continue to provide support, encouragement, and queries about thoughts of self harm. On 31 March 2004 the appellant kidnapped his ex-girlfriend, SSgt R, and transported her by car to Las Vegas, Nevada. The FBI captured him the next day. During the course of the kidnapping, the appellant was originally threatening to his victim, but became progressively less threatening and more suicidal. By the end of the ordeal SSgt R testified that part of the reason she didn't try to escape was because she still cared for the appellant and didn't want him to kill himself. This crime eventually led to the appellant's pleas of guilty to pushing SSgt R's head with his hand, kicking her once, pointing a loaded firearm at her, breaking into her house, wrongfully seizing and holding her against her will, and threatening to shoot her. Also related to this incident were his pleas of guilty to making a false official statement to the FBI agent that apprehended him and "kicking his foot at" the agent as he attempted to flee. No specifications were litigated in relation to these events.

The appellant was held in federal custody for about 14 days and then returned to Kirtland Air Force Base (AFB) and placed in pretrial confinement. On 29 May 2004 the appellant escaped from pretrial custody by overpowering the lone guard, handcuffing her to a pipe, and fleeing in her car. He led Security Forces on a chase around the base, including through base housing, then jumped out of the still-moving car and escaped over a fence. He was apprehended the next day. These events led to the appellant's pleas of guilty to assaulting the confinement officer by choking her, wrongfully appropriating her car, operating the car in a reckless manner by speeding through base housing, escaping from confinement, desertion, fleeing apprehension while driving the vehicle, and fleeing apprehension the next day when an OSI agent came to the door of the house in which he was staying. A specification alleging he kidnapped the pretrial confinement officer was litigated at trial. After evidence was presented the military judge granted the defense's motion for a finding of not guilty pursuant to Rule for Courts-Martial (R.C.M.) 917.

In addition to charges relating to these two events, the government brought charges that were related to the appellant's marriage to SSgt W. The offenses charged allegedly occurred in late 2001 and early 2002. The appellant plead guilty to striking SSgt W in the face with his hand. He pled not guilty, but was found guilty of wrongfully confining and holding SSgt W against her will, choking her, communicating a threat to injure or kill her, and assaulting her by pointing a loaded firearm at her.

The appellant spent the period from 1 April 2004 until his 28 February 2005 trial in pretrial confinement. His trial was originally scheduled to begin in October, but

shortly before it took place he hired civilian defense counsel and requested a delay until 8 December 2004. He was arraigned on that date, but his counsel then moved for a new sanity board based on certain bizarre behavior the appellant had been exhibiting. The sanity board was granted and the trial was postponed until late February 2005. The appellant was granted the appropriate amount of pretrial confinement credit plus 188 additional days credit for illegal pretrial confinement. His time in pretrial confinement is, however, the subject of several of his assignments of error and will be discussed further below.

*Discussion*

*Issues I and II: Illegal Pretrial Punishment*

The appellant, in his first and second assignments of error, contends that he was illegally punished prior to trial in violation of Article 13, UCMJ, and is therefore entitled to additional sentence credit. In his first assignment, he avers the illegal pretrial punishment was a result of the deliberate indifference his mental health care providers exhibited during his pretrial confinement period. In the second, he argues the conditions of his pretrial confinement in suicide watch, which included 24-hour-a-day lighting, denial of books, radio, CD player, and other comforts were so excessive that they constituted punishment. The appellant brought a pretrial punishment motion at trial and the military judge found in his favor, awarding 188 days of additional sentence credit. Before us, the appellant urges we find additional bases of illegal punishment and award additional credit against his sentence.

Whether an appellant is entitled to credit for a violation of Article 13, UCMJ presents a mixed question of fact and law. *United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997). When a military judge makes a finding of fact that there was no intent to punish, we review that finding to determine whether it was clearly erroneous. *United States v. Smith*, 53 M.J. 168, 170 (C.A.A.F. 2000); *United States v. Washington*, 42 M.J. 547, 562 (A.F. Ct. Crim. App. 1995), *aff'd*, 46 M.J. 477 (C.A.A.F. 1997). We will not overturn a military judge's findings of fact unless they are clearly erroneous. *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002). We review de novo the ultimate question of whether an appellant is entitled to credit for a violation of Article 13, UCMJ. *Id.*

The appellant's bases for arguing he was punished illegally prior to trial were essentially the same during motion practice as they are before this Court. After receiving written briefs and evidence, including the testimony of several witnesses, the military judge entertained argument by counsel and decided the appellant had, in fact, been illegally punished prior to trial. The military judge made detailed findings of fact which we find are consistent with the evidence and not clearly erroneous. We therefore adopt them as our own and append them to this opinion.

The military judge's findings both support and undermine the appellant's claims that he was illegally punished prior to trial and deserves additional credit. On the one hand, the conditions of his pretrial confinement were much more restrictive than the average pretrial confinee. He was placed in a "suicide watch" cell, forced to wear a suicide gown for several months, and was allowed to possess few personal items. Most onerous was the continuous lighting of his cell, which confinement officials maintained was essential for around-the-clock video monitoring of the suicide watch cell. The appellant's confinement in this cell continued even after 26 August 2004 when Dr. Leckie determined that a "formal suicide watch" was no longer necessary, although some privileges were restored at that point.

On the other hand, the appellant was not the average pretrial confinee. He had expressed his desire to kill himself on several occasions to different individuals. On 29 May 2004 he escaped from pretrial confinement by overpowering a guard and choking her until she lost consciousness. After the appellant was recaptured, Dr. Leckie classified him as being at "high, long-term risk for suicidal and homicidal behaviors." In the months following this classification he was usually uncooperative with mental health care professionals who attempted to visit him in his cell, an attitude that prevented more thorough evaluations. Finally, we note that although Dr. Leckie's 26 August 2004 memorandum did not recommend a formal suicide watch, in an earlier memorandum he suggested the appellant "should remain under the provisions of [your] suicidal protocol, segregated from other prisoners (since he may attempt to harm them)," and warned that the appellant was "at high risk for violence and suicide for an indefinite, long period of time." The confinement officials' decisions in regard to the appellant's pretrial treatment were reasonable, based on the information they had available to them at the time. We see no intent to punish, and, with the exception of those conditions found by the military judge to be illegal pretrial punishment, find the appellant's pretrial confinement conditions reasonably related to a legitimate government objective. *See United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005).

Based on the military judge's findings of fact as supplemented by our own independent review of the record, and after conducting our own de novo review of whether the appellant is entitled to additional credit under Article 13, UCMJ, we agree with the military judge's conclusion that the appellant was illegally punished between 26 August 2004 and the date of trial. We also agree that 188 days of additional credit was appropriate for the Article 13, UCMJ, violation and decline to award additional credit as requested by the appellant.

The appellant's first and second assignments of error, insofar as they aver illegal pretrial punishment in addition to that found by the military judge at trial and argue that additional sentence credit is appropriate, are without merit.

*Issue III: Unreasonable Multiplication of Charges*

In his third assignment of error, the appellant asserts that certain specifications to which he pled guilty constitute an unreasonable multiplication of charges. First, the appellant complains the specification alleging desertion[4] is essentially the same as the specification alleging escape from confinement[5] because the latter lists the confinement facility as the appellant's place of duty. Second, the appellant argues the fleeing from apprehension[6] and reckless driving[7] specifications punish the same conduct twice. We disagree.

"What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." *See* Discussion to R.C.M. 307(c)(4). As we pointed out in *United States v. Butcher*, 53 M.J. 711, 714 (A.F. Ct. Crim. App. 2000), failure to raise the issue at trial waives an unreasonable multiplication of charges argument. We apply waiver "unless we find an extreme or unreasonable 'piling on' of charges." *Id.* (citing *United States v. Quiroz*, 52 M.J. 510, 513 (N.M. Ct. Crim. App. 1999)). Our superior court has endorsed the following five-part test for determining unreasonably multiplied charges:

> (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications? (2) Is each charge and specification aimed at distinctly separate criminal acts? (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality? (4) Does the number of charges and specifications unreasonably increase the appellant's punitive exposure? (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

*United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004). The factors are to be balanced, with no single factor dictating the result.

With this in mind, we have examined the specifications complained of by the appellant and find no unreasonable multiplication of charges. First, we note the appellant pled guilty unconditionally, and we find no "extreme or unreasonable 'piling on' of charges" that would justify an exception to the waiver doctrine. Second, after considering the appellant's actions and the resulting charges in light of the *Pauling* test, we find the charges were not unreasonably multiplied by the government. The appellant's escape from confinement was complete when he walked out the door of the confinement facility. He then committed the crime of desertion by leaving the Air Force

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[4] Referring to the Specification of Additional Charge III.
[5] Referring to Specification 2 of Additional Charge V.
[6] Referring to the Specification of Additional Charge IX.
[7] Referring to the Specification of Additional Charge VI.

behind with the intent to never return. Similarly, the other specifications complained of describe two completely different crimes. First, the appellant attempted to flee law enforcement by driving away when he saw the flashing lights in his rearview mirror. He then chose to turn into base housing and greatly exceed the speed limit. When he was cornered, he drove across lawns in the base housing area and eventually jumped out of the vehicle while it was still moving. Fortunately it slammed into a tree and not a nearby residence. This was clearly a second crime, above and beyond the crime of fleeing apprehension.

Finally, we find even if the charges were unreasonably multiplied, there was no prejudice. The appellant's maximum allowable sentence, without any of the specifications in question here, was life in prison. The factfinder would have heard the same evidence whether the crimes were charged together or separately. We find it extremely unlikely that this experienced military judge added additional, unwarranted punishment to the appellant's adjudged sentence based on how the government chose to charge this particular case.

Finally, we have examined the assignment of error submitted by the appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982) and find it to be without merit.

*Conclusion*

The findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of the Court

# APPENDIX

[The court-martial was called to order at 0900 hours, 2 March 2005, with all parties present.]

MJ: The defense, pursuant to Rules for Courts-Martial, (R.C.M.) 906, requests this Court "award credit for illegal pretrial punishment, in violation of Article 13, Uniform Code of Military Justice." See Appellate Exhibit XIV, "Motion for Appropriate Relief for Illegal Pretrial Punishment," dated 25 February 2005 (hereinafter "Defense Motion"). The government has submitted a written response. See Appellate Exhibit XV, "United States Response to defense motion for Appropriate Relief for Illegal Pretrial Confinement," dated 28 February 2005 (hereinafter "Government Motion"). In connection with the defense motion dated 25 February 2005, the Court makes the following findings of fact and conclusions of law and issues the following ruling.

**Findings of Fact**

One, on 17 March 2004, the accused, Staff Sergeant Derrick Williams, went to the 377th Medical Group Life Skills Support Center (hereinafter "LSSC"), where he was seen by Captain Richard T. Barker, Clinical Psychologist. Captain Barker informed the accused that, based on his discussion with him, he determined that there needed to be a Commander Directed Evaluation (hereinafter "CDE") initiated before he could be seen at the LSSC. Captain Barker, after consulting with Major John Leckie, Behavioral Health Flight Commander, and Captain Joseph Richards, Psychiatrist, contacted the accused's commander, Lieutenant Colonel Ann-Marie Parker, Commander, 58th Maintenance Squadron. See Defense Exhibit 1, page 17 and 18.

Two, on 24 March 2004, the accused was evaluated by Major Leckie pursuant to a CDE request by the accused's commander. The results of the evaluation are contained in a memorandum dated 31 March 2004. Major Leckie summarized that the accused was at a "low (but not nonexistent) risk of suicide and/or violence." See "Government Response,"

MJ: Attachment 1.

Three, on 31 March 2004, the accused, Staff Sergeant Derrick Williams, was alleged to have broken into Staff Sergeant Tiffany Robinson's off-base residence and forced her at gunpoint to her car. The accused then allegedly took Staff Sergeant Robinson to his residence and later to Las Vegas, Nevada. During this time, the accused was alleged to have expressed a desire to commit suicide. See "Defense Motion."

Four, on 1 April 2004, the accused, Staff Sergeant Derrick Williams, was apprehended by agents of the Federal Bureau of Investigation ("FBI"). The accused remained in the custody of the FBI from 1 April 2004 until 15 April 2004. See Testimony of Staff Sergeant Williams.

Five, on 16 April 2004, the accused was returned to military control. First Lieutenant Scott Crum, 58th Maintenance Squadron, ordered the accused into pretrial confinement. The accused was placed into the Kirtland Air Force Base Confinement Facility. See Testimony of Staff Sergeant Williams.

Six, when the accused initially entered the Kirtland Air Force Base Confinement Facility, he was placed in maximum custody status and suicide watch. It is standard practice to place an individual who enters the facility as a pretrial detainee to be placed on a 24-hour suicide watch to monitor their behavior. After 24 hours, the accused was taken off suicide watch. The accused remained in maximum custody status for 15 days, whereupon he was placed in "medium in" status. See Testimony of Staff Sergeant Williams.

Seven, the "suicide watch" cell is approximately 5' 10" by 8'. The bed is located on the wall that is approximately 5' 10". The accused is approximately 6' 3". A camera allows confinement officials to monitor anyone placed in the "suicide watch" cell. In order to ensure confinement officials could view the detainees at all times, it was required to keep the light on 24 hours a day. This continued until approximately two weeks ago, when a night light was installed

MJ: in the cell.

Eight, on 29 May 2004, the accused escaped from Kirtland Air Force Base Confinement Facility. On 30 May 2004, the accused was apprehended and again placed in the Kirtland Air Force Base Confinement Facility. The accused was placed in maximum security status.

Nine, when he was returned to Kirtland Air Force Base Confinement Facility, the accused was again placed on a 24-hour suicide watch. When he was placed in the "suicide watch" cell, he was required to wear a special robe (Defense Exhibit AS). See Testimony of Staff Sergeant Williams.

Ten, upon reentering pretrial confinement on 31 May 2004, the accused was evaluated by Major Leckie. Major Leckie was informed by Security Forces personnel of reports that the accused had made suicidal statements. The accused refused to answer questions about suicidality, stating that he wanted to speak to his lawyer first. Major Leckie did not schedule a follow-up appointment, because the accused "did not cooperate with provider interventions." See Appellate Exhibit XIV, "Government Response," Attachment 2.

Eleven, in a memorandum dated 10 June 2004; Major Leckie stated that the accused was "at high, long-term risk for suicidal and homicidal behaviors." Major Leckie further noted that the accused was "not reliable with respect to cooperating with mental health check-ins." Finally, Major Leckie stated that the accused "should remain under the provisions of your suicidal protocol, segregated from other prisoners (since he may attempt to harm them). Because he is at high risk for violence and because he will remain at high risk for violence and suicide for an indefinite, long period of time, meticulous scrutiny should be given to his long-term arrangements." See Appellate Exhibit XV, "Government Response," Attachment 3.

Twelve, sometime in June-July 2004, Captain Eason, the accused's Defense Counsel; Captain Terrence McCollum, Chief, Military Justice, 377th Air Base Wing Legal Office;

MJ: Lieutenant Colonel Ann-Marie Parker, Commander, 58th Maintenance Squadron; Senior Master Sergeant Deborah Blaser, First Sergeant, 58th Maintenance Squadron; Major Leckie; Major Martin Rothrock, Commander, 377th Security Forces Squadron; and Senior Master Sergeant Rick Jenkins, First Sergeant, 377th Security Forces Squadron, met to discuss the accused's confinement status. They discussed the conditions of the accused's confinement, who was still in the "suicide watch" cell. One of the topics that they discussed was the fact that the lights were on in the accused's cell 24 hours a day for the reasons stated above in paragraph 7. See Testimony of Captain McCollum.

Thirteen, on 3 August 2004, Lieutenant Colonel Frank B. Thornburg, III, Commander, 58th Maintenance Squadron, addressed the concerns raised by the Accused regarding his confinement conditions. See Appellate Exhibit XIV, "Defense Motion," Attachment 3.

Fourteen, in a memorandum dated 26 August 2004, Major Leckie stated that a "formal suicide watch is not recommended." However, Major Leckie considered the accused "a mild to moderate long-term risk for committing suicidal and homicidal behaviors. Because he has not cooperated with mental health evaluations (due to manipulative agenda) before or after incarceration, it is impossible to specify risk." He recommended, among other things, that the accused be "restricted access to dangerous materials," "regular monitoring (in person or by camera, several times per hour), and his clothing should not be convertible to a weapon." See Appellate Exhibit XIV, "Defense Motion," Attachment 2.

Fifteen, on 8 December 2004, at the request of Defense Counsel, this Court ordered a second Sanity Board. The Defense requested the Sanity Board to determine whether the accused was competent to stand trial and whether he was mentally responsible for the alleged offenses. The Court was provided with several documents indicating unusual behaviors by the accused. See Appellate Exhibit XIII, Court Order, dated 8 December 2004. See also Appellate Exhibit

MJ: XV, "Government Response," Attachments 9 - 12.

Sixteen, at no time since the accused was placed in the "suicide watch" cell on 31 May 2004 has the accused or his Defense Counsel ever requested assistance from the military magistrate or this Court concerning his confinement conditions.

Seventeen, on 19 January 2005, Captain Eason submitted a memorandum to the convening authority requesting the accused be removed from "suicide watch." Captain Eason acknowledged that the accused, "Over time, Sergeant Williams has been granted additional privileges by confinement personnel. He is allowed to work out and shave with minimum supervision." See "Government Response," Attachment 8.

**Discussion**

Eighteen, the defense is requesting this Court "award credit for illegal pretrial punishment, in violation of Article 13, Uniform Code of Military Justice." The defense is requesting "five days credit for every day of suicide watch for the period of 1 June 2004 until 26 August 2004, and four days pretrial confinement credit from 27 August 2004 to the present." The government requests this Court "deny the Defense Motion for Appropriate Relief for Illegal Pretrial Punishment."

Nineteen, Article 13 of the Uniform Code of Military Justice states, "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 ensure his presence, but he may be subjected to minor punishment during that period for infractions of discipline."

Twenty, the burden is on the defense to establish entitlement to additional sentence credit because of a violation of Article 13, Uniform Code of Military Justice. See R.C.M. 905(c2). The question is whether the accused is entitled to credit for a violation of Article 13, Uniform

MJ: Code of Military Justice, is a mixed question of law and fact. See generally *United States v. Smith*, 53 M.J. 168 (2000).

Twenty-one, one significant factor, but not the only one, in determining this issue is to look at the intent of the detention officials. See *United States v. Mosby*, 56 M.J. 309 (2002). A court must look to whether or not there was an "intent to punish" the accused. In "the absence of an intent to punish, the court must look to see if the particular restriction or condition, which may on its face appear to be punishment, is instead but an incident of a legitimate nonpunitive governmental objective." *United States v. Wolfish*, 441 U.S. 520 (1978).

Twenty-two, in the present case, the accused was placed in the "suicide watch" cell when he was entered into the Kirtland Air Force Base Confinement Facility on 31 May 2004. The decision to have the accused remain in the "suicide watch" cell was based on an evaluation by Major Leckie. Major Leckie, who had done a CDE on the accused on 24 March 2004, recommended that the accused be continued in the "suicide watch" cell. The Court has carefully considered the testimony of Dr. Elissa Benedek. However, even Dr. Benedek stated that a suicide watch may be appropriate for a period of time. Major Leckie, informed the Security Forces personnel that the accused had made suicidal statements, and then interviewed the accused on 31 May 2004. In a 10 June 2004 memorandum, Major Leckie informed confinement officials that the accused was a "high, long-term risk for suicidal and homicidal behaviors."

Twenty-three, on 9 July 2004, Major Leckie met with the accused and informed him that he would consult with another expert. As a result of Major Leckie's discussion with Major Niedegaard, a former psychologist at Leavenworth, he considered other alternatives for the accused. The accused was then subsequently seen by Captain Paul J. Milazzo, Element Leader, LSSC. The accused again raised his status on "suicide watch." Additionally, in June-July 2004, Major Leckie met with the accused's Defense Counsel and several other individuals regarding the

MJ: accused's confinement status.

Twenty-four, in a memorandum dated 26 August 2004, Major Leckie informed confinement officials that he did not recommend a "formal suicide watch" for the accused and recommended changes be made to the conditions of his confinement. Sergeant Williams stated that confinement officials made changes around this time consistent with Major Leckie's memorandum. While the Accused was slowly transitioned, for example, out of the "suicide watch" robe into normal clothes, he has remained in the "suicide watch" cell until today.

Twenty-five, since the defense has failed to show an intent to punish, the Court will next consider whether the remaining condition complained of, that is, the light being on 24 hours a day, and the fact that he's still in suicide watch, is but an incident of legitimate nonpunitive governmental objective. The government argues that the light was needed because of the camera. Major Leckie had recommended regular monitoring in person or by camera, several times per hour. It was only approximately two weeks ago that a night light was installed in the cell, which permitted confinement officials to turn off the main light. The Court is convinced that the light served a legitimate governmental objective, the monitoring of the accused in accordance with Major Leckie's recommendation.

Twenty-six, however, the Court will next consider the defense argument that the government failed to follow Air Force Instruction 31-205 dated 7 April 2004. Paragraph 8.10, "Suicide Watch," states the following: Confinement officers determine when it is necessary to place detainees/inmates on suicide watch to prevent injury, maintain health, or discipline standards. The confinement officer develops procedures to ensure the safety of suicidal inmates. Detainees/inmates are segregated to protect themselves against self-harm, and a medical officer will evaluate the individual and make a determination regarding the appropriateness of continued segregation as soon as possible and within 24 hours of the initiation of segregation. Additionally,

MJ: a medical authority will review the appropriateness of continued suicide watch at a minimum every 24 hours after the initiation of segregation to evaluate their health and sanitary conditions. The evidence shows that the accused was not seen every 24 hours, as required by the regulation. However, not every failure to follow the penal regulations constitutes a violation of Article 13. See *United States v. McCarthy*, 45 M.J. 162 (CAAF 1997).

Twenty-seven, in the present case, the accused has been seen by medical personnel throughout his period of confinement. Although this was not every day, as required by the Air Force instruction, the accused was being seen on a regular basis. The Court has also considered the fact that, according to some of the providers, the accused has been uncooperative at times. The Court has also considered that during this entire period, although the accused complained about his status, his counsel never brought their concerns to either the military magistrate or to this Court. While this is "strong evidence" that the accused was not illegally punished, it is not conclusive. See *United States v. James*, 28 M.J. 214 (C.M.A. 1989).

Twenty-eight, after carefully considering the evidence presented, the Court is concerned about the government's failure to comply with the Air Force instruction rules on "suicide watch," particularly after Major Leckie's 26 August 2004 memorandum. This Court believes that up to that point, although there was not strict compliance with the Air Force instructions, medical personnel were attempting to provide confinement officials with the necessary information for them to make a decision on the accused's status. In that memorandum, Major Leckie clearly stated "formal suicide watch" is not recommended. While the Court is mindful of the dicta in many of the court cases that military judges should defer to the expertise of confinement officials, it appears that confinement officials were not provided with information necessary to make an informed decision. While it is commendable that they took steps to give the accused additional privileges after 26 August 2004, the accused continued to remain in "suicide watch"

MJ: status. Although such status may be appropriate, there is no evidence to show that confinement officials have been provided the information every 24 hours required by Air Force instructions to properly make a determination.

**Decision**

Twenty-nine, therefore, after carefully considering the evidence presented, this Court concludes that the government's failure to comply with Air Force instructions on "suicide watch" after 24 August 2004 resulted in the accused being subjected to more onerous conditions that were not related to a legitimate governmental objective. In making this decision, the Court is not making any determination as to what is the proper status of the accused, since that decision should be made by confinement officials. However, confinement officials must ensure they are receiving the necessary information from medical officials, as required by Air Force instructions, to make that determination. The defense has requested "four to one" credit for this period of time. However, after considering all the evidence, particularly efforts by confinement officials to give the accused additional privileges, this Court concludes that only one additional day credit for the period 26 August 2004 to the present is necessary for the failure of confinement officials to follow the Air Force instructions relating to maintaining a detainee in "suicide watch" status. The Court calculates that to be 188 days. Therefore, the accused will be given an additional 188 days credit for the violation of Article 13. This is in addition to any other credit he may be entitled to receive. The Court would also just remind Counsel that if there is any other concerns, that they immediately bring it to the military magistrate or to the Court. Additionally, the Court would ensure -- the Court would ask the government to ensure that confinement officials are familiar with the regulations regarding suicide watch and that they ensure that all the procedures required to be taken are taken on a daily basis as required. With that being said, we have concluded -- are there any other motions regarding credit?

CIV DC: None from the defense, Your Honor, no.

MJ: Sergeant Williams, we went over yesterday your rights during the sentencing proceedings. Do you understand those rights?

ACC: Yes, sir.

MJ: Trial counsel, is the personal data on the front page of the charge sheet correct?

TC: There have been some modifications, Your Honor, based on the new pay schedule on the charge sheet, Item 7A. Basic pay would actually be increased to an amount of $2,421.60, and that would be mirrored in Section C, 7C. And just for clarification, as far as the date of imposed confinement, actually, the accused has been in confinement from April 1 to the present date, but in federal FBI, I guess, detention from April 1 through April 15, till he was transferred to military custody from April 16 to the present date.

MJ: And there's no issue that he should be given credit, one -- day-for-day credit for that time spent in custody of the FBI; is that correct?

TC: No issues with that, Your Honor.

MJ: Have you figured out or calculated what the time is from April 1st to the present?

TC: Yes, I have, Your Honor.

MJ: Okay.

TC: And that would come out to 336 days.

MJ: Defense, do you agree?

CIV DC: Yes, Your Honor.

MJ: Thank you. The next question is -- has already been answered -- has already been asked, and that is the -- Captain Eason or Mr. Myers, has the accused been punished in any way prior to trial that would constitute illegal pretrial punishment under Article 13? Given the fact you filed a motion, I believe that it's been answered, but is there any other matters relating to

MJ: Article 13 illegal pretrial punishment?

DC: No, Your Honor.

MJ: Sergeant Williams, do you believe that there has been anything else, other than what's been raised in the motion, that you believe would constitute illegal pretrial punishment under Article 13?

ACC: No, sir.

MJ: As indicated, by counsel, the accused will be credited with 336 days of pretrial confinement credit to any adjudged sentence. Trial counsel, do you have any other evidence to present at this time?

CTC: Your Honor, is it possible to take a very brief break before we begin the sentencing proceeding?

MJ: How long would you need?

CTC: Oh, just ten minutes, at the most.

MJ: Okay. This court will be in recess for ten minutes.

[The court-martial recessed at 0923 hours, 2 March 2005.]

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